

Rules of Evidence

Article 1

General Provisions

11-101. Scope and title of rules.

A.

Scope of rules. These rules govern proceedings in the courts of the State of New Mexico, to the extent and with the exceptions stated in Rule 11-1101.

B.

Title. These rules may be known as the Rules of Evidence and cited as SCRA 1986, 11- (For example, this rule may be cited as SCRA 1986, 11-101.)

COMPILER'S ANNOTATIONS

Cross-references. - For applicability of New Mexico Rules of Evidence to criminal proceedings, see Rule 5-613.

Compiler's notes. - This rule is similar to Rule 101 of the Federal Rules of Evidence.

Supreme court has exclusive power to regulate procedure. - Power of supreme court to promulgate rules regulating pleading, practice and procedure for district courts is vested by N.M. Const., art. VI, § 3, which grants supreme court superintending control over all inferior courts; absent the clearest language to the contrary in the constitution, powers essential to the functioning of the courts are to be taken as committed solely to the supreme court to avoid confusion in 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 of evidence procedural. - Rules of evidence are procedural in that they are a part of the judicial machinery administered by the courts for determining facts upon which substantive rights of the litigant rest and are resolved; they do no more than regulate the method of proceeding by which substantive rights and duties are determined. *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).

Law reviews. - For article, "Rape Law: The Need for Reform," see 5 N.M.L. Rev. 279 (1975).

For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For comment, "Survey of New Mexico Law: Evidence," see 15 N.M.L. Rev. 311 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence § 8.

11-102. Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 102 of the Federal Rules of Evidence.

Purpose of rule is a common sense approach to the application of the rules of evidence when a problem arises in the construction of the rules. *Sundberg v. Hurley*, 89 N.M. 511, 554 P.2d 673 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

Admissibility of evidence is procedural, and governed by rules adopted by supreme court; if there is a variance between a statute and the rules of evidence adopted by this court, the rules prevail. *State ex rel. Reynolds v. Holguin*, 95 N.M. 15, 618 P.2d 359 (1980).

Effect of dispute regarding effectiveness of scientific procedure. - That a diversity of opinion exists regarding the effectiveness of a scientific procedure does not call for a per se rule of inadmissibility. *Simon Neustadt Family Center v. Blutworth*, 97 N.M. 500,

641 P.2d 531 (Ct. App. 1982).

When psychological stress evaluation evidence is admissible. - Psychological stress evaluation evidence is admissible, within the discretion of the trial court, when evidence is introduced concerning: (1) the qualifications and expertise of the polygraph operator; (2) the reliability of the testing procedure employed as approved by authorities in the field; and (3) the validity of the test made on the subject. *Simon Neustadt Family Center v. Bludworth*, 97 N.M. 500, 641 P.2d 531 (Ct. App. 1982).

Testimony following pretrial hypnosis not automatically inadmissible. - The testimony of a witness who has undergone pretrial hypnosis to revive the memory of the witness without the administration of any drugs is neither automatically inadmissible nor subject to a blanket proscription. *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981).

Law reviews. - For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

11-103. Rulings on evidence.

A.

Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1)

Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2)

Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

B.

Record of offer and ruling. The judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. He may direct the making of an offer in question and answer form.

C.

Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

D.

Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Timely and Specific Objection.
- III. Offer of Proof.
- IV. Plain Error.

I. General Consideration.

Cross-references. - As to making objections known to trial court, see Rule 1-046; Rule 12-216.

As to formal exceptions not being required, see Rule 1-046; Rule 12-216.

Compiler's notes. - This rule is similar to Rule 103 of the Federal Rules of Evidence.

This rule is deemed to have superseded those portions of Rule 1-061, which established the harmless error rule for evidentiary issues and Paragraph C of Rule 1-043, which related to creating a record of excluded evidence.

Constitutional rights of confrontation may be lost, as other rights, by a failure to assert them at the proper time. *State v. Martinez*, 99 N.M. 48, 653 P.2d 879 (Ct. App. 1982).

Trial court is not reversed for reaching correct result for wrong reason. *H.T. Coker Constr. Co. v. Whitfield Transp., Inc.*, 85 N.M. 802, 518 P.2d 782 (Ct. App. 1974).

If trial court's judgment can be sustained upon correct legal principles, it will not be reversed merely because the reasoning or conclusion of law is erroneous. *Mobile Am., Inc. v. Sandoval County Comm'n*, 85 N.M. 794, 518 P.2d 774 (1974), overruled on other grounds, *El Dorado at Santa Fe, Inc. v. Board of County Comm'rs*, 89 N.M. 313, 551 P.2d 1360 (1976).

Where challenged testimony was properly admitted, the fact that it may have been admitted on an erroneous basis would not aid defendant. *Jesko v. Stauffer Chem. Co.*, 89 N.M. 786, 558 P.2d 55 (Ct. App. 1976).

Trial court record or plain error prerequisite to appellate review. - Defendant's contention that the manner in which officers executed the search warrant was improper because the officers waited until defendant arrived before they attempted to enter the premises, suggesting that officers were somehow improperly motivated and that their execution of the warrant was in fact directed exclusively against this defendant, was never brought to the attention of the trial court; accordingly, defendant may not raise it in appellate court without first demonstrating plain error. *State v. Quintana*, 87 N.M. 414, 534 P.2d 1126 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084, cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975).

Defendant asserted his arrest had been illegal and the subsequent finding of heroin "arose" from the claimed illegal arrest so that he was deprived of his fundamental rights by admission into evidence of heroin, but defendant did not attempt to suppress this evidence prior to trial nor object to testimony relative thereto at trial. Therefore, despite claim that under "harmless error" rule no error is harmless if it is inconsistent with substantial justice and despite defendant's reliance on the "plain error" rule, appellate court could not hold there was an illegal arrest as a matter of law. *State v. Bauske*, 86 N.M. 484, 525 P.2d 411 (Ct. App. 1974).

A party may not obtain a review of the evidence where he did not make requested findings, file exceptions or move to amend findings. *Van Orman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967) (decided before enactment of this rule). See Rule 1-052. But see also Rule 1-046 and Rule 12-216, regarding exceptions.

Substantial right violated by evidence of certain collateral offenses. - Evidence of a collateral offense is generally inadmissible in a criminal prosecution to establish a specific crime unless the case falls within an applicable exception under these rules, and the trial court's admission of evidence of a past offense not allowed by these rules was prejudicial error which violated defendant's substantial right to a fair trial. *State v.*

Ross, 88 N.M. 1, 536 P.2d 265 (Ct. App. 1975).

But not where only one of several visual demonstrations excluded. - Where information shown by both the "plain view" and the "profile" of walkway had been presented to the jury without objection in negligence suit arising from fall on walkway, and only the visual demonstration of the distortion of evidence was excluded, plaintiffs had no "substantial right" to have the jury view the distortion, and exclusion thereof was not prejudicial. Cantrell v. Dendahl, 83 N.M. 583, 494 P.2d 1400 (Ct. App. 1972).

Appellant must show prejudice. - Failure of defendant's attorney to object to certain testimony alleged to be hearsay resulted in no prejudice, nor did it deprive defendant of a fair trial, as a review of this testimony reveals that it was not prejudicial. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

Harmless error in exclusion of evidence cannot be basis for new trial. City of Albuquerque v. Ackerman, 82 N.M. 360, 482 P.2d 63 (1971).

Error on immaterial point without effect. - Error in making a finding which is immaterial to the decision in the case is harmless error and cannot be the basis for a reversal. Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967); Melfi v. Goodman, 73 N.M. 320, 388 P.2d 50 (1963).

Where there was no causal relationship between want of a resident inspector and failure of structure, court's refusal to find that contract required provision of resident inspector related merely to evidentiary matters, and error, if any, was harmless. Louis Lyster Gen. Contractor v. City of Las Vegas, 83 N.M. 138, 489 P.2d 646 (1971).

Evidentiary question must contribute to conviction to be error. - To warrant reversible error in the denial of the admission of testimony, the defendant must show that there is a reasonable possibility that the trial court's failure to allow such testimony contributed to the defendant's conviction. State v. Garcia, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

Error must affect verdict. - Admission of evidence is harmless error unless it affects substantial rights of a party. Reception of evidence must be shown to have affected the verdict of the jury before court of appeals will hold that a substantial right has been impaired. Proper v. Mowry, 90 N.M. 710, 568 P.2d 236 (Ct. App. 1977).

Jury findings may render error harmless. - Even if admission into evidence of a state board of education regulation was error, it was harmless error, since the jury found in favor of one of the several defendants under an instruction that violation of the regulation was negligence per se, and so jury could only have concluded that the regulation did not apply. *Maxwell v. Santa Fe Pub. Schools*, 87 N.M. 383, 534 P.2d 307 (Ct. App. 1975).

Court presumed to have disregarded inadmissible testimony. - In cases tried before the court prior to enactment of this rule, it was presumed that the court ultimately disregarded inadmissible testimony, and erroneous admission of testimony afforded no ground of error, unless it was apparent that the court considered such testimony in deciding the case. *L. & B. Equip. Co. v. McDonald*, 58 N.M. 709, 275 P.2d 639 (1954); *Gray v. Grayson*, 76 N.M. 255, 414 P.2d 228 (1966); *Davis v. Davis*, 83 N.M. 787, 498 P.2d 674 (1972).

Improper admission of exhibits afforded no ground for reversal under former law unless it appeared that the court considered them in deciding the case, particularly where there was testimony free from objection to support the court's findings. *Gish v. Hart*, 75 N.M. 765, 411 P.2d 349 (1966).

Alleged error harmless where no dispute over facts shown. - Where the only probative effects admission into evidence of prosecutrix's glasses could have had was to establish their existence and that prosecutrix had been in the area where they were found, and neither the existence of the glasses nor the fact that prosecutrix had been at said place was in dispute, admission could not possibly have prejudiced defendant. *State v. Carrillo*, 82 N.M. 257, 479 P.2d 537 (Ct. App. 1970).

And where essence of evidence already in record. - Exclusion of instruction sheet accompanying anti-snakebite serum kit was harmless error where testimony on the contents of the sheet was already in the record. *Crouch v. Most*, 78 N.M. 406, 432 P.2d 250 (1967).

Exclusion of cumulative evidence not error. - The trial court does not err in not admitting into evidence at the hearing for a new trial the statement of a state eyewitness which purportedly contradicts previous trial testimony where the statement does not contradict previous testimony but is merely cumulative of the defense propounded. *State v. Stephens*, 99 N.M. 32, 653 P.2d 863 (1982).

Effect of corroborating evidence. - If proper objection was made, admission of hearsay testimony was prejudicial and reasonably calculated to cause (and may have caused)

rendition of an improper verdict, and reversal was required. The mere fact that other testimony corroborated or was corroborated by hearsay testimony did not render error harmless. *Sayner v. Sholer*, 77 N.M. 579, 425 P.2d 743 (1967).

Error in admission of evidence may not constitute ground for reversal where evidence which has been admitted is merely corroborative or cumulative. *Davis v. Davis*, 83 N.M. 787, 498 P.2d 674 (1972).

Complaining party's actions may defeat objection. - Plaintiff could not claim reversible error because trial court considered medical depositions which were not properly before it (not having been introduced into evidence) because no objection was made to use of the depositions as evidence by trial court, plaintiff himself relied on part of one of the depositions and he had pointed to nothing in the depositions which might be considered as prejudicial error. There being sufficient competent evidence to support findings and judgment, this 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).

Failure to object to testimony given at one trial precludes opponent at any subsequent trial from any further objection, for the reason and to the extent that a failure to object before or at first trial would have precluded him. *State v. White*, 61 N.M. 109, 295 P.2d 1019 (1956). As to hearsay evidence, see Rules 11-801 to 11-806.

Likewise trial judge's treatment of inadmissible evidence. - Prompt sustaining of defendant's objection and admonition to disregard the answer cured any prejudicial effect from inadmissible hearsay testimony concerning defendant's hitting of a child, and prosecutor's attempt to evade trial court's exclusionary ruling did not deprive defendant of a fair trial because objection to the question was promptly sustained and the question was never answered. *State v. King*, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977).

Where prior to enactment of this rule, evidence erroneously admitted during the progress of the trial was withdrawn or stricken out by the court, the error was cured. *State v. Carlton*, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

Jury could, under former law, exclude from consideration erroneously admitted testimony indicating that defendant had committed criminal acts not related to the offense charged, when evidence was withdrawn by the court with a proper cautionary charge. *State v. Ferguson*, 77 N.M. 441, 423 P.2d 872 (1967).

Or circumstances of trial and production of evidence. - Error, if any, in refusal to permit plaintiff's expert to testify relative to a dangerous installation while permitting defendant's expert to testify relative to a safe installation was harmless where, although court sustained a defense objection to such evidence at two points during testimony of one of plaintiff's experts, immediately after the first objection, the same expert answered the question phrased somewhat differently and without objection and, additionally, substantially the same evidence had been adduced earlier from another of plaintiff's experts. *State Farm Fire & Cas. Co. v. Miller Metal Co.*, 83 N.M. 516, 494 P.2d 178 (Ct. App. 1971), cert. quashed as improvidently granted, 83 N.M. 740, 497 P.2d 742 (1972).

Trial court should not have permitted police officer to evaluate what he had found in terms of whether it constituted negligence or absence of negligence. However, where witness was limited to merely assisting in the investigation, and his answer was limited to only what he found or failed to find, the error committed, in permitting the question to be asked and answered, was harmless. *Lopez v. Maes*, 81 N.M. 693, 472 P.2d 658 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

Court's failure does not excuse defendant's. - When, prior to enactment of this rule, evidence was admitted over objection, with a statement by the court that its use would be limited by the instructions, but the court failed to so instruct, an appellant could not complain of this action if he did 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).

Litigant may not invite error and then take advantage of it. *McCauley v. Ray*, 80 N.M. 171, 453 P.2d 192 (1968).

Counsel may comment on failure to produce apparently qualified witness in civil trial. - It is permissible for counsel in a civil case, in argument to the jury, to comment on failure or omission of the adverse party to produce or examine as a witness on his behalf an employee of such party who is apparently qualified to testify in regard to the matter or question in issue. *Chavez v. Atchison, T. & S.F. Ry.*, 77 N.M. 346, 423 P.2d 34 (1967).

No substantial right affected by jury's viewing picture not in evidence. - It was error for a picture of deceased and his family to have been delivered to the jury room since it had not been admitted into evidence. However, in light of overwhelming evidence against defendant, demonstrated by the record as a whole, it cannot be said that any substantial right of defendant was adversely affected from the viewing by two jurors of this photograph. *State v. Baros*, 87 N.M. 49, 529 P.2d 275 (Ct. App.), cert. denied, 87

N.M. 47, 529 P.2d 273 (1974).

Evidence of extraneous charges not prejudicial to habitual defendant. - Even if objections are made, evidence of extraneous charges does not prejudice an habitual defendant when the jury knows that the charge is based on repeat offenses and the only question for it to decide is the defendant's identity. *State v. Barela*, 97 N.M. 723, 643 P.2d 287 (Ct. App. 1982).

Admission of defendant's dishonorable military discharge as harmless error. - The admission of evidence of the defendant's other than honorable discharge from the military service is harmless error where other strong and competent admissible evidence supports the jury verdict. *State v. Ho'o*, 99 N.M. 140, 654 P.2d 1040 (Ct. App. 1982).

Law reviews. - For article, "Civil Procedure," see 12 N.M.L. Rev. 97 (1982).

For article, "Criminal Procedure," see 12 N.M.L. Rev. 271 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error §§ 517 to 523; 5 Am. Jur. 2d Appeal and Error §§ 601 to 604, 737, 738, 797, 880, 881; 58 Am. Jur. 2d New Trial §§ 129, 131, 132; 75 Am. Jur. 2d Trial §§ 162, 164 to 167, 177 to 179, 183, 185.

Construction of provision of Rule 43(c) of the Federal Rules of Civil Procedure, and similar state provisions providing for entry into record of evidence excluded by trial court, 9 A.L.R.3d 508.

Violation of federal constitutional rule (*Mapp v. Ohio*) excluding evidence obtained through unreasonable search or seizure, as constituting reversible or harmless error, 30 A.L.R.3d 128.

5A C.J.S. Appeal and Error §§ 1724 to 1754; 66 C.J.S. New Trial § 40; 88 C.J.S. Trial §§ 115, 117, 123, 133, 144 to 146.

II. Timely and Specific Objection.

Objection necessary to preserve error. - To preserve error on appeal, there must be a proper objection. *Poorbaugh v. Mullen*, 99 N.M. 11, 653 P.2d 511 (Ct. App. 1982).

A reviewing court will not reverse the trial court on grounds which the trial court was neither first asked to consider nor had the opportunity to review. *State v. Aguilar*, 98 N.M. 510, 650 P.2d 32 (Ct. App. 1982).

Renewal of objection. - When an exhibit is admitted conditionally, it is the duty of the party seeking to exclude the exhibit to renew its objection and to move to strike if its relevancy is not thereafter established. *Woolwine v. Furr's, Inc.*, 106 N.M. 492, 745 P.2d 717 (Ct. App. 1987).

Objection to polygraph evidence must be made at trial. - Since admissibility of polygraph evidence is now governed by the New Mexico rules of evidence, there is no reason to suppose that parties who wish to appeal admissibility of such evidence are excused from challenging its admission at trial. *State v. Ortiz*, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Foundation for admission of inculpatory statements must be challenged at trial. - Absent some contemporaneous challenge to the foundational requirements for admissibility of inculpatory statements in the trial court, an appellate court will not review the claim that foundational requirements were not met. *State v. Gallegos*, 92 N.M. 336, 587 P.2d 1347 (Ct. App. 1978).

Where the trial court was never asked to rule on the admissibility of inculpatory statements, there was no objection from defendant after the prosecutor's foundation questions and no motion was made to strike a police officer's testimony concerning the statements, error cannot be predicated upon the absence of an express affirmative ruling by the trial court concerning voluntariness. *State v. Gallegos*, 92 N.M. 336, 587 P.2d 1347 (Ct. App. 1978).

Objection required regarding witness's reference to defendant's silence. - Where the prosecutor comments on or inquires about the defendant's silence, such a reference can have an intolerable prejudicial impact and may require reversal under the "plain error" rule. However, where the witness simply refers to the defendant's silence, the defendant must object to this testimony as required by Subdivision (a) (now Paragraph A) in order to preserve the error. In such a situation the defendant would simply be objecting to the testimony of the witness as being inadmissible under either Rule 403 or Rule 402 (now 11-403 or 11-402). *State v. Mirabal*, 98 N.M. 130, 645 P.2d 1386 (Ct. App. 1982).

Objection on redirect to issue raised on cross not timely. - Where defendants failed to plead waiver of mechanic's liens as affirmative defense, but intervenors broached the issue when they asked defendant's witness during cross-examination about the existence, identification and usage of 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 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).

Objecting party must state specific grounds. - In objecting to evidence, it is the duty of counsel to advise the court specifically of the ground of objection, so that it may rule intelligently. *State v. Casteneda*, 97 N.M. 670, 642 P.2d 1129 (Ct. App. 1982).

Although defense counsel objected to introduction of prior convictions under Rule 11-609, the "specific grounds" stated related to juvenile convictions and stale convictions; as defendant did not assert inadmissibility of convictions of crimes punishable by imprisonment for less than one year, this issue is raised for the first time on appeal and will not be heard. *State v. Cardona*, 86 N.M. 373, 524 P.2d 989 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

An objection to the introduction of evidence which does not specify the particular ground on which the evidence is objectionable does not call the trial court's attention to the matter to be decided, and on appeal will be treated as if no objection to such evidence had been made. *Leonard v. Barnes*, 75 N.M. 331, 404 P.2d 292 (1965).

Even if the question is objectionable as calling for hearsay evidence, a ruling by the court will be sustained where objection is not properly stated and court's attention is not directed to the defect relied upon. *Sturgeon v. Clark*, 69 N.M. 132, 364 P.2d 757 (1961).

Not always necessary to cite proper rule. - Defense counsel's objection to prosecutor's questions as to defendant's misdemeanor convictions on grounds of irrelevancy was sufficiently specific to alert the trial court and the prosecution to the impropriety of the questioning since objection implicitly asserted the policy behind Rule 609 (now 11-609), and thus defense counsel did not waive this error despite his failure to cite the proper rule. *Albertson v. State*, 89 N.M. 499, 554 P.2d 661 (1976).

So long as nature of objection plain. - Although objection was not as specific as it might have been, as it sufficiently informed the court that objection was being made to proof of content of a document in violation of the best evidence rule, it was sufficient to preserve

that objection for review. *Frost v. Markham*, 86 N.M. 261, 522 P.2d 808 (1974).

Objector must move to strike testimony or request curative instruction. - In prosecution for homicide in a vehicle while driving recklessly, trial court's error, if any, in admitting evidence of the presence of marijuana seeds in the car that defendant was driving was not properly preserved for review where on the first day of trial, when the evidence came in, defendant objected on grounds of illegal search (ruled upon adversely to defendant) and two additional grounds (including irrelevancy), but after the trial court made a preliminary ruling, that evidence was in fact irrelevant and would not be discussed further unless state showed him some law, and recessed trial until the following day, and there was no further mention of the marijuana, then it was incumbent upon defendant to move to strike the testimony complained of or to ask for a curative instruction. *State v. Sandoval*, 88 N.M. 267, 539 P.2d 1029 (Ct. App. 1975).

In a prosecution for check forgery, appellate review would not be allowed with regard to the admission of the unresponsive portion of a witness' answer (i.e., "I have lost a lot of money to him with other checks") into evidence, despite Rule 404 (now 11-404), relating to other crimes, wrongs or acts, and Rule 608 (now 11-608), relating to specific instances of conduct, since the defendant failed to voice an objection at trial, to ask the court to strike the response, or to offer a curative instruction, and since the evidence did not constitute prejudicial or plain error. *State v. Young*, 103 N.M. 313, 706 P.2d 855 (Ct. App. 1985).

Failure to object constitutes waiver of right. - Where no objection was made to the testimony of officer in which he related the content of his remark and defendant's response thereto and where defendant had already been advised of his rights to an attorney and to remain silent, even if defendant had a right to have this testimony excluded he waived such right when he failed to make objection to the testimony or to raise any question as to its admissibility. *State v. Smith*, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969).

Where no objection was made to the testimony pertaining to the previous criminal offense, the error was not preserved for review. *State v. Gutierrez*, 79 N.M. 732, 449 P.2d 334 (Ct. App. 1968), cert. denied, 80 N.M. 33, 450 P.2d 633 (1969).

Failure to object to the admission of evidence constitutes a waiver of objection, and in such case the objection cannot be raised for the first time on appeal. *McCauley v. Ray*, 80 N.M. 171, 453 P.2d 192 (1968); *Bloom v. Lewis*, 97 N.M. 435, 640 P.2d 935 (Ct. App. 1980); *Security Bank & Trust v. Parmer*, 97 N.M. 108, 637 P.2d 539 (1981).

III. Offer of Proof.

Offer of proof essential to preserve error where evidence excluded. - When error is based on an improper exclusion of evidence, an offer of proof is essential to preserve the error for appeal. *Williams v. Yellow Checker Cab Co.*, 77 N.M. 747, 427 P.2d 261 (1967); *Nichols Corp. v. Bill Stuckman Constr., Inc.*, 105 N.M. 37, 728 P.2d 447 (1986).

Timely offer and nonrepetitious proof essential. - Right to offer proof is almost absolute, but offer must be timely and trial court has discretion to restrict repetitious proof. *State v. Shaw*, 90 N.M. 540, 565 P.2d 1057 (Ct. App. 1977).

Basic reason underlying rule of tender is directed at insuring exact knowledge on the part of trial court of evidentiary facts which he is called upon to admit into consideration. *State v. White*, 58 N.M. 324, 270 P.2d 727 (1954).

Proposed evidence must be tendered to court. - Defendant's claim that trial court erred in refusing to allow him to call a juror to impeach the verdict (on grounds that one or more jurors in his case had been jurors in another case which tried a defense witness) was not reached by appellate court because the record did not show a tender of the excluded evidence. *State v. Carrillo*, 88 N.M. 236, 539 P.2d 626 (Ct. App. 1975).

Assuming that the withholding of certain logs was improper, they were never presented to trial court so that it could determine whether they were material or whether the withholding prejudiced the defense, and consequently there was no error in denying motion for a new trial. *State v. Lucero*, 90 N.M. 342, 563 P.2d 605 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Substance and purpose of evidence must be made clear. - Where no questions were asked and the substance of the evidence was not made known to the court, defendant merely informing the court that it desired to present this type of evidence, tender was insufficient. *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).

Bias of witness is always relevant and therefore pendency of civil action by prosecuting witness seeking damages for assault being tried in criminal action is a proper subject of inquiry; however, trial court did not err in prohibiting defendant in an aggravated battery prosecution from questioning of victim concerning civil suit where counsel gave court no information about the suit, made no tender of evidence and never informed court that the witness himself had anything to do with the suit. *State v. Santillanes*, 86 N.M. 627, 526 P.2d 424 (Ct. App. 1974).

Where there was no indication in the record that trial judge was ever informed that defendant believed that a crucial witness for the state bore tattoos which were self-inflicted, thus allegedly calling into question her credibility, and there was no offer of proof to that effect, it was not error for judge to sustain an objection to the question. *State v. Ortiz*, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Where defendant failed to pose any questions to any witness concerning any character trait of victim and merely claimed that a certain witness could testify concerning his reputation for aggressiveness and recklessness, without revealing the substance of the evidence either as to such character traits or his reputation in connection with those traits, the offer of proof as to reputation or opinion evidence was deficient, and there was no error in exclusion of evidence. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

An offer to prove facts which state mere conclusions is too general and should properly be rejected. The substance of the evidence must be made known to the trial court. *State ex rel. Nichols v. Safeco Ins. Co. of Am.*, 100 N.M. 440, 671 P.2d 1151 (Ct. App. 1983).

General claim of relevancy insufficient tender. - Where issue was whether specific instances of conduct in 1975 were admissible on question of damages suffered in 1972, defendant's general claim of evidence relating to probable life expectancy of plaintiff was an insufficient tender. *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).

Appellate court reluctant to guess nature of evidence. - Where state objected to further questioning regarding witness's juvenile record, and after the judge sustained the objection the defendant made no proffer as to what his next questions would have been and what he expected to show, he failed to preserve the error since because of difficult evidentiary problems involved in this sort of questioning, appellate court was unwilling to guess as to what questions defendant was prevented from asking. *State v. Ortiz*, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Subsequent general offer insufficient tender. - Where with exception of one question and answer at time objections were sustained, defendant did not ask to make an offer of proof, but after jury was excused for the evening, defendant sought to offer proof of other unidentified questions to which objections had been sustained, court could not say trial court erred in not permitting defendant to put on a general offer of proof going to an unidentified subject matter for which he had not stated any theory of admissibility. *State v. Kendall*, 90 N.M. 236, 561 P.2d 935 (Ct. App.), reversal of conviction on other

grounds held improper, 90 N.M. 191, 561 P.2d 464 (1977).

But requirements relaxed where party prevented from making proper tender. - Where prosecution and trial judge effectually prevented defense attorney from asking any questions, prosecution could not be heard to urge failure of defense to ask a proper question calling for testimony covered by tender. *State v. White*, 58 N.M. 324, 270 P.2d 727 (1954).

Party must pursue available means for introducing evidence. - Although trial court refused to subpoena psychologist as requested by defendant after trial had begun, defendant himself could have subpoenaed the doctor without court permission, and had trial court refused to allow him to testify, 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).

Insanity defense abandoned upon failure to offer proof. - Where defendant never made offer of proof on issue of insanity after trial court sustained state's objection to admission of evidence on the question because of defendant's failure to comply with Rule 35(a), N.M.R. Crim. P. (now see Paragraph A of Rule 5-602), and one of his experts was unable even to give an opinion on whether or not defendant was able to form requisite specific intent, then defendant had abandoned defense of insanity. *State v. Padilla*, 88 N.M. 160, 538 P.2d 802 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Where defendant never brought to the attention of trial court the fact that the state actually had notice that he would raise the defense of insanity, he was precluded from raising this ground for reversal on appeal. *State v. Padilla*, 88 N.M. 160, 538 P.2d 802 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Judge errs in leaving courtroom during offer. - Where evidence should have been presented to the court, a trial judge errs in leaving the courtroom during the offer of proof, even though she believes it to be immaterial to her decision and offered only for the record. *Malibu Pools of N.M., Inc. v. Harvard*, 97 N.M. 106, 637 P.2d 537 (1981).

IV. Plain Error.

Generally as to former law. - New Mexico law prior to adoption of the present rules of evidence did not allow review of unpreserved plain error. *State v. Tucker*, 86 N.M. 553, 525 P.2d 913 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888.

"Plain error" construed. - "Plain error" refers to grave errors which seriously affect substantial rights of the accused, result in a clear miscarriage of justice or are obvious or otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. The plain error rule should be applied with caution and invoked only to avoid a miscarriage of justice. *State v. Marquez*, 87 N.M. 57, 529 P.2d 283 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

Plain error must relate to evidentiary ruling. - Reference in this section to plain errors affecting substantial rights is part of a rule concerned with evidentiary rulings and is inapplicable to criminal defendant's contention that prosecutor's reference to victim's "constitutional rights" was prejudicial and influenced jury. *State v. Sanchez*, 86 N.M. 713, 526 P.2d 1306 (Ct. App. 1974) (construing rule despite its inapplicability to present case).

Comment on defendant's silence plain error. - In defendant's murder trial, there being no basis for a question concerning defendant's silence, district attorney's question about it was plain error because it constituted a comment on defendant's silence, and the fact that the question was asked of the brother and not defendant makes no difference, since the prejudicial impact was the same. *State v. Lara*, 88 N.M. 233, 539 P.2d 623 (Ct. App. 1975).

Comments instituted by the state on a defendant's silence following Miranda warnings constitute "plain error" and have an intolerable prejudicial impact requiring reversal unless the defendant's silence has a significant probative value. *State v. Martin*, 101 N.M. 595, 686 P.2d 937 (1984).

But only if prosecution initiates comment. - Where prosecutor comments on or inquires about defendant's silence, such a reference can have an intolerable prejudicial impact and may require reversal under the plain error rule; any reference to defendant's silence by the state, if it lacks significant probative value, constitutes plain error and as such requires reversal even if defendant fails to object. However, where witness refers to defendant's silence, defendant must object to this testimony in order to preserve the error. *State v. Baca*, 89 N.M. 204, 549 P.2d 282 (1976).

There is not plain error where prosecution's questions were invited by defendant's testimony on direct examination and did not directly concern his post-arrest silence. *State v. Molina*, 101 N.M. 146, 679 P.2d 814 (1984).

No plain error where admissible evidence to same effect. - Admission of hearsay testimony of owner of certain stolen property, in a prosecution for possession thereof,

as to its worth was not plain error since even without the hearsay, testimony from another witness as to market value supported a valuation of stolen property in excess of \$100 and therefore a felony conviction, so no prejudice was shown. *State v. Olguin*, 88 N.M. 511, 542 P.2d 1201 (Ct. App. 1975).

Nor where proposed evidence circumstantial, collateral and cumulative. - Where two eyewitnesses called by the state, along with testimony of defendant, established that deceased and his friend were the aggressors, there was no other purpose for which additional evidence of decedent's misconduct could be introduced, and additional evidence would be circumstantial, collateral and merely cumulative; as such, its admission rested within the sound discretion of the trial court, and exclusion thereof would not have affected a substantial right of defendant. *State v. Marquez*, 87 N.M. 57, 529 P.2d 283 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

Nor where admissibility decision conforms with rules. - Exclusion of uncorroborated testimony of defense witness, who would have testified that a third party, prior to his death, told witness that the heroin was his and not defendant's, was not plain error since the policy behind Rule 11-804 is to require corroboration in order to circumvent fabrication. *State v. Anaya*, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).

Allowing evidence of a prior conviction contrary to Rule 11-609 does not constitute plain error where defendant did not state the grounds of his objection. *State v. Cardona*, 86 N.M. 373, 524 P.2d 989 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

Nor where alternative means of achieving admission not used. - Defendant's claim on appeal that admission of chemist's testimony concerning test results was plain error because chemist did not bring his worksheets to court, thus denying defendant the right to cross-examine concerning underlying facts, was without merit since defendant could have but did not inform himself of the contents of the worksheets by proceeding under Rule 27(a)(6), N.M.R. Crim. P. (now see Rule 5-501). *State v. Carrillo*, 88 N.M. 236, 539 P.2d 626 (Ct. App. 1975).

Violation of Rule 104 (now 11-104) is not plain error where violation did not result in miscarriage of justice nor affect the fairness or integrity of the trial. *State v. Gallegos*, 92 N.M. 336, 587 P.2d 1347 (Ct. App. 1978).

Plain error pertains only to errors that concern evidentiary rulings. *State v. Wall*, 94 N.M. 169, 608 P.2d 145 (1980); *State v. Isiah*, N.M. , 781 P.2d 293 (1989).

Defendant cannot challenge memorandum on appeal if not objected to at trial. - On appeal, defendant cannot challenge the use of a memorandum at trial to refresh the memory of a witness when he made no objection to its use at the time and since he cannot challenge it as plain error pursuant to Paragraph D. State v. Wall, 94 N.M. 169, 608 P.2d 145 (1980).

11-104. Preliminary questions.

A.

Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of Paragraph B. In making his determination he is not bound by the Rules of Evidence except those with respect to privileges.

B.

Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

C.

Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require.

D.

Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

E.

Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 104 of the Federal Rules of Evidence.

Prerequisites for evidentiary hearing. - To be entitled to evidentiary hearing under former law, defendant must have alleged a factual basis for relief; vague conclusional charges are insufficient. Further, defendant's claims must raise issues which cannot be conclusively determined from files and records, and claims must be such, that if true, provide a legal basis for relief sought. *State v. Kenney*, 81 N.M. 368, 467 P.2d 34 (Ct. App. 1970).

Trial court's duty to decide issues relating to scientific evidence. - Contested factual issues on the admissibility of scientific evidence, and of polygraph examinations in particular, are factual determinations to be made by the trial court. *Baum v. Orosco*, 106 N.M. 265, 742 P.2d 1 (Ct. App. 1987).

The argument that since there were conflicting opinions regarding the reliability of the polygraph evidence, the trial court abused its discretion in excluding the evidence was clearly specious. It is the role of the trial court to resolve such conflicts, and it is the very essence of discretion to make such a resolution and determination. *Baum v. Orosco*, 106 N.M. 265, 742 P.2d 1 (Ct. App. 1987).

Consideration of hearsay. - Paragraph A authorizes consideration of hearsay in determining preliminary questions of admissibility. *State v. Roybal*, 107 N.M. 309, 756 P.2d 1204 (Ct. App. 1988).

Police officer's testimony regarding verification of a telephone call made to an embezzlement victim was a preliminary matter within the meaning of Paragraph A. *State v. Roybal*, 107 N.M. 309, 756 P.2d 1204 (Ct. App. 1988).

Relevancy conditioned on fact. - When an exhibit is admitted conditionally, it is the duty of the party seeking to exclude the exhibit to renew its objection and to move to strike if its relevancy is not thereafter established. *Woolwine v. Furr's, Inc.*, 106 N.M. 492, 745 P.2d 717 (Ct. App. 1987).

Prohibiting jury viewing of films admitted into evidence held improper. - The determination of whether evidence is relevant, and therefore admissible, rests within the discretion of the trial court but admitting films into evidence, thereby determining that they were relevant, and then not allowing the jury to view them, constituted an improper limitation on defendant's right to present evidence to the jury. *State v. Martin*, 101 N.M. 595, 686 P.2d 937 (1984).

Doctor's letter on paternity. - Exclusion of a letter written by a doctor summarizing his conclusions of paternity test results, together with the statistical probability calculations based on the serologic tests performed was proper since a proper foundation had not been established for the documents admission. State v. Leal, 104 N.M. 506, 723 P.2d 977 (Ct. App. 1986).

Voir dire of police officer in presence of jury on admissibility of defendant's inculpatory statements violates Paragraph C. State v. Gallegos, 92 N.M. 336, 587 P.2d 1347 (Ct. App. 1978).

Law reviews. - For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error § 523; 5 Am. Jur. 2d Appeal and Error § 601; 75 Am. Jur. 2d Trial §§ 147, 345.

Requisite foundation or predicate to permit nonexpert witness to give opinion, in a civil action, as to sanity, mental competency or mental condition, 40 A.L.R.2d 15.

Mode and degree of proof required to establish genuineness of handwriting offered as standard or exemplar for comparison with a disputed writing or signature, 41 A.L.R.2d 575.

Mental subnormality of accused as affecting voluntariness or admissibility of confession, 69 A.L.R.2d 348.

Qualifications of chemist or chemical engineer to testify as to effect of poison upon human body, 70 A.L.R.2d 1029.

Competency, as a standard of comparison to establish genuineness of handwriting, of writings made after controversy arose, 72 A.L.R.2d 1274.

Qualification as expert to testifying as to findings or results of scientific test to determine alcoholic content of blood, 77 A.L.R.2d 971.

Qualification of nonmedical psychologist to testify as to mental condition or competency, 78 A.L.R.2d 919.

Testing qualifications of expert witness, other than handwriting expert, by objective tests or experiments, 78 A.L.R.2d 1281.

Constitutional aspects of procedure for determining voluntariness of pretrial confession, 1 A.L.R.3d 1251.

Preliminary proof, verification, or authentication of X-rays requisite to their introduction in evidence in civil cases, 5 A.L.R.3d 303.

Admissibility, in civil case, of evidence obtained by unlawful search and seizure, 5 A.L.R.3d 670.

Necessity of laying foundation for opinion of attesting witness as to mental condition of testator or testatrix, 17 A.L.R.3d 503.

Admissibility of confession by one accused of felonious homicide, as affected by its inducement through compelling, or threatening to compel, accused to view victim's corpse, 27 A.L.R.3d 1185.

Admissibility of evidence of lineup identification as affected by allegedly suggestive lineup procedures, 39 A.L.R.3d 487.

Admissibility of evidence of showup identification as affected by allegedly suggestive showup procedures, 39 A.L.R.3d 791.

Admissibility of evidence of photographic identification as affected by allegedly suggestive identification procedure, 39 A.L.R.3d 1000.

"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search, 43 A.L.R.3d 385.

Censorship and evidentiary use of unconvicted prisoners' mail, 52 A.L.R.3d 548.

Admissibility in criminal prosecution, of evidence obtained by electronic surveillance of prisoner, 57 A.L.R.3d 172.

Omission or inaudibility of portions of sound recording as affecting its admissibility in evidence, 57 A.L.R.3d 746.

Admissibility of videotape film in evidence in criminal trial, 60 A.L.R.3d 333; 41 A.L.R.4th 812; 41 A.L.R.4th 877.

Mental subnormality of accused as affecting voluntariness or admissibility of confession, 8 A.L.R.4th 16.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 A.L.R.4th 419.

Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification, 29 A.L.R.4th 104.

Admissibility of hearsay evidence for court's determination, under Rule 104(a) of the Federal Rules of Evidence, of preliminary questions of fact, 39 A.L.R. Fed. 720.

Error in evidentiary ruling in federal civil case as harmless or prejudicial under Rule 103(a), Federal Rules of Evidence, 84 A.L.R. Fed. 28.

4 C.J.S. Appeal and Error §§ 289, 290; 5A C.J.S. Appeal and Error § 1724; 88 C.J.S. Trial §§ 97, 273.

11-105. Limited admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Committee commentary. - Former Rule 106 was renumbered as 11-105 and former Rule 107 was renumbered as 11-106 to make the numbering system conform to the federal rules.

The federal rules do not contain a rule prohibiting comments on the evidence by the judge. The New Mexico rule covering that subject, former Rule 105, was renumbered as Rule 11-107.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 105 of the Federal Rules of Evidence.

Proper situation for limiting instruction. - Where a state's witness's mention of defendant's previous armed robbery was off-handed and casual, whereas evidentiary value of entire exchange between the two was compelling, appellate court was not willing to conclude that the jury would not have followed limiting instructions, if requested, so that prejudicial effect of evidence could have been minimized; defendant should have requested and been granted a curative instruction. *State v. Ortiz*, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Where a statement of one defendant includes inculpatory facts concerning a codefendant, the proper procedure is to admit the statement but to exclude from the jury's consideration all parts thereof damaging to the other defendant. *State v. Alaniz*,

55 N.M. 312, 232 P.2d 982 (1951) (decided before enactment of this rule).

Limiting instruction not given where failure to request. - The trial court properly refused to give an instruction on the limited purpose of the cross-examination where the defendant failed to request such an instruction. *State v. Wyman*, 96 N.M. 558, 632 P.2d 1196 (Ct. App. 1981).

Limiting instruction is mandatory when properly requested. *Gonzales v. Sansoy*, 103 N.M. 127, 703 P.2d 904 (Ct. App. 1984).

Admissibility of codefendant's guilty plea. - Hearsay evidence of a coconspirator's or codefendant's guilty plea may not be admitted when the witness himself does not testify, nor when that evidence is offered solely to prove the defendant's guilt. *State v. Gilbert*, 98 N.M. 77, 644 P.2d 1066 (Ct. App. 1982).

Timing of curative instruction. - Exclusion of portions of statement damaging to a codefendant may be accomplished by an instruction to disregard the inadmissible portions, both when the statement is read to or seen by the jury, and again when the jury is instructed on the law of the case. *State v. Minor*, 78 N.M. 680, 437 P.2d 141 (1968) (decided before enactment of this rule).

Law reviews. - For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial §§ 126, 170 to 173.

88 C.J.S. Trial §§ 87, 130 to 132.

11-106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Committee commentary. - See same catchline in notes to Rule 11-105.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 106 of the Federal Rules of Evidence.

Purpose of this rule is to permit the introduction of recorded statements that place in context other writings admitted into evidence which, viewed alone, may be misleading. *State v. Carr*, 95 N.M. 755, 626 P.2d 292 (Ct. App.), cert. denied, 95 N.M. 669, 625 P.2d 1186, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981).

Only relevant other parts of document competent. - This rule is subject to the qualification that only the other parts of the document which are relevant and throw light upon the parts already admitted become competent upon its introduction. There is no rule that either the whole document, or no part of it, is competent. *State v. Carr*, 95 N.M. 755, 626 P.2d 292 (Ct. App.), cert. denied, 95 N.M. 669, 625 P.2d 1186, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981).

This rule applies only to the other parts of the document which are relevant and shed some light upon the parts of the document already admitted. *State v. Case*, 103 N.M. 574, 711 P.2d 19 (Ct. App. 1985).

Counsel may use portion of exhibit to illustrate argument. - No authority prevents counsel from using a portion of an exhibit, such as a portion of a medical report admitted as evidence, to illustrate his argument. *Chavez v. Atchison, T. & S.F. Ry.*, 77 N.M. 346, 423 P.2d 34 (1967).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 268, 839.

Requirement, under Rule 106 of Federal Rules of Evidence, that when writing or recorded statement or part thereof is introduced in evidence, another part or another writing or recorded statement must also be introduced in evidence, 75 A.L.R. Fed. 892.

32 C.J.S. Evidence § 704.

11-107. Comment by judge.

The judge shall not comment to the jury upon the evidence or the credibility of the witnesses.

Committee commentary. - See same catchline in notes to Rule 11-105.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is deemed to have superseded former Rule 51, 1(h), N.M.R. Civ. P., which permitted comment on evidence by the judge.

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Propriety, in federal criminal trial, of including in jury instruction statement disparaging defendants' credibility, 59 A.L.R. Fed. 514.

Article 2

Judicial Notice

11-201. Judicial notice of adjudicative facts.

A.

Scope of rule. This rule governs only judicial notice of adjudicative facts.

B.

Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either

(1) generally known within the community, or

(2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or

(3) notice is provided for by statute.

C.

When discretionary. A judge or court may take judicial notice, whether requested or not.

D.

When mandatory. A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.

E.

Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

F.

Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

G.

Instructing jury. In a civil action or proceeding, the judge shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Committee commentary. - Paragraph G was changed to conform to federal rule. The jury in a criminal case may no longer be instructed that a judicially noticed fact is conclusive. UJI 14-5013 was also amended to conform to the amended rule.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Judicial Notice Of Lay Facts.
- III. Judicial Notice of Governmental Action.

I. General Consideration.

Cross-references. - For judicial notice as to proceedings relating to irrigation districts, see 73-9-16 NMSA 1978.

As to irrigation districts cooperating with federal reclamation laws, see 73-10-20 NMSA 1978.

For judicial notice of herd law district proceedings, see 77-12-8 NMSA 1978.

For notice of proceedings to impound trespassing animals within irrigation districts, see 77-14-10 NMSA 1978.

Compiler's notes. - This rule is similar to Rule 201 of the Federal Rules of Evidence.

This rule is deemed to have superseded former Rule 44(d), N.M.R. Civ. P. (now see Rule 1-044).

Basic considerations of procedural fairness demand opportunity to be heard on propriety of taking judicial notice and tenor of matter to be noticed. Paragraph E requires granting of that opportunity upon request. Although no formal scheme of giving notice is provided, an adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party or through an indication by the court. *Frost v. Markham*, 86 N.M. 261, 522 P.2d 808 (1974).

Law reviews. - For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For article, "Workmen's Compensation," see 13 N.M.L. Rev. 495 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 5 Am. Jur. 2d Appeal and Error §§ 606, 739, 740; 29 Am. Jur. 2d Evidence §§ 18, 22 to 122.

Uniform Judicial Notice of Foreign Law Act, 23 A.L.R.2d 1437.

Reception of evidence to contradict or rebut matters judicially noticed, 45 A.L.R.2d 1169.

Judicial notice of matters relating to public thoroughfares and parks, 48 A.L.R.2d 1102; 86 A.L.R.3d 484.

Judicial notice of intoxicating quality, and the like, of liquor or particular liquid, from its name, 49 A.L.R.2d 764.

Judicial notice of diseases or similar conditions adversely affecting human beings, 72 A.L.R.2d 554.

Judicial notice of drivers' reaction time and of stopping distance of motor vehicles traveling at various speeds, 84 A.L.R.2d 979.

Judicial notice as to assessed valuations, 42 A.L.R.3d 1439.

Judicial notice as to location of street address within particular political subdivision, 86 A.L.R.3d 484.

Federal or state law as governing federal court's authority, in diversity action after *Erie R. Co. v. Tompkins*, to take judicial notice of law of sister state or foreign country, 7 A.L.R. Fed. 921.

What constitutes "adjudicative facts" within meaning of Rule 201 of Federal Rules of Evidence, concerning judicial notice of adjudicative facts, 35 A.L.R. Fed. 440.

Effect of Rule 201(g) of the Federal Rules of Evidence, providing for instruction in criminal case that jury need not accept as conclusive fact judicially noticed, on propriety of taking judicial notice on appeal under Rule 201(f), 49 A.L.R. Fed. 911.

4 C.J.S. Appeal and Error § 1751; 5A C.J.S. Appeal and Error § 1604; 5B C.J.S. Appeal and Error § 1212; 31 C.J.S. Evidence §§ 6 to 102; 35A C.J.S. Federal Civil Procedure § 442.

II. Judicial Notice Of Lay Facts.

Kinds of facts courts may notice. - Courts may take judicial notice of facts which are self-evident or which are commonly and generally known and are capable of immediate and accurate verification by resort to readily accessible sources of unquestionable accuracy. *Horton v. Driver-Miller Plumbing, Inc.*, 76 N.M. 242, 414 P.2d 219 (1966) (decided before enactment of this rule).

Judicial notice of factors considered in fixing attorney's fees. - In most instances, a lawyer's skill, ability, experience and standing in the legal community, and the rising cost of living, as well as other recognized factors, may be judicially noticed in fixing an attorney's fee in a workmen's compensation case. *Woodson v. Phillips Petroleum Co.*, 102 N.M. 333, 695 P.2d 483 (1985).

Judicial notice properly taken of English translation of waiver. - Where record reflected defendant's waiver in Spanish of his constitutional rights, the court of appeals took judicial notice of its English interpretation and agreed with trial court that the language of the waiver satisfied requirements of due process. *State v. Ramirez*, 89 N.M. 635, 556

P.2d 43 (Ct. App. 1976).

And of nature of cattle guards. - Cattle guards are common objects in New Mexico cattle country, and courts can take judicial notice of their nature by appropriate books or documents of reference. *Williams v. New Mexico State Hwy. Comm'n*, 82 N.M. 550, 484 P.2d 770 (Ct. App. 1971).

And boundaries of state and counties. - New Mexico allows its courts to take judicial notice of boundaries of the state and counties therein. *State v. Tooke*, 81 N.M. 618, 471 P.2d 188 (Ct. App. 1970).

Matter must be certain. - The matter of which a court will take judicial notice must be a subject of common and general knowledge that is well established and authoritatively settled; thus, uncertainty of the matter or fact in question will operate to preclude judicial notice thereof. *Rozelle v. Barnard*, 72 N.M. 182, 382 P.2d 180 (1963).

No judicial notice of repair charges. - Local charges in Albuquerque for rebuilding a motor, repairing a radiator or the charges for labor are not of such common and general knowledge that they can be judicially noticed. *Rozelle v. Barnard*, 72 N.M. 182, 382 P.2d 180 (1963).

Nor causes of leaking pipes. - Cause or causes of leaking pipes are not matters of such common knowledge that the court could properly have taken judicial notice thereof. *Horton v. Driver-Miller Plumbing, Inc.*, 76 N.M. 242, 414 P.2d 219 (1966).

Nor state of market. - Appellate court will not take judicial notice of the market to determine the issue of impossibility of performance as a defense to an action for breach of contract. *Reinhart v. Rauscher Pierce Sec. Corp.*, 83 N.M. 194, 490 P.2d 240 (Ct. App. 1971).

Nor availability of mental health care. - Where defendant asked court of appeals to take judicial notice that no psychiatric or psychological help was available for defendant at the penitentiary, but defendant cited neither source nor reference for such a proposition and court found none in its search, assertion is not a matter for judicial notice. *State v. Hogan*, 83 N.M. 608, 495 P.2d 388 (Ct. App. 1972).

Nor general scientific law absent showing of application. - Trial court properly refused to take judicial notice of an encyclopedia article on the general nature of combustion of

gases, since a showing was required as to application of the variables of the general law to the situation in question, and plaintiff made no such showing. *Hartford Accident & Indem. Co. v. Beevers*, 84 N.M. 159, 500 P.2d 444 (Ct. App. 1972).

III. Judicial Notice of Governmental Action.

Supreme court will not take notice of proceedings in lower court. *Richardson Ford Sales v. Cummins*, 74 N.M. 271, 393 P.2d 11 (1964).

Court will take notice that written pleading is prerequisite to obtaining restraining order. *Norton v. Reese*, 76 N.M. 602, 417 P.2d 205 (1966).

Courts of state judicially notice public act of judicial department. *Lott v. State*, 77 N.M. 612, 426 P.2d 588 (1967).

District courts are authorized to take judicial notice of official acts of state judiciary; however, if judicial notice is taken of a prior judicial proceeding, there should be a clear delineation in the record as to what is being noticed, writings so noticed should be in the record so as to permit appellate review and a specification of what is being noticed should be clearly and timely stated so that parties affected may have an opportunity to address themselves to such matters. *Frost v. Markham*, 86 N.M. 261, 522 P.2d 808 (1974) (decided under former version of Rule 1-044.).

Notice of incomplete or confusing law refused. - Judicial notice of a law which is incomplete or confusing is properly refused. *State v. Shafer*, 102 N.M. 629, 698 P.2d 902 (Ct. App. 1985).

Ordinances noticed where de novo trial in district court. - Where district court tries case de novo upon appeal from municipal court, it is the prevailing rule that ordinances may be judicially noticed. *City of Albuquerque v. Leatherman*, 74 N.M. 780, 399 P.2d 108 (1965).

But not in regular appeals. - 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).

Judicial notice of valid rules and regulations proper. - Trial court properly refused to take judicial notice of rules and regulations allegedly adopted by the state fire board (59-17-1 NMSA 1978 et seq. (now repealed)) since, absent a showing that the rules and regulations had been properly filed under State Rules Act (see 14-4-1 NMSA 1978) or that these specific rules and regulations were not required to be filed, there could be no showing of valid rules and regulations of an executive department. *Hartford Accident & Indem. Co. v. Beevers*, 84 N.M. 159, 500 P.2d 444 (Ct. App. 1972).

When shipper sues carrier for loss of property in interstate shipment, the court may take judicial notice of tariffs and rates filed by carrier with the interstate commerce commission. *Murchison v. Allied Van Lines*, 74 N.M. 446, 394 P.2d 596 (1964).

Record itself is evidence of print, if kept by authority express or implied, and fingerprint records are kept under the express authority of a federal regulation (28 C.F.R. § 0.85) of which the supreme court takes judicial notice. *State v. Miller*, 79 N.M. 117, 440 P.2d 792 (1968).

Governor's messages and legislative reports may be noticed. - Governor's messages before joint sessions of the legislative houses and reports of legislative committees with which the legislature satisfied itself of the accuracy of matters called to its attention by the executive will be judicially noticed by the courts. *State ex rel. Hughes v. Cleveland*, 47 N.M. 230, 141 P.2d 192 (1943), explained in *Otto v. Buck*, 61 N.M. 123, 295 P.2d 1028 (1956).

It should be assumed by supreme court that, the governor having pointed out in message to legislature that a large decrease in revenues was anticipated, the lawmakers were moved in part thereby. *State ex rel. Hughes v. Cleveland*, 47 N.M. 230, 141 P.2d 192 (1943).

Also action of constitutional convention. - Courts may take notice of rejection of a minority report of a constitutional convention committee. *State ex rel. Hughes v. Cleveland*, 47 N.M. 230, 141 P.2d 192 (1943).

Prerequisites for judicial notice of other states' law. - While courts are authorized under former Rule 44(d), N.M.R. Civ. P. (now superseded by this rule), to take judicial notice of statutes of other states and their construction by the highest courts of appellate jurisdiction, they will do so only where such statute has been presented to trial court and where error is asserted because trial court failed to notice or follow such foreign statute, or where it is necessary for the court to take judicial notice of the statute of another state upon which a decision of that state, relied upon, is predicated. *Boswell v. Rio De Oro*

Uranium Mines, Inc., 68 N.M. 457, 362 P.2d 991 (1961).

Use of foreign law to decide admissibility of death certificate. - Former Rule 44(d), N.M.R. Civ. P. (now superseded by this rule), required that the supreme court examine decisions from the state of Texas in an effort to determine if a death certificate issued by a Texas justice of the peace was admissible or not by virtue of the fact that it showed on its face that the statement as to cause of death was based on hearsay. Callaway v. Mountain States Mut. Cas. Co., 70 N.M. 337, 373 P.2d 827 (1962).

Article 3

Presumptions

11-301. Presumptions in general in civil actions and proceedings.

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

COMPILER'S ANNOTATIONS

Cross-references. - For conclusive presumption of acceptance of Workmen's Compensation Act by employee, see 52-1-6 NMSA 1978.

Compiler's notes. - This rule is similar to Rule 301 of the Federal Rules of Evidence.

Scope of rule. - This rule imposes only a burden of production on the party against whom the presumption is directed. Mortgage Inv. Co. v. Griego, 108 N.M. 240, 771 P.2d 173 (1989).

Because "presumption" is technical term, better practice is to describe presumption to the jury in terms as assumed facts and burden of proof. Trujillo v. Chavez, 93 N.M. 626, 603 P.2d 736 (Ct. App. 1979).

Jury must find the presumed fact true if, (1) the jury is persuaded of the existence of the basic fact from which the presumed fact is inferred, and (2) the party against whom the presumption operates has failed to show that the nonexistence of the presumed fact is

more probable than its existence. *Trujillo v. Chavez*, 93 N.M. 626, 603 P.2d 736 (Ct. App. 1979).

Inference may continue after introduction of contrary evidence. - An inference may continue to operate in an evidentiary sense even after introduction of evidence tending to establish the contrary, and may sufficiently influence the trier of facts to conclude that the presumed fact does exist. *Sanchez v. Quintana*, 97 N.M. 508, 641 P.2d 539 (Ct. App. 1982).

"Bursting bubble" theory rejected. - The so-called "bursting bubble" theory, under which a presumption vanished upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too slight and evanescent an effect. *Trujillo v. Chavez*, 93 N.M. 626, 603 P.2d 736 (Ct. App. 1979).

The disappearance of a presumption upon the presentation of contrary evidence was eliminated when the Rules of Evidence were adopted. *Sanchez v. Quintana*, 97 N.M. 508, 641 P.2d 539 (Ct. App. 1982).

A marriage is presumed valid; that is, the party attacking it carries the burden of proof and the invalidity must be proven by clear and convincing evidence. To overcome presumption of validity which attaches to a later marriage proof is required of the prior marriage plus the fact that it has not been terminated by death or divorce. *Panzer v. Panzer*, 87 N.M. 29, 528 P.2d 888 (1974).

Several burdens of proof in one case. - If a party attacking validity of a later marriage by showing continued existence of a predecessor makes out a prima facie case, his adversary is free to attack validity of the predecessor, but in that case has the burden of proof. In resolving issue between predecessor and an even earlier marriage, the presumption of validity would attach to the former, it being the later in point of time. *Panzer v. Panzer*, 87 N.M. 29, 528 P.2d 888 (1974).

Presumption in favor of natural parents. - Parents have a prima facie natural and legal right to custody of their children, and this right creates presumption that the welfare and best interests of the child will best be served in the custody of the natural parents; burden of proving the contrary is cast on the nonparent. *Shorty v. Scott*, 87 N.M. 490, 535 P.2d 1341 (1975).

Defendant prejudiced by not being able to retest state's blood alcohol test results. - Where a chemist testifies that defendant's blood alcohol percentage was 0.10 percent and that this is the minimum sufficient percentage to invoke the presumption of intoxication and he further testified that there is tolerance for error and that there was no rechecking by anyone of the results of his test, defendant clearly is prejudiced by not being able to retest the results reached by the State. *State v. Lovato*, 94 N.M. 780, 617 P.2d 169 (Ct. App. 1980).

Presumption that employee's death arose out of employment. - Where trial judge found that employer failed to rebut the presumption that employee's death by shooting arose out of his employment, judge, as fact finder, was entitled to presume that employee's death arose out his employment but was not required to make this presumption, and upon weighing the evidence, could properly resolve the issue against employee. *Mortgage Inv. Co. v. Griego*, 108 N.M. 240, 771 P.2d 173 (1989).

Presumption of due execution of will. - A presumption of due execution is not sufficient to create a prima facie case for the proponents of a will. New Mexico is now guided by this rule. *Sanchez v. Quintana*, 97 N.M. 508, 641 P.2d 539 (Ct. App. 1982).

Presumption regarding vehicle ownership. - The presumption that the operator of defendant's car was the defendant or the agent and servant of the defendant-owner and that said operator was acting within the scope of his employment by the defendant at the time of the accident ceased to exist upon the introduction of credible and substantial evidence which would support a contrary finding. *Payne v. Tuozzoli*, 80 N.M. 214, 453 P.2d 384 (Ct. App. 1969).

Section 66-3-12 NMSA 1978 creates a presumption that the owner listed in the certificate of title to an automobile, who is also the parent of a driver involved in an accident, is, in fact, the real owner. It is then necessary for the factfinder to determine for purposes of a negligence suit against the parent under the Family Purpose Doctrine, whether the presumption is rebutted by counter evidence. *Shryock v. Madrid*, 106 N.M. 589, 746 P.2d 1121 (Ct. App. 1987).

Rebutting presumption that properly addressed letter was received. - Defendant may rebut presumption that original letter properly addressed and mailed was received by introducing evidence that it was not received. *State Farm Fire & Cas. Co. v. Price*, 101 N.M. 438, 684 P.2d 524 (Ct. App. 1984).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For article, "Estates and Trusts," see 13 N.M.L. Rev. 395 (1983).

For article, "Evidence I," see 13 N.M.L. Rev. 407 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 7, 159 to 248.

Effect of presumption as evidence or upon burden of proof where controverting evidence is introduced, 5 A.L.R.3d 19.

Modern status of the rules against basing an inference upon an inference or presumption upon a presumption, 5 A.L.R.3d 100.

Medical malpractice: presumption or inference from failure of hospital or doctor to produce relevant medical records, 69 A.L.R.4th 906.

31A C.J.S. Presumptions §§ 114 to 157.

11-302. Presumptions in criminal cases.

A.

Scope. Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

B.

Submission to jury. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

C.

Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

COMPILER'S ANNOTATIONS

Cross-references. - For presumption of knowledge or belief that property has been stolen, see 30-16-11 NMSA 1978.

Existence or nonexistence of general criminal intent not presumed. - There was clearly no merit in defendant's argument that (1) since voluntary intoxication is not a defense to existence of a general criminal intent, said intent is always conclusively presumed from the doing of the prohibited act, (2) conclusive presumptions are unconstitutional and therefore, (3) refusal of requested instructions on the effect of intoxication on ability to form a general criminal intent denied defendant the right to put on a defense. Existence or nonexistence of general criminal intent is question of fact for the jury, and the general intent instruction so submitted the issue to the jury; no presumption was involved in the instruction given. *State v. Kendall*, 90 N.M. 236, 561 P.2d 935 (Ct. App.), reversal of conviction on other grounds held improper, 90 N.M. 191, 561 P.2d 464 (1977).

Basic facts supporting guilt beyond reasonable doubt. - Where defendant entered a store, which had just opened for the day, with a blanket wrapped around him, went to the rack where expensive rugs were kept and, when asked if he needed help, turned around and started towards the door; where storekeeper waited until defendant got to the door and then asked defendant to give back rug which she had noticed missing, which rug defendant had under his blanket, hidden and folded up; and where defendant, who was the only one who had been near the rack when the rug disappeared, did not approach the cash register at any time, evidence was sufficient for a rational juror to find each of the inferred facts in 30-16-22 NMSA 1978 (creating presumption of shoplifting from concealment of merchandise) beyond a reasonable doubt, and furthermore showed willful concealment. *State v. Matamoros*, 89 N.M. 125, 547 P.2d 1167 (Ct. App. 1976).

Rule incorporates constitutional requirement that presumptions not be conclusive in criminal cases even if unrebutted. *State v. Matamoros*, 89 N.M. 125, 547 P.2d 1167 (Ct. App. 1976).

Paragraph C abolishes "true" presumptions in criminal cases and puts presumptions found in 30-16-11B NMSA 1978 (relating to knowledge or belief that property was stolen), into the category of permissible inference, so that statute must be read to say that requisite knowledge or belief that property has been stolen "may be," rather than "is," presumed to exist upon proof of the basic facts. *State v. Jones*, 88 N.M. 110, 537 P.2d 1006 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975). See also *State v. Matamoros*, 89 N.M. 125, 547 P.2d 1167 (Ct. App. 1976), regarding presumption of shoplifting from concealment of merchandise, created by 30-16-22 NMSA 1978.

Defendant held to have waived error. - Where trial court instructed jury that ultimate fact "must" be presumed upon proof of basic facts, but instruction requiring that presumption was not objected to, such error was waived and did not constitute fundamental error. *State v. Jones*, 88 N.M. 110, 537 P.2d 1006 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Instructions embodying the language of 30-16-22 NMSA 1978 (creating presumption of shoplifting from concealment of merchandise), violated this rule, but since defendant objected only with a general claim that the instructions created an unconstitutional presumption and did not alert the trial court to the issue under the rule, error would not be considered further. *State v. Matamoros*, 89 N.M. 125, 547 P.2d 1167 (Ct. App. 1976).

Where defendant failed to ask for an instruction pursuant to Paragraph C (that existence of a presumed fact which establishes guilt, negatives a defense or is an element of offense must, on all the evidence, be proved beyond a reasonable doubt), the error was not before appeals court for review. *State v. Matamoros*, 89 N.M. 125, 547 P.2d 1167 (Ct. App. 1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 10 to 12, 278; 75 Am. Jur. 2d Trial §§ 758 to 787.

Statutory presumption of possession of weapon by occupants of place or vehicle where it was found, 87 A.L.R.3d 949.

Burden of proof as to entrapment defense - state cases, 52 A.L.R.4th 775.

22A C.J.S. Criminal Law § 695 et seq.; 23A C.J.S. Criminal Law § 1325 et seq.

Article 4

Relevancy and Its Limits

11-401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Specific Applications.

I. General Consideration.

Compiler's notes. - This rule is similar to Rule 401 of the Federal Rules of Evidence.

Arguments of counsel are not evidence. *State v. Herrera*, 84 N.M. 46, 499 P.2d 364 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972), cert. denied, 409 U.S. 1110, 93 S. Ct. 918, 34 L. Ed. 2d 692 (1973) (decided prior to enactment of this rule).

"Relevancy" defined. - Relevancy is that which tends to establish a material proposition. *State v. Romero*, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974).

Generally, whatever naturally and logically tends to establish a fact in issue is relevant. *Wright v. Brem*, 81 N.M. 410, 467 P.2d 736 (Ct. App. 1970).

Evidence which is offered to prove an issue in a case and which sheds light on that issue is material and should be admitted. *State v. Gutierrez*, 79 N.M. 732, 449 P.2d 334 (Ct. App. 1968), cert. denied, 80 N.M. 33, 450 P.2d 633 (1969).

Under this rule, there must be an important fact in the case to be determined. Whatever naturally and logically tends to establish a fact in issue is relevant. *Wilson v. Hayner*, 98 N.M. 514, 650 P.2d 36 (Ct. App. 1982).

Determination of relevancy within trial court's discretion. - Because of difficulty of precisely defining the term "relevant evidence" or of circumscribing by specific and categorical rules the substance or content of evidence which falls within the area of "relevancy," the determination of relevancy, as well as of materiality, rests largely within the discretion of the trial court. *Wright v. Brem*, 81 N.M. 410, 467 P.2d 736 (Ct. App. 1970) (decided prior to enactment of this rule). See also *Glass v. Stratoflex, Inc.*, 76 N.M. 595, 417 P.2d 201 (1966).

The determination of relevancy, as well as materiality, rests largely within the discretion of the trial court. *Wilson v. Hayner*, 98 N.M. 514, 650 P.2d 36 (Ct. App. 1982); *United States v. Plains Elec. Generation & Transmission Coop.*, 106 N.M. 775, 750 P.2d 475 (Ct. App. 1988).

Relevant evidence decided on case-by-case basis. - There is, and can be, no fixed rule delineating relevant and irrelevant evidence. The problem must be decided on a case-by-case basis. *Ohlson v. Kent Nowlin Constr. Co.*, 99 N.M. 539, 660 P.2d 1021 (Ct. App. 1983).

Real evidence is admissible to show commission of crime charged; to connect the accused with the commission of the crime; to show fingerprints, palmprints or footprints in order to establish the identity of the wrongdoer; to illustrate, explain or throw light on the criminal transaction; to show that a person accused of homicide was armed when he went to the scene of the crime; to show malice, knowledge and preparation, purpose, intent or a lustful disposition; to show the ability to commit a crime; to show the nature and location of a wound; to show the ownership and value of stolen property; to corroborate a witness or admissions of the defendant; to contradict defendant's theory of self-defense by showing that the victim's skull had been crushed by the use of excessive force or that the victim's gun had not been discharged; and to contradict the defendant's testimony. *State v. Gray*, 79 N.M. 424, 444 P.2d 609 (Ct. App. 1968), *aff'd*, 80 N.M. 751, 461 P.2d 233 (Ct. App. 1969).

Court's decision admitting evidence upheld where admissible under any theory. - Where evidence is admissible under any theory, the trial court's decision to admit it will be upheld. The same ruling will apply even more forcefully to evidence presented to the grand jury. *State v. Ballinger*, 99 N.M. 707, 663 P.2d 366 (Ct. App. 1983), *rev'd on other grounds*, 100 N.M. 583, 673 P.2d 1316 (1984).

Items are admissible which show either an admission by conduct or consciousness of guilt. *State v. Vallejos*, 98 N.M. 798, 653 P.2d 174 (Ct. App. 1982).

Law reviews. - For article, "Rape Law: The Need for Reform," see 5 N.M.L. Rev. 279 (1975).

For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Evidence I," see 13 N.M.L. Rev. 407 (1983).

For article, "Evidence II: Evidence of Other Crimes as Proof of Intent," see 13 N.M.L. Rev. 423 (1983).

For note, "Lie Detector Evidence - New Mexico Court of Appeals Holds Voice-Stress Lie Detector Evidence Conditionally Admissible: Simon Neustadt Family Center, Inc. v. Blutworth," see 13 N.M.L. Rev. 703 (1983).

For article, "Survey of New Mexico Law, 1982-83: Evidence," see 14 N.M.L. Rev. 161 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 251 to 256.

Admissibility of evidence that defendant escaped or attempted to escape while being detained for offense in addition to that or those presently being prosecuted, 3 A.L.R.4th 1085.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 A.L.R.4th 829.

Admissibility of evidence of fingernail comparisons in criminal case, 40 A.L.R.4th 575.

Modern status of rule relating to admission of results of lie detector (polygraph) test in federal criminal trials, 43 A.L.R. Fed. 68.

Propriety, in federal court action, of attack on witness' credibility by rebuttal evidence pertaining to cross-examination testimony on collateral matters, 60 A.L.R. Fed. 8.

31A C.J.S. Evidence §§ 158 to 166.

II. Specific Applications.

A defendant's refusal to take a chemical test is relevant to show his consciousness of guilt and fear of the test results. *McKay v. Davis*, 99 N.M. 29, 653 P.2d 860 (1982).

Evidence illuminating accused's arrest, conduct and condition relevant. - Evidence tending to show circumstances of the arrest of an accused, his acts and conduct, his physical and mental condition and any declarations by him are pertinent and admissible evidence. 1964 Op. Att'y Gen. No. 64-38.

Evidence of flight relevant to show consciousness of guilt. - Evidence of flight or the aborting of defendant's plan for flight is relevant because it tends to show consciousness of guilt. *State v. Smith*, 89 N.M. 777, 558 P.2d 46 (Ct. App.), rev'd on other grounds, 89 N.M. 770, 558 P.2d 39 (1976).

Testimony of prehypnotic recollections is admissible in the sound discretion of trial court. *State v. Hutchinson*, 99 N.M. 616, 661 P.2d 1315 (1983).

Money in defendant's possession upon arrest relevant. - Amount of money in defendant's possession upon arrest, a short distance and in a short period of time after cashing forged check, certainly tended to throw light on the criminal transaction and was therefore admissible as evidence. *State v. Belcher*, 83 N.M. 130, 489 P.2d 410 (Ct. App. 1971).

Evidence of drinking relevant to carelessness. - Evidence of drinking has a tendency to make the existence of carelessness or lack of due caution more probable than it would be without the evidence; said evidence is thus relevant, though it is but one circumstance to consider when the prosecution is for reckless driving. *State v. Sandoval*, 88 N.M. 267, 539 P.2d 1029 (Ct. App. 1975).

Documents submitted to insurer relevant to show fraud. - Where exhibits were documents submitted by defendant to insurance company grouped as to each count of fraud, where as to each group of papers there was testimony that they were received from defendant, and where at least one paper in each group bore the signature of defendant, the record fully established their relevancy. *State v. Archuleta*, 82 N.M. 378, 482 P.2d 242 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Testimony of polygraph examiner relevant to show degree of crime. - Where testimony of polygraph examiner would have been that defendant was telling the truth on questions about intent and provocation, said testimony would be crucial in determining whether defendant had committed murder in the second degree or voluntary

manslaughter; therefore the tendered evidence was admissible as relevant evidence. State v. Dorsey, 87 N.M. 323, 532 P.2d 912 (Ct. App.), aff'd, 88 N.M. 184, 539 P.2d 204 (1975).

Pistol and shells relevant in armed robbery prosecution. - Exhibits of automatic pistol and empty shells are properly admitted as material and relevant evidence in armed robbery prosecution where pistol is identified as one used during robbery and shells were found at the scene. State v. Beachum, 78 N.M. 390, 432 P.2d 101 (1967), cert. denied, 392 U.S. 911, 88 S. Ct. 2068, 20 L. Ed. 2d 1369 (1968).

Videotape of trail to father's house relevant to connect defendant with burglary. - In burglary case where arresting officers had fired at suspect fleeing service station that had been broken into, where defendant was found wounded at a hospital shortly thereafter, where defendant's fingerprints matched those found at scene of crime, where officers made videotape of trail of small red splotches, alleged to be bloodstains, leading to or near residence of defendant's father and where an officer who was present at the taping testified at the trial that such tape was true and accurate as to what it purported to represent, defendant's contention that, absent proof that the spots were blood, the tape was not relevant and therefore was inadmissible was without merit since the tape tended to connect defendant with the burglary whether or not the spots were blood. State v. Thurman, 84 N.M. 5, 498 P.2d 697 (Ct. App. 1972).

Proposal for redesign of parking lot relevant in condemnation suit. - In a condemnation suit exhibits and testimony offered by the state proposing a redesign of the parking area and utilization of this area by reducing width of striped stalls from 10 feet to eight and one-half feet was an element to be considered in determining the difference between the "before" and "after" fair market values, particularly in view of the fact that property owner was permitted to introduce evidence to show that the effect of the taking was to substantially reduce rental area of the proposed building because of lost parking space. State ex rel. State Hwy. Dep't v. Kistler-Collister Co., 88 N.M. 221, 539 P.2d 611 (1975).

Evidence of similar incidents relevant to show agent's authority. - Testimony concerning the chemical Eradicane's damage to fields of other farmers and negotiation and settlement of those claims by defendant company was relevant as tending to show that these other claims were investigated and settled by a certain individual on behalf of the company and to show the authority of the individual. Jesko v. Stauffer Chem. Co., 89 N.M. 786, 558 P.2d 55 (Ct. App. 1976).

Other cigarettes relevant to show use of marijuana. - Where defendant smoked a cigarette made up from loose material in plastic bag, where cigarettes in question were also made from the loose material in the plastic bag, where defendant "used" a cigarette

made from same material as cigarettes in question and where cigarettes in question contained marijuana, cigarettes in question were relevant to question of defendant's use of marijuana, and were properly admitted. *State v. Covens*, 83 N.M. 175, 489 P.2d 888 (Ct. App. 1971).

Conduct of others relevant to safety of product. - Conduct of others is proper evidence for a jury to consider in determining whether the tendency of the thing is dangerous or defective. Testimony as to the reputation of the corporation which manufactures the safety device on the rifle in question, and the reputation of the corporation which manufactures rifles which have the same safety device as rifle in question, was relevant to the issue of whether the safety device on the rifle was unsafe or safe. *Lopez v. Heesen*, 69 N.M. 206, 365 P.2d 448 (1961).

But evidence of accidents other than one in question ordinarily not admissible. - Evidence of the happening of accidents at other places is ordinarily not admissible to show whether the danger of such an accident exists at the place in question. *Ruiz v. Southern Pac. Transp. Co.*, 97 N.M. 104, 638 P.2d 406 (Ct. App. 1981).

Mortality table relevant. - Mortality table showing life expectancy of a person of plaintiff's age is admissible into evidence where there is substantial evidence tending to show that injuries are permanent. *Maisel v. Wholesome Dairy, Inc.*, 79 N.M. 310, 442 P.2d 800 (Ct. App. 1968).

Fingerprint substantial evidence of identity. - Where person appears in the case on trial under a different name from the name of the person elsewhere convicted, the fingerprint will be substantial evidence of identity. *State v. Miller*, 79 N.M. 117, 440 P.2d 792 (1968).

Photographs competent evidence. - Photographs are the pictured expressions of data observed by a witness; they are often more accurate than any description by words, and give a clearer comprehension of physical facts than can be obtained from the testimony of witnesses. Ordinarily photographs are competent evidence of anything which it is competent for a witness to describe in words. When photographic evidence constituted visual explanations of testimony of witnesses and was corroborative of said testimony, photographs were admissible for those purposes. *State v. Carlton*, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

Even where merely corroborative of testimony. - Photograph taken by police of items stolen, which merely corroborated testimony of police, was relevant evidence as

corroboration of a witness. *State v. Baca*, 86 N.M. 144, 520 P.2d 872 (Ct. App. 1974).

Mug shot shows defendant's appearance and agent's abilities. - Admission into evidence of a mug shot went to ability of undercover agent to identify with people suspected of dealing in narcotics, and shows defendant's appearance. *State v. Mordecai*, 83 N.M. 208, 490 P.2d 466 (Ct. App. 1971).

One reason for admitting an exhibit is to illustrate, explain or throw light on a criminal transaction. *State v. Belcher*, 83 N.M. 130, 489 P.2d 410 (Ct. App. 1971).

Exhibits must be shown to be connected with defendant, victim or crime. - Insofar as a foundation or identification of evidentiary exhibits is concerned, in order to establish the requisite relevancy sufficient to permit their proper admission they should in some manner be shown to be connected with the defendant, the victim or the crime itself. *State v. Gray*, 79 N.M. 424, 444 P.2d 609 (Ct. App. 1968), *aff'd*, 80 N.M. 751, 461 P.2d 233 (Ct. App. 1969).

Ultimate use of exhibit not important. - Where exhibit was connected with the crime and was identified as a device capable of being used in committing the crime with which defendants were charged, it was relevant and material to preparation and intent of defendants, even though there is no evidence that, in fact, the exhibit was so used. *State v. Hardison*, 81 N.M. 430, 467 P.2d 1002 (Ct. App. 1970).

Safe punch relevant to show possession of burglary tools. - A specially made up burglary tool used as a safe punch was properly admitted in burglary and possession of burglary tools prosecution under 30-16-3 and 30-16-5 NMSA 1978, even where there was no evidence that a safe had been opened during any of the burglaries. *State v. Everitt*, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Officer's testimony on speed of defendant admissible. - In an action arising out of an automobile-pedestrian accident, an officer's testimony that he clocked the defendant driving at an excessive rate of speed is relevant as tending to make the existence of defendant's excessive speed more or less probable than it would be without the evidence; additionally, it is relevant to the credibility of a statement by the defendant that he had not exceeded the speed limit the night of the accident. *Estrada v. Cuaron*, 93 N.M. 283, 599 P.2d 1080 (Ct. App.), *cert. denied*, 93 N.M. 172, 598 P.2d 215 (1979).

Testimony linking bat, splinters and defendant admissible. - Testimony showing that a bat which was admitted into evidence was cracked and that wood splinters were

removed from the hand of the defendant on the day following a murder has a tendency to make more probable the state's theory that the defendant had struck the victim with the cracked baseball bat, although the splinters which were removed were unavailable. *State v. Stephens*, 93 N.M. 368, 600 P.2d 820 (1979).

Photograph admissible if corroborates other evidence. - The fact that a photograph may be cumulative of other evidence does not necessarily render it inadmissible so long as it serves to corroborate other evidence. *Harrell v. City of Belen*, 93 N.M. 612, 603 P.2d 722 (Ct. App.), rev'd on other grounds, 93 N.M. 601, 603 P.2d 711 (1979).

Probable cause to search not relevant to credibility. - Whether a police officer had probable cause to search the nearby house trailer of the defendant's brother does not tend to prove that the officer lied in connection with defendant's sale of heroin to the officer, and so the probable cause testimony would not be relevant evidence. *State v. Barela*, 91 N.M. 634, 578 P.2d 335 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978).

Inquiry into basis of witness' information, accuracy, credibility is almost universally admissible. *State v. Christopher*, 94 N.M. 648, 615 P.2d 263 (1980).

Relevancy of child victim's prior sexual conduct. - A child victim's prior sexual conduct, whether with defendant or another, is relevant and admissible insofar as it tends to show that defendant coerced the victim to submit to sex. *State v. Gillette*, 102 N.M. 695, 699 P.2d 626 (Ct. App. 1985).

Error in perjury prosecution to admit evidence of acquittal entered in prior case, from which the allegation of perjury arose, because the perjury defendant could have told the truth, but not been believed by the jury because of his faulty memory, reputation, and demeanor. *State v. Naranjo*, 94 N.M. 413, 611 P.2d 1107 (Ct. App. 1979), rev'd on other grounds, 94 N.M. 407, 611 P.2d 1101 (1980).

Government standards in related area not relevant to manufacturer's duty. - Standards and government codes relating to safety of cranes during operation near electric power lines had no bearing on the duty of a manufacturer to install a safety device on its crane, and thus were irrelevant and inadmissible in products liability suit against manufacturer. *Jasper v. Skyhook Corp.*, 89 N.M. 98, 547 P.2d 1140 (Ct. App. 1976), rev'd on other grounds, 90 N.M. 143, 560 P.2d 934 (1977).

Mere desire to take polygraph test not relevant. - Defendant's desire to take a polygraph test did not tend to make it more probable or less probable that defendant was an armed robber. Until a valid test was performed and there was a meaningful result, evidence of defendant's desire was no more than self-serving evidence which was properly excluded. *State v. Duran*, 91 N.M. 35, 570 P.2d 36 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977), cert. denied, 435 U.S. 972, 98 S. Ct. 1615, 56 L. Ed. 2d 65 (1978).

Rating of positive three on polygraph test was irrelevant and inadmissible as it did not prove that defendant's truthfulness was more likely or less likely. *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977).

Conflicting custom not relevant where statutory standard. - Evidence is not admissible to show a custom in conflict with standard imposed by statute or ordinance. *Sanchez v. J. Barron Rice, Inc.*, 77 N.M. 717, 427 P.2d 240 (1967).

But testimony not persuasive at another trial still relevant. - Even though defendant had been tried and acquitted for driving while under the influence of intoxicating liquors on the same facts under which he was presently charged with reckless driving, testimony by arresting officer that defendant appeared intoxicated was competent to prove all of the circumstances at the time of the alleged criminal act, including defendant's condition, movements and conduct. *State v. Platter*, 66 N.M. 273, 347 P.2d 166 (1959).

In negligent entrustment case, evidence of prior specific acts indicating incompetence or unfitness are relevant and admissible on the separate questions of the trustee's competence or fitness and the entruster's knowledge. *McCarson v. Foreman*, 102 N.M. 151, 692 P.2d 537 (Ct. App. 1984).

Evidence of crime other than the one charged. - The state may not introduce into evidence a handgun not used in the perpetration of a crime for which the defendant is charged if the state does so to link the defendant to the commission of another crime. *State v. Espinosa*, 107 N.M. 293, 756 P.2d 573 (1988).

Possession of marijuana inadmissible in vehicular homicide case. - In a vehicular homicide case, evidence that the victims possessed marijuana was evidence of a criminal act, but it was not "relevant" evidence which would tend to be probative of the victims' negligence and of their being the sole cause of the accident. *State v. Lopez*, 99 N.M. 791, 664 P.2d 989 (Ct. App. 1982).

An explanation of defendant's prior conviction for commercial burglary was irrelevant to his credibility or to the charges of aggravated burglary, criminal sexual penetration in the second degree, and kidnapping for which he was being tried. *State v. Noland*, 104 N.M. 537, 724 P.2d 246 (Ct. App. 1986).

Statistical evidence relating to quality of seller's goods held relevant. - In seller's suit against buyer for purchase price and buyer's counterclaim for breach of contract, statistical evidence relating to quality of seller's goods was relevant because it depicted seller's regular "habit" or course of conduct over a 22-year period which bore directly on probabilities that buyer received large percentage of poor quality goods. *Kirk Co. v. Ashcraft*, 101 N.M. 462, 684 P.2d 1127 (1984).

Carbon copy of letter sent by insured's attorney is relevant evidence since there is an inference that because carbon copy was received by insured the original was mailed to and received by insurer. *State Farm Fire & Cas. Co. v. Price*, 101 N.M. 438, 684 P.2d 524 (Ct. App. 1984).

Evidence held relevant to show motive. - See *State v. Garcia*, 99 N.M. 771, 664 P.2d 969 (1983).

Circumstances affecting relevancy of testimony. - Neither the small amount of the material involved nor the lack of positive identification upon the initial view provided basis for holding, as a matter of law, that the officer did not have a reasonable belief that the substance was marijuana, where officer had served in the narcotics division of the state police for six years and during his service had observed over 1000 samples of marijuana per year. *State v. Miller*, 80 N.M. 227, 453 P.2d 590 (Ct. App.), cert. denied, 80 N.M. 198, 453 P.2d 219 (1969).

Hearsay evidence can be relevant. - Recitals of heirship in a deed, although hearsay, can become competent evidence to prove the truth of the facts recited when admitted in evidence by stipulation or without objection. *Caranta v. Pioneer Home Imps., Inc.*, 81 N.M. 393, 467 P.2d 719 (1970).

11-402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by constitution, by statute, by these rules or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 402 of the Federal Rules of Evidence.

This rule is deemed to have superseded that part of former Rule 43(a), N.M.R. Civ. P., which mandated the liberal admission of evidence (see now Rule 1-043).

Trend in American jurisprudence is toward greater admissibility of evidence consonant with need to safeguard the rights of the opposite party. *State v. Schrader*, 64 N.M. 100, 324 P.2d 1025 (1958).

Subject to important qualifications, any evidence which throws light on the question in issue should be admitted with trial court responsible for holding the hearing within reasonable bounds, and in doubtful cases doubt should be resolved in favor of admissibility. *Brown v. General Ins. Co. of Am.*, 70 N.M. 46, 369 P.2d 968 (1962).

Court's decision admitting evidence upheld where admissible under any theory. - Where evidence is admissible under any theory, the trial court's decision to admit it will be upheld. The same ruling will apply even more forcefully to evidence presented to the grand jury. *State v. Ballinger*, 99 N.M. 707, 663 P.2d 366 (Ct. App. 1983), rev'd on other grounds, 100 N.M. 583, 673 P.2d 1316 (1984).

When character admissible. - Where character is an element of the crime, claim or defense, there is no question as to its relevancy and its admission is governed by this rule, but in all other cases where character evidence is collateral, its admissibility is limited to the exceptions outlined in Rule 404 (now 11-404). *State v. Smith*, 92 N.M. 533, 591 P.2d 664 (1979).

Inquiry into basis of witness' information, accuracy, credibility is almost universally admissible. *State v. Christopher*, 94 N.M. 648, 615 P.2d 263 (1980).

Objections to irrelevant inquiries sustained. - Where the stated purpose of inquiries made by a party does not relate to a valid defense and the questions are not relevant on any other basis to any issue being litigated, objections to the inquiries are properly sustained. *John Doe v. City of Albuquerque*, 96 N.M. 433, 631 P.2d 728 (Ct. App. 1981).

Restrictions on admissibility of polygraph test results incompatible with rules. - Rule that polygraph test results are inadmissible except when stipulated to by both parties to the case and not objected to at trial is: (1) mechanistic in nature, (2) inconsistent with concept of due process, (3) repugnant to announced purpose and construction of New Mexico Rules of Evidence and (4) particularly incompatible with purposes and scope of Rules 401, 402, 702 and 703 (now 11-401, 11-402, 11-702 and 11-703). *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975).

Fact that photographs were cumulative or repetitious does not make them inadmissible so long as they are "reasonably relevant" to the issues of the case. *State v. Trujillo*, 84 N.M. 593, 506 P.2d 337 (Ct. App. 1973) (decided before enactment of this rule).

Doubt about evidence affects weight but not admissibility. - Doubt concerning an exhibit of evidence affected weight to be accorded exhibit, but such doubt did not render exhibit inadmissible. *State v. Belcher*, 83 N.M. 130, 489 P.2d 410 (Ct. App. 1971).

Unenforceable contract may constitute competent evidence of an admission. *Van Orman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967) (decided before enactment of this rule).

Court may not indirectly exclude relevant evidence. - It would be reversible error for court to refuse to accord relevant and admissible evidence any weight where refusal would in effect amount to exclusion of the evidence. *State ex rel. State Hwy. Comm'n v. Bassett*, 81 N.M. 345, 467 P.2d 11 (1970).

Where materiality of evidence is doubtful, admission is within discretion of trial court, and its ruling will not be reversed unless there is an abuse of discretion. *State v. Wesson*, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972).

Likewise regarding admission of photographs. - Question of admission of photographs into evidence rests largely within discretion of trial court, and ordinarily its decision will not be disturbed. *State v. Carlton*, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

And certain evidence of defendant's driving style. - Admission of witness's testimony that, prior to the accident and some distance away, defendant revved his engine at high RPMs with his tires squealing and smoking for about 25 yards, was a matter within the sound discretion of the trial court. *State v. Richerson*, 87 N.M. 437, 535 P.2d 644 (Ct.

App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

And jury view of premises. - The trial court's refusal of appellant's request that the jury in condemnation case be permitted to view the premises was within the province of the trial court and should not be disturbed absent an abuse of discretion, and in this case no abuse of discretion was shown. *El Paso Elec. Co. v. Landers*, 82 N.M. 265, 479 P.2d 769 (1970).

Comment on defendant's silence inadmissible. - Where prosecutor comments on or inquires about defendant's silence, such a reference can have an intolerable prejudicial impact and may require reversal under the plain error rule (See Rule 11-103); any reference to defendant's silence by the state, if it lacks significant probative value, constitutes plain error and as such requires reversal even if defendant fails to timely object. However, where a witness refers to defendant's silence, defendant must object to this testimony in order to preserve the error, the objection being that testimony is inadmissible under either this rule or Rule 11-403. *State v. Baca*, 89 N.M. 204, 549 P.2d 282 (1976); *State v. Mirabal*, 98 N.M. 130, 645 P.2d 1386 (Ct. App. 1982).

Factors relevant to admissibility of confession. - Where prior to signing a confession without the advice of an attorney, defendant was advised of his rights to remain silent and to call an attorney, was offered the use of a telephone book to call an attorney and was again advised of his right to counsel and of his right to remain silent by assistant district attorney, totality of circumstances does not require exclusion of the confession. *State v. Ortiz*, 77 N.M. 316, 422 P.2d 355 (1967).

Confession is not ipso facto inadmissible if made while under the influence of drugs, but this is a factor to be considered in determining whether confession was voluntary. *State v. Ortiz*, 77 N.M. 316, 422 P.2d 355 (1967).

Where cross-examination of character witnesses concerning defendant's convictions not allowed. - Cross-examination of character witnesses concerning defendant's convictions 23 years prior to the trial will not be allowed when: (1) the trial judge conducted no in camera inquiry to determine whether the prior alleged events had occurred; (2) none of the witnesses had known the accused for more than six years; (3) the trial court did not instruct the jury at all concerning the limited purpose of the prosecutor's inquiry on the subject; (4) the defendant offered no evidence of specific prior acts, either good or bad, to the jury; and (5) the defense attorney did specifically object to the inquiry made by the prosecutor. *State v. Christopher*, 94 N.M. 648, 615 P.2d 263 (1980).

Error to admit evidence outside record of prior suit. - In owner's negligence suit against contractor who had damaged the building that had been located on the land, it was error to admit evidence dehors the record of prior condemnation suit to vary terms of that prior judgment, and it was also error to refuse owner's instruction that he had not received compensation for his building in the condemnation suit. *Owen v. Burn Constr. Co.*, 90 N.M. 297, 563 P.2d 91 (1977).

Exclusion of irrelevant evidence not denial of due process. - Where Laws 1973, ch. 258, § 17 (now repealed), fixed two methods of determining market value (sales of comparable property and application of generally accepted appraisal techniques), taxpayer's offer of evidence of a valuation of comparable property was not relevant, and exclusion of such evidence did not deny taxpayer due process. *Peterson Properties v. Valencia County Valuation Protests Bd.*, 89 N.M. 239, 549 P.2d 1074 (Ct. App. 1976).

In products liability cases circumstantial evidence is sufficient to show existence of defect. *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).

In negligent entrustment case, evidence of prior specific acts indicating incompetence or unfitness are relevant and admissible on the separate questions of the entrustee's competence or fitness and the entruster's knowledge. *McCarson v. Foreman*, 102 N.M. 151, 692 P.2d 537 (Ct. App. 1984).

Expert testimony on witness' prior drug addiction not admitted. - Trial court did not abuse its discretion in excluding testimony of defendant's expert witness about prior heroin addiction of state's witness where trial court found that the expert had not applied any particular psychological test with regard to state's witness, that the testimony would be highly prejudicial while having little probative value due to lack of clear connection between witness' prior addiction and her present ability to recall, and that evidence would not be helpful to jury. *State v. Blea*, 101 N.M. 323, 681 P.2d 1100 (1984).

Evidence relevant only as foundation for excluded expert testimony not admitted. - Since evidence of state witness' prior addiction to heroin was relevant only insofar as it laid the foundation for the testimony of defendant's expert, no such foundation was necessary once the testimony of the expert witness was properly excluded, and therefore, the trial court did not err in refusing to allow cross-examination of witness on her prior addiction to heroin. *State v. Blea*, 101 N.M. 323, 681 P.2d 1100 (1984).

Evidence of victim's prior gun play held irrelevant in murder prosecution. - In prosecution for first-degree murder, it was within trial court's discretion to exclude

evidence that victim had pulled a gun on someone in another bar since this had no bearing on defendant's claim that he was not in the bar at the time of the shooting, nor did it relate to state witness' identification of defendant as victim's assailant. *State v. Blea*, 101 N.M. 323, 681 P.2d 1100 (1984).

Identity of operator of motor vehicle may be proved by circumstantial evidence regardless of whether he was owner of the vehicle. *Payne v. Tuozzoli*, 80 N.M. 214, 453 P.2d 384 (Ct. App. 1969).

Evidence of undue influence or lack of testamentary capacity requires admission. - A motion seeking the exclusion of evidence of alleged undue influence or the lack of testamentary capacity of a decedent is in the nature of a motion to exclude evidence on the grounds of irrelevance, waste of time or prejudice under this rule or Rule 11-403 and the trial court correctly denies such a motion; by express statutory provision it is required to determine the validity of, and the persons entitled to the decedent's property under any testamentary document filed for probate. *Rutland v. Scanlan*, 99 N.M. 229, 656 P.2d 892 (Ct. App. 1982).

Evidence indicative of comments by testator concerning persons slighted in will or concerning persons accused of exerting undue influence is admissible, even when the comments were made after the will was executed. *Thorp v. Cash*, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Evidence of post-execution business arrangements between testator and proponent of will. - There is no error in admitting evidence of business arrangements and financial transactions between the testator and the proponent of the will which occurred after the will was executed. *Thorp v. Cash*, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Sufficiency of circumstantial evidence in criminal cases. - The burden rests upon the state to prove each and every essential element of the criminal offense charged beyond a reasonable doubt. It is not necessary, however, that the charge be established only by direct evidence; circumstantial evidence is sufficient if the circumstances point unerringly to the defendant and are incompatible with and exclude every reasonable hypothesis other than that of his guilt. *State v. Slade*, 78 N.M. 581, 434 P.2d 700 (Ct. App. 1967).

Where circumstantial evidence alone is relied upon for a conviction such evidence must be incompatible with the innocence of the accused upon any rational theory and incapable of explanation upon any reasonable hypothesis of the defendant's innocence. *State v. Zarafonitis*, 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669,

472 P.2d 383 (1970).

Guilty knowledge is rarely susceptible of direct and positive proof and generally can be established only through circumstantial evidence. *State v. Zarafonetis*, 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

Law reviews. - For article, "Rape Law: The Need for Reform," see 5 N.M.L. Rev. 279 (1975).

For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

For article, "Evidence II: Evidence of Other Crimes as Proof of Intent," see 13 N.M.L. Rev. 423 (1983).

For note, "Lie Detector Evidence - New Mexico Court of Appeals Holds Voice-Stress Lie Detector Evidence Conditionally Admissible: *Simon Neustadt Family Center, Inc. v. Bludworth*," see 13 N.M.L. Rev. 703 (1983).

For article, "Survey of New Mexico Law, 1982-83: Evidence," see 14 N.M.L. Rev. 161 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error § 518; 29 Am. Jur. 2d Evidence § 249.

Admissibility, in negligence action against bank by depositor, of evidence as to custom of banks in locality in handling and dealing with checks and other items involved, 8 A.L.R.2d 446.

Use and admissibility of maps, plats, and other drawings to illustrate or express testimony, 9 A.L.R.2d 1044.

Admissibility of evidence as to tire tracks or marks on or near highway, 23 A.L.R.2d 112.

Admissibility in evidence of unsigned confession, 23 A.L.R.2d 919.

Physiological or psychological truth and deception tests, 23 A.L.R.2d 1306.

Admissibility of evidence of unperformed compromise agreement, 26 A.L.R.2d 858.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased naming accused as beneficiary, 28 A.L.R.2d 857.

Lack of proper automobile registration or operator's license as evidence of operator's negligence, 29 A.L.R.2d 963.

Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 31 A.L.R.2d 190.

Valuation for taxation purposes as admissible to show value for other purposes, 39 A.L.R.2d 209.

Admissibility of extrinsic evidence to explain or contradict bank deposit slips, deposit entries in passbooks, certificates of deposit, or similar instruments, 42 A.L.R.2d 600.

Admissibility of evidence of absence of other accidents or injuries from a customary practice or method asserted to be negligent, 42 A.L.R.2d 1055.

Admissibility, in damage action arising out of explosion or blasting, of evidence of damage to other property in vicinity, 45 A.L.R.2d 1121.

Admissibility, in action involving motor vehicle accident, of evidence as to manner in which participant was driving before reaching scene of accident, 46 A.L.R.2d 9.

Admissibility of evidence showing plaintiff's antecedent intemperate habits, in personal injury motor vehicle accident action, 46 A.L.R.2d 103.

Admissibility, in railroad crossing accident case, of evidence of other functional failures of railroad crossing devices and appliances of the same kind at other times, 46 A.L.R.2d 935.

Blood grouping tests, 46 A.L.R.2d 1000; 43 A.L.R.4th 579.

Admissibility in evidence of rules of defendant in action for negligence, 50 A.L.R.2d 16.

Admissibility of mortality tables in personal injury action as dependent upon showing of permanency of injury, 50 A.L.R.2d 419.

Admissibility of testimony of transferee as to his knowledge, purpose, intention, or good faith on issue whether conveyance was in fraud of transferor's creditors, 52 A.L.R.2d 418.

Admissibility in evidence of colored photographs, 53 A.L.R.2d 1102.

Admissibility of evidence as to experiments or tests in civil action for death, injury, or property damage against electric power company or the like, 54 A.L.R.2d 922.

Admissibility and weight of party's admissions as to tort occurring during his absence, 54 A.L.R.2d 1069.

Admissibility and permissible use, in malicious prosecution action, of documentary evidence showing that prior criminal proceedings against instant plaintiff were terminated in his favor, 57 A.L.R.2d 1086.

Propriety, in trial of civil action, of use of skeleton or model of human body or part, 58 A.L.R.2d 689.

Admissibility of evidence of precautions taken, or safety measures used, on earlier occasions at place of accident or injury, 59 A.L.R.2d 1379.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children, and the like, 62 A.L.R.2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix, 62 A.L.R.2d 1083.

Admissibility of evidence as to manner or case of firing gun, in civil action involving issue of accidental death or suicide, 63 A.L.R.2d 1150.

Admissibility of evidence of value or extent of decedent's estate in action against estate for reasonable value of services furnished decedent, 65 A.L.R.2d 945.

Permitting demonstration to show effect of injury in action for bodily injury, 66 A.L.R.2d 1382.

Admissibility and propriety, in homicide prosecution, of evidence as to deceased's spouse and children, 67 A.L.R.2d 731.

Admissibility, in homicide prosecution, of deceased's clothing worn at time of killing, 68 A.L.R.2d 903.

Admissibility, in prosecution for maintaining liquor nuisance, of evidence of general reputation of premises, 68 A.L.R.2d 1300.

Propriety, in trial of civil action, of use of model of object or instrumentality, or of site or premises, involved in the accident or incident, 69 A.L.R.2d 424.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death, 73 A.L.R.2d 769.

Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance, 76 A.L.R.2d 354.

Admissibility of experimental evidence as to explosion, 76 A.L.R.2d 402.

Admissibility and weight of surveys or polls of public or consumers' opinion, recognition, preference, or the like, 76 A.L.R.2d 619.

Admissibility of experimental evidence to show visibility or line of vision, 78 A.L.R.2d 152.

Admissibility of experimental evidence, skidding tests, or the like, relating to speed or control of motor vehicle, 78 A.L.R.2d 218.

Admissibility in wrongful death action of testimony of actuary or mathematician for purpose of establishing present worth of pecuniary loss, 79 A.L.R.2d 259.

Admissibility of testimony of actuary or mathematician as to present value of loss or impairment of injured person's general earning capacity, 79 A.L.R.2d 275.

Admissibility, in wrongful death action brought for benefit of minor children, of evidence of decedent's desertion, nonsupport, abandonment, or the like, of said children, 79 A.L.R.2d 819.

Admissibility in evidence of receipt of third person, 80 A.L.R.2d 915.

Admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in an action for personal injury or death, 81 A.L.R.2d 733.

Admissibility of evidence of plaintiff 's or decedent's drawings from partnership or other business as evidence of earning capacity, in action for personal injury or death, 82 A.L.R.2d 679.

Propriety, in trial of criminal case, of use of skeleton or model of human body or part, 83 A.L.R.2d 1097.

Admissibility in evidence of braces, crutches, or other prosthetic or orthopedic devices used by injured party, 83 A.L.R.2d 1271.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 86 A.L.R.2d 611.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries, 87 A.L.R.2d 926.

Admissibility, on issue of testamentary capacity, of previously executed wills, 89 A.L.R.2d 177.

Admissibility in civil action, apart from *res gestae*, of lay testimony as to another's expressions of pain, 90 A.L.R.2d 1071.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 91 A.L.R.2d 1046.

What evidence is admissible to identify plaintiff as person defamed, 95 A.L.R.2d 227.

Admissibility in evidence of sample or samples of article or substance of which the quality, condition, or the like is involved in litigation, 95 A.L.R.2d 681.

Propriety and prejudicial effect of comment or evidence as to accused's willingness to take lie detector test, 95 A.L.R.2d 819.

Admissibility, in wrongful death action for pecuniary loss suffered by next of kin, etc., of evidence as to decedent's personal qualities with respect to sobriety or morality, 99 A.L.R.2d 972.

Admissibility of evidence of accused's reenactment of crime, 100 A.L.R.2d 1257.

Admissibility, in criminal case, of evidence obtained by search by private individual, 36 A.L.R.3d 553.

Admissibility, in criminal case, of statistical or mathematical evidence offered for purpose of showing probabilities, 36 A.L.R.3d 1194.

Admissibility, in civil action, of disposal of property as bearing on question of liability, 38 A.L.R.3d 996.

Admissibility of evidence of other accidents to prove hazardous nature of product, 42 A.L.R.3d 780.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 42 A.L.R.3d 1217.

Admissibility of evidence that injured plaintiff received benefits from a collateral source, on issue of malingering or motivation to extend period of disability, 47 A.L.R.3d 234.

Admissibility in criminal case, of evidence obtained by search conducted by school official or teacher, 49 A.L.R.3d 978.

Admissibility of evidence of neutron activation analysis, 50 A.L.R.3d 117.

Admissibility of lie detector test taken upon stipulation that the result will be admissible in evidence, 53 A.L.R.3d 1005.

Admissibility in evidence, on issue of negligence, of codes or standards of safety issued or sponsored by governmental body or by voluntary association, 58 A.L.R.3d 148.

Admissibility in evidence of sound recording as affected by hearsay and best evidence rules, 58 A.L.R.3d 598.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense, 88 A.L.R.3d 8.

Propriety and prejudicial effect of informing jury that accused has taken polygraph test, where results of test would be inadmissible in evidence, 88 A.L.R.3d 227.

Admissibility in personal injury action of hospital or other medical bill which includes expenses for treatment of condition unrelated to injury, 89 A.L.R.3d 1012.

Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases, 2 A.L.R.4th 500.

Admissibility of evidence that defendant escaped or attempted to escape while being detained for offense in addition to that or those presently being prosecuted, 3 A.L.R.4th 1085.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 A.L.R.4th 829.

Mental subnormality of accused as affecting voluntariness or admissibility of confession, 8 A.L.R.4th 16.

Propriety and prejudicial effect of informing jury that witness in criminal prosecution has taken polygraph test, 15 A.L.R.4th 824.

Admissibility of expert or opinion testimony on battered wife or battered woman syndrome, 18 A.L.R.4th 1153.

Modern status of rules as to admissibility of evidence of prior accidents or injuries at same place, 21 A.L.R.4th 472.

Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 A.L.R.4th 1112.

Admissibility of evidence as to linguistics or typing style (forensic linguistics) as basis of identification of typist or author, 36 A.L.R.4th 598.

Admissibility of bare footprint evidence, 45 A.L.R.4th 1178.

Admissibility of police officer's testimony at state trial relating to motorist's admissions made in or for automobile accident report required by law, 46 A.L.R.4th 291.

Admissibility of defendant's evidence of industry custom or practice in strict liability action, 47 A.L.R.4th 621.

Admissibility of voice stress evaluation test results or of statements made during test, 47 A.L.R.4th 1202.

Admissibility and weight of evidence of prior misidentification of accused in connection with commission of crime similar to that presently charged, 50 A.L.R.4th 1049.

Products liability: admissibility of evidence of absence of other accidents, 51 A.L.R.4th 1186.

Thermographic tests: admissibility of test results in personal injury suits, 56 A.L.R.4th 1105.

Criminal law: dog scent discrimination lineups, 63 A.L.R.4th 143.

Products liability: admissibility of experimental or test evidence to disprove defect in motor vehicle, 64 A.L.R.4th 125.

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains, 66 A.L.R.4th 588.

Modern status of rule relating to admission of results of lie detector (polygraph) test in federal criminal trials, 43 A.L.R. Fed. 68.

Propriety, in federal court action, of attack on witness' credibility by rebuttal evidence pertaining to cross-examination testimony on collateral matters, 60 A.L.R. Fed. 8.

22A C.J.S. Criminal Law § 759 et seq.; 31A C.J.S. Evidence §§ 158 to 185.

11-403. Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Cumulative Evidence.
- III. Photographic Evidence.
- IV. Evidence of Other Offenses or Acts.
- V. Specific Applications.

I. General Consideration.

Cross-references. - For rule regarding admissibility of evidence of other crimes, wrongs or acts, see Rule 11-404.

Compiler's notes. - This rule is similar to Rule 403 of the Federal Rules of Evidence.

Generally. - This rule, which explicitly recognizes the large discretionary role of the judge in controlling the introduction of evidence, codifies previous case law. It applies to all forms of evidence: direct and circumstantial, testimonial, documentary, real proof and demonstrations; and its balancing approach should also be utilized in deciding on the admissibility of evidence relevant to impeachment. *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct. App. 1978).

This rule applies to all evidence. *Simon Neustadt Family Center v. Blutworth*, 97 N.M. 500, 641 P.2d 531 (Ct. App. 1982).

Rule applies to admission of all evidence, including evidence admissible under Rule 11-609 and thus impeachment evidence admissible under Rule 11-609 was subject to exclusion by the trial court under this rule. *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct. App. 1978).

Trial court may not admit irrelevant or prejudicial evidence. - It is within the discretion of the trial court to expand the scope of cross-examination as long as inquiry into additional matters is conducted as if on direct examination, but the trial court may not admit evidence which is otherwise inadmissible because it is irrelevant, or if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Martin*, 101 N.M. 595, 686 P.2d 937 (1984).

Court's decision admitting evidence upheld where admissible under any theory. - Where evidence is admissible under any theory, the trial court's decision to admit it will be upheld. The same ruling will apply even more forcefully to evidence presented to the grand jury. *State v. Ballinger*, 99 N.M. 707, 663 P.2d 366 (Ct. App. 1983), rev'd on other grounds, 100 N.M. 583, 673 P.2d 1316 (1984).

Discretion of court governed by logic and reason. - An abuse of discretion in the application of the balancing test under this rule may be found when the trial court's decision is contrary to logic and reason. *Davila v. Bodelson*, 103 N.M. 243, 704 P.2d 1119 (Ct. App. 1985).

Prejudicial effect of evidence must outweigh probative value. - Defendant's claim that certain evidence was prejudicial was insufficient to alert trial court to a question concerning this rule. The fact that competent evidence may tend to prejudice defendant is not grounds for exclusion of that evidence; the question is whether the probative value of the evidence is outweighed by its prejudicial effect. *State v. Hogervorst*, 90 N.M. 580, 566 P.2d 828 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977); *State v. Martinez*, 94 N.M. 50, 607 P.2d 137 (Ct. App. 1980).

Assuming that defendant's motion for a mistrial constituted a timely objection to the introduction of testimony of a detective, who was asked by the state if he had interviewed defendant and who in the course of a lengthy description of reading defendant his rights mentioned defendant's refusal to talk to him, the trial court correctly denied motion for mistrial since there was no showing that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, as required by this rule. *State v. Baca*, 89 N.M. 204, 549 P.2d 282 (1976).

Prejudicial effect of prior convictions outweighed probative value. - Trial court did not err in holding that prejudicial effect of victim's 32- and 33-year-old convictions offered to prove the victim was the aggressor outweighed their probative effect where there was no evidence that defendant knew of victim's prior convictions. *Ewing v. Winans*, 749 F.2d 607 (10th Cir. 1984).

Trial court has great deal of discretion in applying this rule and Rule 11-411 and its ruling can only be held to be reversible error in the event of an abuse of that discretion. *Mac Tyres, Inc. v. Vigil*, 92 N.M. 446, 589 P.2d 1037 (1979).

Admission or exclusion of evidence is matter within discretion of trial court, and court's determination will not be disturbed on appeal in the absence of a clear abuse of that discretion. *State v. Valdez*, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), *aff'd*, 83 N.M. 720, 497 P.2d 231, *cert. denied*, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972); *Thorp v. Cash*, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Whether trial court abused discretion issue on appeal. - When the trial court has applied the balancing test of this rule, the appellate issue is whether the trial court's ruling was an abuse of discretion. *State v. Carr*, 95 N.M. 755, 626 P.2d 292 (Ct. App.), *cert. denied*, 95 N.M. 699, 625 P.2d 1186, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981).

Where it is contended that the probative nature of a prior conviction was outweighed by its prejudicial impact upon the jury, the appellate question is whether the trial court abused its discretion in permitting a question concerning the prior conviction. *Jaramillo v. Fisher Controls Co.*, 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985).

Probative value of testimony considered by appellate court. - When the trial court has applied the balancing approach required by this rule, the appellate issue is whether the trial court has abused its discretion, and in determining whether discretion was abused the appellate court must consider the probative value of the testimony. *State v. Schifani*, 92 N.M. 127, 584 P.2d 174 (Ct. App.), *cert. denied*, 92 N.M. 180, 585 P.2d 324 (1978).

Items are admissible which show either an admission by conduct or consciousness of guilt. *State v. Vallejos*, 98 N.M. 798, 653 P.2d 174 (Ct. App. 1982).

In order to admit evidence under Rule 11-404, the court must find that the evidence is relevant to a disputed issue other than the defendant's character, and it must determine that the prejudicial effect of the evidence does not outweigh its probative value, as set out by this rule. *State v. Beachum*, 96 N.M. 566, 632 P.2d 1204 (Ct. App. 1981).

Prerequisites for predicated error on violation of this rule. - Although trial court is allowed to balance the probative value of the evidence against its possibly prejudicial effect, this is a rule of exclusion, and the procedure set out in Rule 11-103 must be followed before error can be predicated upon violation of this rule. *State v. Cardona*, 86

N.M. 373, 524 P.2d 989 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

Party may lose rights under rule. - Contention that trial court abused its discretion in allowing in evidence a mug shot of defendant because it was suggestive of guilt and was prejudicial was invalid where the record shows that prosecution did not offer the mug shot in evidence on direct examination of a police officer but only after defendant's attorney on cross-examination questioned the police officer on the photographs and opened up the subject and that mug shot was identified without objection before it was offered in evidence. *State v. Samora*, 83 N.M. 222, 490 P.2d 480 (Ct. App. 1971).

Failure to object at trial. - The contention on appeal, that certain questions violated this rule, will not be considered where it was not raised in the trial court. *State v. Keener*, 97 N.M. 295, 639 P.2d 582 (Ct. App. 1981).

No mistrial where declined instruction could have cured prejudice. - Trial court did not abuse its discretion in denying a mistrial motion based on the ground that defendant was prejudiced by an unsolicited comment by one of the state's key witnesses that defendant was acquainted with "inmates," where defendant declined a cautionary instruction which could have cured any prejudicial effect the objectionable testimony might have had on the jury. *State v. Nichols*, 104 N.M. 74, 717 P.2d 50 (1986).

Law reviews. - For article, "Rape Law: The Need for Reform," see 5 N.M.L. Rev. 279 (1975).

For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

For note, "Custodial Interrogation in New Mexico: *State v. Trujillo*," see 12 N.M.L. Rev. 577 (1982).

For article, "Evidence I," see 13 N.M.L. Rev. 407 (1983).

For article, "Evidence II: Evidence of Other Crimes as Proof of Intent," see 13 N.M.L. Rev. 423 (1983).

For note, "Evidence - The Admissibility of Hypnotically Refreshed Testimony in New Mexico: State v. Beachum," see 13 N.M.L. Rev. 541 (1983).

For note, "Lie Detector Evidence - New Mexico Court of Appeals Holds Voice-Stress Lie Detector Evidence Conditionally Admissible: Simon Neustadt Family Center, Inc. v. Blutworth," see 13 N.M.L. Rev. 703 (1983).

For article, "Survey of New Mexico Law, 1982-83: Evidence," see 14 N.M.L. Rev. 161 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 336 to 343.

Prejudicial effect of admission of evidence as to Communist or other subversive affiliation or association of accused, 30 A.L.R.2d 589.

Admissibility in evidence of colored photographs, 53 A.L.R.2d 1102.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children, and the like, 62 A.L.R.2d 1067.

Admissibility and propriety, in homicide prosecution, of evidence as to deceased's spouse and children, 67 A.L.R.2d 731.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death, 73 A.L.R.2d 769.

Propriety and prejudicial effect of showing, in criminal case, withdrawn guilty plea, 86 A.L.R.2d 326.

Propriety and prejudicial effect of comment or evidence as to accused's willingness to take lie detector test, 95 A.L.R.2d 819.

Admissibility of evidence that defendant escaped or attempted to escape while being detained for offense in addition to that or those presently being prosecuted, 3 A.L.R.4th 1085.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 A.L.R.4th 829.

Propriety and prejudicial effect of informing jury that witness in criminal prosecution has taken polygraph test, 15 A.L.R.4th 824.

Propriety and prejudicial effect of witness testifying while in prison attire, 16 A.L.R.4th 1356.

Modern status of rules as to admissibility of evidence of prior accidents or injuries at same place, 21 A.L.R.4th 472.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 25 A.L.R.4th 934.

Fact that witness undergoes hypnotic examination as affecting admissibility of testimony in civil case, 31 A.L.R.4th 1239.

Admissibility of voice stress evaluation test results or of statements made during test, 47 A.L.R.4th 1202.

Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits, 69 A.L.R.4th 131.

Modern status of rule relating to admission of results of lie detector (polygraph) test in federal criminal trials, 43 A.L.R. Fed. 68.

Propriety under Rule 403 of the Federal Rules of Evidence, permitting exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time, of attack on credibility of witness for party, 48 A.L.R. Fed. 390.

Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 A.L.R. Fed. 700.

22A C.J.S. Criminal Law § 759 et seq.; 31A C.J.S. Evidence §§ 158 to 185.

II. Cumulative Evidence.

Cumulative evidence proper if corroborating other evidence. - Photographs which may be characterized as cumulative evidence are properly admitted if they serve to corroborate other evidence. State v. Upton, 60 N.M. 205, 290 P.2d 440 (1955).

Explanatory evidence admissible even though cumulative. - In aggravated battery case, the fact that there had been verbal descriptions of the presence of blood and the condition of room where alleged crime occurred did not make photographs of the room inadmissible, even though to some extent they were cumulative, since photographic evidence constituted visual explanations of the testimony of witnesses and was corroborative of that testimony. *State v. Webb*, 81 N.M. 508, 469 P.2d 153 (Ct. App. 1970).

Refusal to hear psychologist's testimony justified as merely cumulative. - In a criminal sexual penetration prosecution, the trial court's refusal to hear testimony of a psychologist who had treated the victim for various emotional problems and whose reports on the victim had already been introduced into evidence was justified because such material would be merely cumulative. *State v. Romero*, 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980).

Testimony held cumulative on motivation issue. - Where testimony as to a witness' purported heroin use would not add to the evidence already before the jury that he was motivated by money, the trial court in its discretion may properly exclude the tendered cumulative testimony. *State v. Lovato*, 91 N.M. 712, 580 P.2d 138 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

III. Photographic Evidence.

Admissibility clear where photo not distorted or calculated to prejudice jury. - Trial court did not abuse its discretion in admitting into evidence a portrait of the deceased for the purpose of identification only since there was nothing on the record to indicate that the photograph was distorted or otherwise calculated to prejudice the jury. *State v. Baros*, 87 N.M. 49, 529 P.2d 275 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

This rule does not make obsolete the "reasonably relevant" test, whereby photographs which are calculated to arouse prejudices and passions of the jury and which are not reasonably relevant to issues of the case ought to be excluded. *State v. Valenzuela*, 90 N.M. 25, 559 P.2d 402 (1976).

Photographs which are calculated to arouse prejudices and passions of the jury and which are not reasonably relevant to the issues of the case ought to be excluded. *State v. Upton*, 60 N.M. 205, 290 P.2d 440 (1955).

When defendant's appearance in relation to the undercover agent was a material issue,

and defendant did not object to testimony regarding his appearance, introduction of photographs merely corroborated testimony already received, and the fact that the photographs might have had some inflammatory effect did not render them inadmissible. *State v. Mordecai*, 83 N.M. 208, 490 P.2d 466 (Ct. App. 1971).

Question of inflammatory effect for court's discretion. - Question of admissibility of photographic evidence, objected to as being inflammatory of the passions and prejudices of the jury, is largely one of discretion to be exercised by the trial court; ordinarily discretion thereon will not be disturbed on appeal. *State v. Webb*, 81 N.M. 508, 469 P.2d 153 (Ct. App. 1970).

Photographs of victim as found by police were admissible. - Photographs of body of the deceased showing the victim as she was found by the police in her house and showing the wounds inflicted on the victim were not so inflammatory, prejudicial and irrelevant that they should have been excluded; rather, they were used to illustrate, clarify and corroborate the testimony of witnesses concerning the scene of the crime, wounds of the victim and identity of the deceased. Defendant, who had the burden to show abuse of trial court's discretion in admitting the photographs, failed to meet that burden. *State v. Noble*, 90 N.M. 360, 563 P.2d 1153 (1977).

Close-up photograph of murder victim properly admitted. - Admission of a close-up photograph of the left side of a murder victim's neck wounds was properly allowed by the trial court to show defendant's intent since the danger of unfair prejudice did not outweigh the probative value of the photograph. *State v. Boeglin*, 105 N.M. 247, 731 P.2d 943 (1987).

Photo of decedent during autopsy admissible. - The admission into evidence in a murder trial of photographs of the decedent taken during her autopsy is proper if they are reasonably relevant to material issues in the trial, showing the identity of the victim, and the number and location of the wounds inflicted upon her body. *State v. Ho'o*, 99 N.M. 140, 654 P.2d 1040 (Ct. App. 1982).

IV. Evidence of Other Offenses or Acts.

Evidence of other "offenses" is properly admitted where they tend to show the defendant's knowledge of a crime and an absence of mistake or accident. *State v. Turner*, 97 N.M. 575, 642 P.2d 178 (Ct. App. 1981).

Evidence not excluded solely because it proves defendant guilty of other crime. - Testimony of which defendant complains was evidence tending to throw some light upon guilt of the defendant and having a logical connection with crimes with which he was charged. Evidence which is competent, relevant and material cannot be excluded solely because it also tends to prove the person on trial guilty of some other crime. *State v. Valdez*, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), *aff'd*, 83 N.M. 720, 497 P.2d 231, *cert. denied*, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Probative value of evidence of other crimes, etc., to be considered. - In determining whether evidence admissible under Rule 11-404 should be excluded under this rule, the probative value of the evidence is to be considered. In considering the probative value, a factor is the availability of other means of proof. *State v. Fuson*, 91 N.M. 366, 574 P.2d 290 (Ct. App. 1978).

Admissibility of evidence of prior conviction. - Absent a plea of guilty, proof of conviction was inadmissible in trial of subsequent tort action arising out of the same act. An exception was permitted when the convicted criminal sought in the civil action to take advantage of rights arising from the crime; in such case, proof of previous conviction was admissible as evidence of the facts upon which it was based. *Hudson v. Otero*, 80 N.M. 677, 459 P.2d 839 (1969).

Rule 11-609A(1) evidence is always subject to possible exclusion under this rule. *Lenz v. Chalamidas*, N.M. , 782 P.2d 85 (1989).

Evidence of prior conviction is admissible within confines of trial court's discretion. *State v. Baca*, 86 N.M. 144, 520 P.2d 872 (Ct. App. 1974).

Evidence of similar sex offenses generally inadmissible. - General rule of inadmissibility of evidence of similar sex offenses committed with or upon persons other than prosecutrix was inapplicable to other or similar sex offenses committed by defendant with prosecuting witness; such evidence, if not too remote, was admissible as showing lewd and lascivious disposition of defendant toward prosecuting witness and as corroborating evidence. *State v. Minns*, 80 N.M. 269, 454 P.2d 355 (Ct. App.), *cert. denied*, 80 N.M. 234, 453 P.2d 597 (1969).

Because of the emotional persuasiveness of evidence involving sex offenses with or upon children, evidence of similar but distinct offenses with or upon other children ordinarily is to be excluded because the danger of prejudice so often outweighs the permissible probative value of such evidence. This does not mean such evidence could not properly be received if it was relevant to, and its probative force was sufficiently

great upon, some material element of crime charged which was in issue and upon which there was doubt. *State v. Mason*, 79 N.M. 663, 448 P.2d 175 (Ct. App.), cert. denied, 79 N.M. 688, 448 P.2d 489 (1968).

Absent showing sufficient to raise issue as to relevancy, questions concerning past sexual conduct are to be excluded, but once such a showing is made the balancing test of this rule and 30-9-16 NMSA 1978 is to be applied in determining admissibility. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Evidence of victim's prior gun play held irrelevant in murder prosecution. - In prosecution for first-degree murder, it was within trial court's discretion to exclude evidence that victim had pulled a gun on someone in another bar since this had no bearing on defendant's claim that he was not in the bar at the time of the shooting, nor did it relate to state witness' identification of defendant as victim's assailant. *State v. Blea*, 101 N.M. 323, 681 P.2d 1100 (1984).

Defendant's photo extracted from police album not prejudicial. - Where a photo of the defendant is extracted from a police photo album, such evidence is relevant to corroborate a victim's in-court identification of the defendant and the defendant is not so prejudiced by the date of his prior arrest shown on the exhibits and his documented association with other prior arrestees that this evidence should be excluded. *State v. Gutierrez*, 93 N.M. 232, 599 P.2d 385 (Ct. App. 1979).

Admission of acquittal evidence error and highly prejudicial. - In perjury prosecution, where defendant had testified for the state in an earlier case, admission of evidence that defendant in that earlier case had been acquitted was error, since it had no bearing on the guilt or innocence of the perjury defendant, and was highly prejudicial to him. *State v. Naranjo*, 94 N.M. 407, 611 P.2d 1101 (1980).

Prejudicial to seek admission by defendant regarding felony of which not convicted. - A prosecutor seeking, under Rule 11-608, to have a defendant make an admission concerning a felony when there has been no conviction hazards a reversal absent a showing of probative value because of the prejudicial nature of the question. *State v. Miller*, 92 N.M. 520, 590 P.2d 1175 (1979).

Error in perjury prosecution to admit evidence of acquittal entered in prior case, from which the allegation of perjury arose, because the perjury defendant could have told the truth, but not been believed by the jury because of his faulty memory, reputation, and demeanor. *State v. Naranjo*, 94 N.M. 413, 611 P.2d 1107 (Ct. App. 1979), rev'd on other

grounds, 94 N.M. 407, 611 P.2d 1101 (1980).

Parole records which contained defendant's signature were inadmissible where state had other handwriting exemplars and could have obtained signature by court order. State v. Martinez, 94 N.M. 50, 607 P.2d 137 (Ct. App. 1980).

V. Specific Applications.

Some inflammatory effect does not necessarily require exclusion. - Where evidence presented by testimony of the seven-year old daughter of a murder victim was relevant, noncumulative and of considerable probative value, the trial court was correct in denying the motion to exclude the testimony on grounds of undue prejudice. State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977).

Admission of evidence that appellant was arrested in north Las Vegas, Nevada, for reckless driving, and that he attempted to bribe arresting officer, broke arrest and fled was nonprejudicial even though generally proof of other criminal offenses is not admissible in the trial of an accused and is considered prejudicial; here, evidence was relevant to prove identity, consciousness of guilt and attempt to escape trial and punishment. State v. Nelson, 65 N.M. 403, 338 P.2d 301, cert. denied, 361 U.S. 877, 80 S. Ct. 142, 4 L. Ed. 2d 115 (1959).

Even if evidence not essential to case. - Although proof concerning revolvers taken from defendant was not essential to establish any of the five charges against him, nevertheless revolvers were relevant and material to questions of intent and preparation in connection with the burglary and attempted burglary charges; being thus admissible, the exhibits were not prejudicial to defendant's rights even if, as alleged, they may have had some inflammatory effect. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Pornographic material allowed as evidence. - In a prosecution for sexual offenses, the court did not err by allowing the introduction into evidence of two types of alleged pornographic material: a paperback which contained fictional accounts of sexual practices between members of the same family, and a magazine, containing pictures of nude males. The court, realizing that the jury could get overly involved in reading the book and looking at the pictures in the magazine, thus leading to a likelihood of undue prejudice, allowed the items to be admitted into evidence and described to the jury, but the items were not shown to the jury. State v. Larson, 107 N.M. 85, 752 P.2d 1101 (Ct. App. 1988).

Weapon or other instrument found in possession of accused's associate was admissible as part of the history of the arrest and as bearing on the crime, and its prejudicial effect did not outweigh its probative value. *State v. Samora*, 83 N.M. 222, 490 P.2d 480 (Ct. App. 1971).

Insurance evidence excludable where prejudice outweighs relevancy. - Even if evidence of insurance is relevant, it still may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Phillips v. Smith*, 87 N.M. 19, 528 P.2d 663 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974); *Safeco Ins. Co. of Am. v. United States Fid. & Guar. Co.*, 101 N.M. 148, 679 P.2d 816 (1984).

Evidence that party is insured is generally inadmissible because it is immaterial to the issues tried and prejudicial, but insurance may be mentioned when it is highly relevant to an issue in the lawsuit. *Mac Tyres, Inc. v. Vigil*, 92 N.M. 446, 589 P.2d 1037 (1979).

Reference to defendant's silence prejudicial. - Where prosecutor comments on or inquires about defendant's silence, such a reference can have an intolerably prejudicial impact. *State v. Baca*, 89 N.M. 204, 549 P.2d 282 (1976).

Reference by witness to defendant's silence. - Where the prosecutor comments on or inquires about the defendant's silence, such a reference can have an intolerable prejudicial impact and may require reversal under the "plain error" rule. However, where the witness simply refers to the defendant's silence, the defendant must object to this testimony as required by Rule 11-103 in order to preserve the error. In such a situation the defendant would simply be objecting to the testimony of the witness as being inadmissible under either this rule or Rule 402. *State v. Mirabal*, 98 N.M. 130, 645 P.2d 1386 (Ct. App. 1982).

Evidence of undue influence or lack of testamentary capacity must be admitted. - A motion seeking the exclusion of evidence of alleged undue influence or the lack of testamentary capacity of a decedent is in the nature of a motion to exclude evidence on the grounds of irrelevance, waste of time or prejudice under Rule 11-402 or this rule and the trial court correctly denies such a motion; by express statutory provision it is required to determine the validity of, and the persons entitled to the decedent's property under any testamentary document filed for probate. *Rutland v. Scanlan*, 99 N.M. 229, 656 P.2d 892 (Ct. App. 1982).

Expert testimony on witness' prior drug addiction not admitted. - Trial court did not abuse its discretion in excluding testimony of defendant's expert witness about prior heroin addiction of state's witness where trial court found that the expert had not applied

any particular psychological test with regard to state's witness, that the testimony would be highly prejudicial while having little probative value due to lack of clear connection between witness' prior addiction and her present ability to recall, and that evidence would not be helpful to jury. *State v. Blea*, 101 N.M. 323, 681 P.2d 1100 (1984).

Evidence of cashing of other checks in forgery case. - In a prosecution for forging a signature on a traveler's check, evidence that other traveler's checks issued to the same individual whose signature the defendant was charged with forging were cashed during a period of a few days in Albuquerque, and that the checks had all earlier been lost or stolen at the same time in California, was relevant as circumstantial evidence tending to establish that the defendant was physically present in Albuquerque, the scene of the offense charged, in contradiction of his alibi testimony, that he had been out of the county, since the prejudicial effect of the evidence did not outweigh its probative value. *State v. Young*, 103 N.M. 313, 706 P.2d 855 (Ct. App. 1985).

Evidence of similar, contemporaneous robberies by another in robbery case. - Since no prejudice would have resulted to defendant, charged with robbery, in the admission of evidence that similar, contemporaneous robberies had been committed by some other person, and since such other evidence would have been highly probative on the defendant's defense of mistaken identity, the evidence should have been admitted. *State v. Saavedra*, 103 N.M. 282, 705 P.2d 1133 (1985).

Evidence of juvenile's escape from detention facility. - District court did not abuse its discretion in determining that evidence of defendant's unauthorized departure from a Colorado juvenile detention facility was admissible, at his trial for murder, where the court properly could have concluded that defendant's reasons for eluding the police were circumstantial evidence relevant to the jury's determination whether his acts indicated a depraved mind regardless of human life and whether he had a subjective knowledge of the risk involved in his actions. *State v. Omar-Muhammad*, 105 N.M. 788, 737 P.2d 1165 (1987).

Psychological stress evaluations. - Unless the trial court recognizes the instrument operator as an expert, psychological stress evaluation has no probative value. *Simon Neustadt Family Center v. Bludworth*, 97 N.M. 500, 641 P.2d 531 (Ct. App. 1982).

Prior inconsistent statement admissible for impeachment purposes. - A written or oral statement of a witness as to material matters inconsistent with his trial testimony is admissible at trial for impeachment purposes. However, it is equally clear that the admission is limited by the necessary balancing of probativeness against prejudice. *State v. Davis*, 97 N.M. 130, 637 P.2d 561 (1981).

Admission or exclusion of inconsistent statement rests within sound discretion of trial court under the particular facts in a case and will not be reversed absent an abuse of that discretion. *State v. Davis*, 97 N.M. 130, 637 P.2d 561 (1981).

But testimony of informant's former attorney inadmissible. - The testimony of an informant's former attorney offered for the purpose of impeaching the informant's reputation for truthfulness violates the attorney-client privilege and is inadmissible under the Rules of Evidence. *State v. Hinojos*, 95 N.M. 659, 625 P.2d 588 (Ct. App. 1980).

Testimony of witness who has undergone pretrial hypnosis to revive his memory without the administration of any drugs is neither automatically inadmissible nor subject to a blanket proscription, but the party seeking to introduce hypnotically refreshed testimony must establish compliance with the requirements for admissibility by clear and convincing evidence. *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981).

In establishing a proper foundation for the use of hypnotically refreshed testimony, the hypnotist may testify to the reliability of the procedures utilized, but may not on direct examination offer tape recordings, video tapes or transcripts of the hypnosis sessions as substantive evidence to prove the truth of the matters therein stated. *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981).

Testimony of prehypnotic recollections is admissible in the sound discretion of the trial court, but post-hypnotic recollections, revived by the hypnosis procedure, are only admissible in a trial where a proper foundation has also first established the expertise of the hypnotist and that the techniques employed were correctly performed, free from bias or improper suggestibility. *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981).

Circumstances where proper to exclude rebuttal evidence. - Under former rule, it was discretionary with trial court to exclude rebuttal evidence which is properly part of the case-in-chief or merely cumulative thereof. *Phillips v. Smith*, 87 N.M. 19, 528 P.2d 663 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

The admission of a juvenile probation officer's rebuttal testimony regarding the officer's opinion of the defendant's reputation for truthfulness is impermissibly prejudicial. *State v. Guess*, 98 N.M. 438, 649 P.2d 506 (Ct. App. 1982).

Evidence of experiment must not confuse or mislead. - Evidence of an experiment is admissible if it is of such nature as to aid the jury in determining the issues of fact;

obviously some experiments would tend towards confusion rather than enlightenment. It is for trial court in the exercise of its discretion to determine such preliminary questions, and appellate court will not interfere unless there is an abuse thereof. No hard and fast rule can be announced as to degree of similarity of conditions under which experiment is to be made, but the law does not require that the conditions be identical; it is sufficient if there is a substantial similarity of conditions. *State v. Rose*, 79 N.M. 277, 422 P.2d 589 (1968), cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969).

Illustrative evidence must not be misleading. - Although diagrams are admissible to illustrate the testimony of a witness, nevertheless admission of exhibit was within trial court's discretion, and it was of the opinion that the diagram might mislead jury. *Cantrell v. Dendahl*, 83 N.M. 583, 494 P.2d 1400 (Ct. App. 1972).

Testimony on probable cause would have confused issues and misled jury. - Trial court properly excluded testimony as to whether a police officer had probable cause to search the nearby house trailer of the defendant's brother because the evidence would not tend to prove that the officer had lied in connection with defendant's sale of heroin to the officer and the offered testimony would also have confused the issues and mislead the jury. *State v. Barela*, 91 N.M. 634, 578 P.2d 335 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978).

To determine that exhibits wrongly received into evidence constituted harmless error, evidence of defendant's guilt must be so overwhelmingly persuasive that under no reasonable probability could the exhibits have induced the jury's findings of guilt. *State v. Gutierrez*, 93 N.M. 232, 599 P.2d 385 (Ct. App. 1979).

Refusal to sever counts not error. - Where the strength and quality of the evidence on various counts convinces the appellate court that the defendant was not prejudiced by the failure to sever multiple counts submitted to the jury, the trial court did not err in refusing to sever. *State v. Montano*, 93 N.M. 436, 601 P.2d 69 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

11-404. Character evidence not admissible to prove conduct; exceptions; other crimes.

A.

Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1)

Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2)

Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3)

Character of witness. Evidence of the character of a witness, as provided in Rules 11-607, 11-608 and 11-609.

B.

Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Committee commentary. - Paragraph B was changed to conform to the federal rule. The change emphasizes admissibility of evidence to prove motive, etc., but is not considered a substantive change.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Character of Accused.
- III. Character of Victim.
- IV. Other Crimes, Wrongs or Acts.

I. General Consideration.

Cross-references. - For exclusion of relevant evidence on grounds of prejudice, confusion or waste of time, see Rule 11-403.

For types of evidence admissible to prove character, see Rule 11-405.

Compiler's notes. - This rule is similar to Rule 404 of the Federal Rules of Evidence.

When character admissible. - Where character is an element of the crime, claim or defense, there is no question as to its relevancy and its admission is governed by Rule 11-402, but in all other cases where character evidence is collateral, its admissibility is limited to the exceptions outlined in this rule. *State v. Smith*, 92 N.M. 533, 591 P.2d 664 (1979).

Trait to be proven must be directly in issue. - Character evidence is admissible in a civil case where character is in issue, but the trait of character, desired to be proved by testimony in the form of opinion or evidence of reputation, must be directly in issue. *Baum v. Orosco*, 106 N.M. 265, 742 P.2d 1 (Ct. App. 1987).

Rule does not cover character evidence where character element of crime. - This rule does not bar character evidence when character is an element of the crime. *Thorp v. Cash*, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Where character is an element of the crime, claim or defense, there is no question as to relevancy; character evidence of this type is not covered by this rule and is admissible under Rule 11-402, which relates to admission of relevant evidence. Such character evidence may be proved by evidence of reputation, by opinion evidence or by specific instances of conduct. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

But circumstantial use of character restricted. - Where character evidence is used to suggest that a person acted consistently with his character, the evidence is circumstantial and problems of relevancy exist. This rule authorizes the admission of circumstantial character evidence in specified situations, and circumstantial character may be proved only by evidence of reputation or opinion evidence, not by specific instances of conduct. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Substance and purpose of evidence must be made clear. - Where no questions were asked and the substance of the evidence was not made known to the court, defendant merely informing the court that it desired to present this type of evidence, tender was insufficient. *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).

Admission of evidence under rule is within discretion of trial court, and its determination will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Allen*, 91 N.M. 759, 581 P.2d 22 (Ct. App. 1978); *State v. Smith*, 92 N.M. 533, 591 P.2d 664 (1979).

Inadmissible evidence not reversible error if it does not induce verdict. - Receipt of inadmissible evidence is not a reversible error when other evidence of the defendant's guilt is so persuasive that under no reasonable probability could the improper evidence have induced the jury's verdict. *State v. Vialpando*, 93 N.M. 289, 599 P.2d 1086, cert. denied, 93 N.M. 172, 598 P.2d 215 (Ct. App. 1979).

Evidence in will contest of character of beneficiary. - Evidence of the character of the beneficiary may be admitted when a will is contested on the grounds of undue influence even when the disposition to exert undue influence is not considered an element of the claim. Such evidence may concern actions occurring, or reputation formed, after the will was executed. *Thorp v. Cash*, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Evidence held relevant to show motive. - See *State v. Garcia*, 99 N.M. 771, 664 P.2d 969 (1983).

Law reviews. - For article, "Rape Law: The Need For Reform," see 5 N.M.L. Rev. 279 (1975).

For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For survey, "Evidence: Prior Crimes and Prior Bad Acts Evidence," see 6 N.M.L. Rev. 405 (1976).

For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

For article, "Evidence I," see 13 N.M.L. Rev. 407 (1983).

For article, "Evidence II: Evidence of Other Crimes as Proof of Intent," see 13 N.M.L.

Rev. 423 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error § 518; 5 Am. Jur. 2d §§ 799, 800, 802; 29 Am. Jur. 2d Evidence §§ 254, 256, 260, 363, 364, 366.

Admissibility and effect of evidence or comment on party's military service or lack thereof, 9 A.L.R.2d 606.

Admissibility, in prosecution based on abortion, of evidence of commission of similar crimes by accused, 15 A.L.R.2d 1080.

Admissibility, in prosecution for bribery or accepting bribes, of evidence tending to show the commission of other bribery or acceptance of bribe, 20 A.L.R.2d 1012.

Admissibility, in civil motor vehicle accident case, of evidence that driver was or was not involved in previous accidents, 20 A.L.R.2d 1210.

Cross-examination of automobile driver in civil action with respect to arrest or conviction for previous traffic offenses, 20 A.L.R.2d 1217; 88 A.L.R.3d 74.

Prejudicial effect of admission of evidence as to Communist or other subversive affiliation or association of accused, 30 A.L.R.2d 589.

Right of prosecution, in homicide case, to introduce evidence in rebuttal to show good, quiet, and peaceable character of deceased, 34 A.L.R.2d 451.

Admissibility, in forgery prosecution, of other acts of forgery, 34 A.L.R.2d 777.

Admissibility, in prosecution for illegal sale of intoxicating liquor, of other sales, 40 A.L.R.2d 817.

Admissibility, in robbery prosecution, of evidence of other robberies, 42 A.L.R.2d 854.

Admissibility, in subornation of perjury prosecution, of evidence of alleged perjurer's plea of guilty to charge of perjury, 63 A.L.R.2d 825.

Admissibility, in prosecution for gambling or gaming offense, of evidence of other acts of gambling, 64 A.L.R.2d 823.

Admissibility, in civil assault and battery action, of similar acts or assaults against other persons, 66 A.L.R.2d 806.

Admissibility, in civil case involving usury issue, of evidence of other assertedly usurious transactions, 67 A.L.R.2d 232.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses, 77 A.L.R.2d 841; 2 A.L.R.4th 330.

Admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempts on other occasions, 78 A.L.R.2d 1359.

Admissibility, in prosecution for criminal burning of property, or for maintaining fire hazard, of evidence of other fires, 87 A.L.R.2d 891.

Admissibility of evidence of accused's good reputation as affected by remoteness of time to which it relates, 87 A.L.R.2d 968.

Admissibility on behalf of accused of evidence of similar acts or transactions tending to rebut fraudulent intent, 90 A.L.R.2d 903.

Admissibility, in prosecution for illegal sale of narcotics, of evidence of other sales, 93 A.L.R.2d 1097.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for homicide, 98 A.L.R.2d 6.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for assault, 98 A.L.R.2d 195.

Admissibility of evidence of other offenses in rebuttal of defense of entrapment, 61 A.L.R.3d 293.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense, 88 A.L.R.3d 8.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 A.L.R.3d 718.

Admissibility of evidence of subsequent criminal offenses as affected by proximity as to time and place, 92 A.L.R.3d 545.

Admissibility, in incest prosecution, of evidence of alleged victim's prior sexual acts with persons other than accused, 97 A.L.R.3d 967.

Admissibility of evidence of character or reputation of party in civil action for sexual assault on issues other than impeachment, 100 A.L.R.3d 569.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix, 2 A.L.R.4th 330.

Admissibility of evidence of accused's drug addiction or use to show motive for theft of property other than drugs, 2 A.L.R.4th 1298.

Admissibility of expert or opinion testimony on battered wife or battered woman syndrome, 18 A.L.R.4th 1153.

Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity not having resulted in arrest or charge - modern state cases, 24 A.L.R.4th 333.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 25 A.L.R.4th 934.

Admissibility and weight of evidence of prior misidentification of accused in connection with commission of crime similar to that presently charged, 50 A.L.R.4th 1049.

Products liability: admissibility of evidence of absence of other accidents, 51 A.L.R.4th 1186.

Admissibility of evidence of pertinent trait under Rule 404(a) of the uniform rules of evidence, 56 A.L.R.4th 402.

Admissibility of traffic conviction in later state civil trial, 73 A.L.R.4th 691.

Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged, 41 A.L.R. Fed. 497.

Construction and application of Rule 609(c) of the Federal Rules of Evidence, providing that evidence of conviction is not admissible to attack credibility of witness if conviction has been subject to pardon, annulment, or other procedure based on finding of rehabilitation or innocence, 42 A.L.R. Fed. 942.

Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan, 47 A.L.R. Fed. 781.

When is evidence of trait of accused's character "pertinent" for purposes of admissibility under Rule 404(a)(1) of the Federal Rules of Evidence, 49 A.L.R. Fed. 478.

Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of Federal Rules of Evidence, in civil cases, 64 A.L.R. Fed. 648.

23 C.J.S. Criminal Law §§ 816 to 832; 32 C.J.S. Evidence §§ 422 to 437; 98 C.J.S. Witnesses §§ 489, 491 to 537.

II. Character of Accused.

Evidence of trait irrelevant where trait not in issue. - Where defendant's veracity was not an element of the claim in a civil case, evidence of defendant's reputation for truthfulness was irrelevant and properly excluded. *Baum v. Orosco*, 106 N.M. 265, 742 P.2d 1 (Ct. App. 1987).

Rebuttal benefits strictly construed. - Rule allows admission of evidence of accused's character by the prosecution for the purpose of proving that she acted in conformity therewith on a particular occasion only to rebut character evidence offered by the accused; where record shows that accused offered no such character evidence, the state may not avail itself of rebuttal benefits of this rule. *State v. Ross*, 88 N.M. 1, 536 P.2d 265 (Ct. App. 1975).

Refusal of testimony asserting defendant's honesty held harmless error. - Trial court erred in excluding testimony of two defense witnesses (employers of defendant) as to the defendant's honesty, but the error was harmless because the evidence of guilt was overwhelming. *State v. Williams*, 91 N.M. 795, 581 P.2d 1290 (Ct. App. 1978).

When rule is authority for admission of character evidence, the method of proof must be in conformity with Rule 11-405. *State v. Montoya*, 95 N.M. 433, 622 P.2d 1053 (Ct. App.), writ quashed, 95 N.M. 426, 622 P.2d 1046 (1981).

Character evidence tendered in form required by Rule 11-405. - Where this rule is authority for admission of tendered character evidence, the evidence is not to be admitted unless tendered in the form required by Rule 11-405. *State v. Montoya*, 95 N.M. 433, 622 P.2d 1053 (Ct. App.), writ quashed, 95 N.M. 426, 622 P.2d 1046 (1981).

Evidence of pertinent trait of character of murder victim is admissible to prove that the victim acted in conformity with that character trait in the incident where the killing occurred. *State v. Montoya*, 95 N.M. 433, 622 P.2d 1053 (Ct. App.), writ quashed, 95 N.M. 426, 622 P.2d 1046 (1981).

Specific conduct evidence is not admissible to prove pertinent trait of character under this rule. *State v. Montoya*, 95 N.M. 433, 622 P.2d 1053 (Ct. App.), writ quashed, 95 N.M. 426, 622 P.2d 1046 (1981).

Hearsay evidence admissible under Subparagraph A(2) as to collateral matters is within the trial court's discretionary control. *State v. Montoya*, 95 N.M. 433, 622 P.2d 1053 (Ct.

App.), writ quashed, 95 N.M. 426, 622 P.2d 1046 (1981).

When cross-examination of character witnesses concerning defendant's convictions not allowed. - Cross-examination of character witnesses concerning defendant's convictions 23 years prior to the trial will not be allowed when: (1) the trial judge conducted no in camera inquiry to determine whether the prior alleged events had occurred; (2) none of the witnesses had known the accused for more than six years; (3) the trial court did not instruct the jury at all concerning the limited purpose of the prosecutor's inquiry on the subject; (4) the defendant offered no evidence of specific prior acts, either good or bad, to the jury; and (5) the defense attorney did specifically object to the inquiry made by the prosecutor. *State v. Christopher*, 94 N.M. 648, 615 P.2d 263 (1980).

Evidence of peaceful, law-abiding nature. - Where aggression or self-defense is in issue, evidence of a defendant's peaceful, law-abiding nature is admissible to show that he was not the aggressor, but where, immediately prior to the incident in question, defendant admits to being in the midst of a violent affray, evidence of his peaceful nature in the past ceases to be relevant and is no longer admissible. *Baum v. Orosco*, 106 N.M. 265, 742 P.2d 1 (Ct. App. 1987).

Evidence of consciousness of guilt. - A handwriting expert's testimony as to defendant's attempt to disguise his handwriting in exemplars, at a time when he was charged with multiple forgeries, was relevant evidence showing a consciousness of guilt and was not inadmissible character evidence. *State v. Deutsch*, 103 N.M. 752, 713 P.2d 1008 (Ct. App. 1985).

Judgment reversed where prosecutor's suggestion of availability of inadmissible evidence leads to conviction. - Where a prosecutor improperly instructs the jury on an evidentiary rule so as to suggest the availability of inadmissible evidence relating to the accused's character and there is a reasonable probability that the misconduct contributed to the conviction, the judgment and sentence must be reversed and the defendant accorded a new trial. *State v. Payne*, 96 N.M. 347, 630 P.2d 299 (Ct. App. 1981).

III. Character of Victim.

Admission of violent acts of decedent discretionary. - Determination of the admission of violent acts of decedent, a collateral issue, rests in the discretion of the trial court. *State v. Marquez*, 87 N.M. 57, 529 P.2d 283 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

The exclusion of admission of relevant evidence is a matter within the sound discretion of the trial court. *State v. Ewing*, 97 N.M. 235, 638 P.2d 1080 (1982).

And there is no abuse of discretion in excluding 32- and 33-year-old convictions. *State v. Ewing*, 97 N.M. 235, 638 P.2d 1080 (1982).

Specific violent act not inadmissible because defendant's knowledge not shown. - Evidence of a specific violent act is evidence concerning a trait of violence which may throw light on the question of aggression. A specific violent act is not to be excluded solely because it is not shown that defendant knew of that act. However, such evidence is directed to a collateral issue, and the extent to which that evidence on a collateral issue is to be permitted is within trial court's discretion. *State v. Alderette*, 86 N.M. 600, 526 P.2d 194 (Ct. App.), cert. denied, 86 N.M. 593, 526 P.2d 187 (1974).

Prior convictions excluded as evidence of victim's aggression. - Trial court did not err in holding that prejudicial effect of victim's 32- and 33-year-old convictions offered to prove the victim was the aggressor outweighed their probative effect where there was no evidence that defendant knew of victim's prior convictions. *Ewing v. Winans*, 749 F.2d 607 (10th Cir. 1984).

Victim's aggravated battery conviction inadmissible where defendant had no direct knowledge of it. - Where defendant in a murder trial testified that he heard of instances where the victim had stabbed several persons, but there was no evidence that defendant knew that the victim had been convicted of aggravated battery, the aggravated battery conviction was not admissible. *State v. McCarter*, 93 N.M. 708, 604 P.2d 1242 (1980).

Proper to exclude additional evidence of deceased's aggression. - Where two eyewitnesses called by the state, along with testimony of defendant, established that the deceased and his friend were the aggressors, there was no other purpose for which additional evidence of decedent's misconduct could be introduced. Additional evidence would be circumstantial, collateral and merely cumulative, and as such its admission rested within the sound discretion of the trial court; exclusion would not have affected a substantial right of the defendant. *State v. Marquez*, 87 N.M. 57, 529 P.2d 283 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

Trial court in second-degree murder prosecution properly excluded proffered testimony which defense wanted to use to corroborate the testimony of other witnesses which showed deceased's reputation and disposition for fighting, his violent temper and his

conduct as a bully. *State v. Snow*, 84 N.M. 399, 503 P.2d 1177 (Ct. App.), cert. denied, 84 N.M. 390, 503 P.2d 1168 (1972).

In prosecution for first-degree murder, defendant's tendered evidence that victim had pulled a gun on someone in another bar was evidence of specific conduct not admissible to prove character of victim and did not fit the "other purposes" exception to Paragraph B, since there was no question as to victim's identity and victim's prior act was also not probative of identity of his assailant. *State v. Blea*, 101 N.M. 323, 681 P.2d 1100 (1984).

Self defense in homicide case. - When self-defense is an issue in a homicide case, the victim's character constitutes an element of the defense which properly can be proven by specific instances of conduct, and if the trial court precludes defendant from proving an element of that defense, the court abuses its discretion. *State v. Gallegos*, 104 N.M. 247, 719 P.2d 1268 (Ct. App. 1986).

Types of evidence admissible to prove victim's character. - Absent any claim of self-defense, victim's asserted character traits were not essential elements of the defense in prosecution for assault with intent to commit a violent felony, and said traits were not provable by specific acts of conduct but only by reputation or opinion evidence. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

IV. Other Crimes, Wrongs or Acts.

Generally as to admissibility of other acts. - Whenever the proof of another act or crime tends to prove the guilt of the person on trial, it is admissible notwithstanding the consequences to the defendant since the state has the right to show the guilt of the defendant by any relevant fact. *State v. Allen*, 91 N.M. 759, 581 P.2d 22 (Ct. App. 1978).

Proof of another act or crime may properly be received if it is relevant to and its probative force is sufficiently great upon, some material element of the crime charged which is in issue and upon which there is doubt (such as identity). *State v. Allen*, 91 N.M. 759, 581 P.2d 22 (Ct. App. 1978).

Under former law, admission of evidence of other acts with prosecutrix similar in nature to those charged but occurring at times not covered in the indictment was not error, as whenever proof of another act or crime tends to prove the guilt of the person on trial it is

admissible, notwithstanding consequences to defendant. *State v. Dodson*, 67 N.M. 146, 353 P.2d 364 (1960).

Testimony which amounted to evidence of defendant's bad character or reputation or of her disposition to commit the crime with which she was charged, was clearly inadmissible as a part of state's case in chief, and was prejudicial. *State v. Alberts*, 80 N.M. 472, 457 P.2d 991 (Ct. App. 1969).

It is generally held that proof of convictions of other and separate criminal offenses by defendant is not admissible and that it is prejudicial error to admit such proof. *State v. Paul*, 80 N.M. 521, 458 P.2d 596 (Ct. App.), cert. denied, 80 N.M. 746, 461 P.2d 228, 397 U.S. 1044, 90 S. Ct. 1354, 25 L. Ed. 2d 654 (1970).

Evidence of offenses other than and independent of the offense with which accused is charged and for which he is being tried was not admissible. *State v. Lindsey*, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969), cert. denied, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

Court to examine other means of proving disputed issue. - In determining the probative value of proffered evidence of other crimes, wrongs or acts, the court should look to the availability of other means of proving the disputed issue and the remoteness in time of the other crime, wrong or act. *State v. Taylor*, 104 N.M. 88, 717 P.2d 64 (Ct. App. 1986).

Evidence admissible to prove material element in issue. - Evidence is not admissible under this rule to prove a material element of the crime charged unless that element is in issue. *State v. Beachum*, 96 N.M. 566, 632 P.2d 1204 (Ct. App. 1981).

In order to admit evidence under Paragraph B, the court must find that the evidence is relevant to a disputed issue other than the defendant's character, and it must determine that the prejudicial effect of the evidence does not outweigh its probative value, as set out by Rule 11-403. *State v. Beachum*, 96 N.M. 566, 632 P.2d 1204 (Ct. App. 1981).

Prior criminal record admissible only for rebuttal. - Generally, evidence of a defendant's prior criminal record, and thus his character, is not permitted to prove conduct or that he acted in conformity with such character unless presented to rebut character evidence offered by the accused. *State v. Gutierrez*, 93 N.M. 232, 599 P.2d 385 (Ct. App. 1979); *State v. Vialpando*, 93 N.M. 289, 599 P.2d 1086, cert. denied, 93 N.M. 172, 598 P.2d 215 (Ct. App. 1979).

Cross-examination regarding prior complaints properly refused. - There was no abuse of discretion in refusing to allow the defense to cross-examine the complainant regarding prior complaints in order to impeach her credibility where the defendant offered no proof that the accusations were false, since the probative value of the fact that the victim made prior complaints is nonexistent, while its prejudicial effect is great. *State v. Johnson*, 102 N.M. 110, 692 P.2d 35 (Ct. App. 1984).

Evidence of other acts admissible for specified purposes. - Reference to other offenses during course of trial is error unless such evidence is received for one of the purposes recognized as exceptions to the general rule. *State v. Gutierrez*, 79 N.M. 732, 449 P.2d 334 (Ct. App. 1968), cert. denied, 80 N.M. 33, 450 P.2d 633 (1969).

There are several exceptions to the general rule that evidence of offenses and crimes, other than that for which defendant is on trial, cannot be introduced; among these are other offenses showing motive, intent, absence of a mistake or accident, common scheme or plan or identity of the person charged with commission of the crime. *State v. Lopez*, 85 N.M. 742, 516 P.2d 1125 (Ct. App. 1973).

This rule allows, under certain circumstances, evidence of other crimes, wrongs or acts, not to prove that the person had a character trait with which she acted in conformity but to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. *State v. Ross*, 88 N.M. 1, 536 P.2d 265 (Ct. App. 1975).

To show motive. - Written documents found in defendant's trunk which tended to show a wicked and depraved mind and were directed toward son of prosecuting witness, if not the whole family, were admissible to show motive in prosecution for poisoning with intent to kill or injure. *State v. Holden*, 45 N.M. 147, 113 P.2d 171 (1941).

Rule authorizes admission of motive testimony subject to balancing requirement of Rule 11-403. *State v. Lovato*, 91 N.M. 712, 580 P.2d 138 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

But motive evidence relating to witness credibility governed by Rule 11-608. - If asserted motive evidence is in fact no more than evidence of character and conduct attacking the credibility of a witness, its admissibility would be governed by Rule 11-608. *State v. Lovato*, 91 N.M. 712, 580 P.2d 138 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Intent. - In fraud cases, related incidents of accused's acts are admissible to establish motive, absence of mistake or accident, common scheme or plan or the identity of the person charged. Fact that defendant entered into many contracts which he failed to complete shows that either he was aware of the risks, that he was aware of his capabilities or that he could not have believed that he would complete the contracts; thus his proceeding to contract in spite of his awareness is evidence of fraudulent intent. *State v. McCallum*, 87 N.M. 459, 535 P.2d 1085 (Ct. App.), cert. denied, 87 N.M. 457, 535 P.2d 1083 (1975).

Confession of prior criminal acts inadmissible to prove intent where intent not issue. - The defendant's confession of possible prior acts of rape is not admissible, in a proceeding in which the defendant was convicted of criminal sexual contact of a minor and aggravated battery, to prove intent where the defendant claimed that he did not commit the charged acts and, thus, did not put the element of intent into issue. *State v. Beachum*, 96 N.M. 566, 632 P.2d 1204 (Ct. App. 1981).

Testimony of persons regarding dealings with defendant similar in nature to victims' dealings with him was properly admitted to show defendant's intent and a common scheme or plan. *State v. Schifani*, 92 N.M. 127, 584 P.2d 174 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Knowledge. - Evidence of other "offenses" is properly admitted where they tend to show the defendant's knowledge of a crime and an absence of mistake or accident. *State v. Turner*, 97 N.M. 575, 642 P.2d 178 (Ct. App. 1981).

Unless defendant admits knowledge of fact that goods he has received are stolen, this knowledge of necessity must be established by circumstantial evidence, and often the only way this can be accomplished is by evidence of other similar offenses. *State v. Lindsey*, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969), cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

Identity. - Evidence of collateral offenses is generally inadmissible to prove the guilt of defendant of a specific crime. However, one of the recognized exceptions to this general rule is that evidence of collateral offenses is admissible to prove the identity of the defendant as the person who committed the crime with which he is charged and for which he is being tried; where testimony of two witnesses did tend to prove the identity of defendant, it was admissible. *State v. Aguirre*, 84 N.M. 376, 503 P.2d 1154 (1972). See also *State v. Stout*, 82 N.M. 455, 483 P.2d 510 (Ct. App. 1971).

Other acts demonstrating unique or distinct pattern admissible to prove identity. - Evidence of other acts may be admitted to prove identity if the modus operandi of those acts is sufficiently similar to the charged acts to indicate they were likely done by the same person. In order for evidence to be admissible, the similarity required must rise above the level of characteristics common to many incidents of the crime; it must demonstrate a unique or distinct pattern easily attributable to one person. *State v. Beachum*, 96 N.M. 566, 632 P.2d 1204 (Ct. App. 1981).

Evidence of cashing of other checks in forgery case. - In a prosecution for forging a signature on a traveler's check, evidence that other traveler's checks issued to the same individual whose signature the defendant was charged with forging were cashed during a period of a few days in Albuquerque, and that the checks had all earlier been lost or stolen at the same time in California, was relevant as circumstantial evidence tending to establish that the defendant was physically present in Albuquerque, the scene of the offense charged, in contradiction of his alibi testimony, that he had been out of the county. *State v. Young*, 103 N.M. 313, 706 P.2d 855 (Ct. App. 1985).

Evidence of similar, contemporaneous robberies by another in robbery case. - Since no prejudice would have resulted to defendant, charged with robbery, in the admission of evidence that similar, contemporaneous robberies had been committed by some other person, and since such other evidence would have been highly probative on the defendant's defense of mistaken identity, the evidence should have been admitted. *State v. Saavedra*, 103 N.M. 282, 705 P.2d 1133 (1985).

Testimony of sex offense victim B was sufficiently similar and thus admissible to prove identity of perpetrator of crime against victim A where: A was abducted at knifepoint and though a gun was initially used against B during the previous crime her abductor had put away his gun and thereafter used a knife; each victim was told the knife would be used if she tried to escape; the abductor talked to both victims about fellatio and required victim A to perform fellatio; he first told the victims that he had robbery in mind and soon thereafter told them he wanted to rape them; A was abducted at a shopping center and B had been abducted after leaving and one block away from a shopping center; each victim wore glasses and was told to remove them shortly after being abducted; and the abductor had each victim remove her brassiere while being driven by him. *State v. Allen*, 91 N.M. 759, 581 P.2d 22 (Ct. App. 1978).

Absence of accident. - Evidence that defendant stated he could not flee New Mexico with the other two men involved in the murder because he could not go through Missouri since he was wanted in Missouri for some other murders that he had committed was admissible because testimony concerning flight was probative of absence of accident on defendant's part in his participation in the killing. *State v. Smith*, 89 N.M. 777, 558 P.2d 46 (Ct. App.), rev'd on other grounds, 89 N.M. 770, 558 P.2d 39

(1976); *State v. Trujillo*, 93 N.M. 728, 605 P.2d 236 (Ct. App. 1979), *aff'd*, 93 N.M. 724, 605 P.2d 232 (1980).

Other acts admissible to show state of mind. - Testimony of witness, mentioning defendant's references to prior armed robbery made in conversations shortly after the shooting, was admissible as an admission by defendant that he had just participated in an armed robbery, which offense was relevant to the murder and aggravated battery charges under the gun enhancement statute (31-18-4 NMSA 1978 (now repealed)) or as a statement of defendant's state of mind at the time of the shooting (which was a short time before the conversations). However, it would have been improper for the state to have introduced separately evidence of this prior armed robbery. *State v. Ortiz*, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

In a prosecution for homicide by vehicle by driving recklessly, evidence of driving conduct that occurred immediately before the mishap was admissible under this rule to show both defendant's mental state and lack of accident. *State v. Sandoval*, 88 N.M. 267, 539 P.2d 1029 (Ct. App. 1975).

And characteristic conduct. - Carnival shooting incident two days before the crimes in question bore upon intent of defendant when he shot decedent and his friend and showed the state of mind of defendant and his characteristic conduct in the use of a gun; though not admissible under Rule 11-608, because not probative of credibility or lack thereof, this evidence was properly admitted under Paragraph B. *State v. Marquez*, 87 N.M. 57, 529 P.2d 283 (Ct. App.), *cert. denied*, 87 N.M. 47, 529 P.2d 273 (1974).

And deliberation. - Where defendant's shooting of decedent's wife occurred within a second or so after the shooting of decedent and as she sought to escape, shooting her under the circumstances had real probative value upon the issues of deliberation and intent, and constituted evidence of a preconceived plan to kill her as well as her husband. *State v. Lucero*, 88 N.M. 441, 541 P.2d 430 (1975).

To rebut alibi. - Generally, evidence of collateral offenses is inadmissible to prove guilt of a specific crime except where proof of collateral offenses tends to identify the person charged with commission of the crime on trial; such evidence is also admissible to rebut the defense of alibi. *State v. Garcia*, 80 N.M. 21, 450 P.2d 621 (1969).

To establish fact of crime. - In prosecution for poisoning with intent to kill or injure, evidence that witness after partaking of cake baked in home of prosecuting witness, became sick and displayed symptoms similar to those of prosecuting witness and members of his family after eating food made from flour was admissible as a link in the

chain of circumstances tending to establish both the crime and that it was designed, not accidental or the result of mistake. *State v. Holden*, 45 N.M. 147, 113 P.2d 171 (1941).

Evidence of prior escape from detention facility. - District court did not abuse its discretion in determining that evidence of defendant's unauthorized departure from a Colorado juvenile detention facility was admissible at his trial for murder, where the court properly could have concluded that defendant's reasons for eluding the police were circumstantial evidence relevant to the jury's determination whether his acts indicated a depraved mind regardless of human life and whether he had a subjective knowledge of the risk involved in his actions. *State v. Omar-Muhammad*, 105 N.M. 788, 737 P.2d 1165 (1987).

Evidence of prior untruthfulness held violative of Paragraph B. - Where defendant argued that evidence of a police officer's prior untruthfulness in the face of allegations of excessive force should have been admitted "for the purpose of showing his [officer's] tendency to falsify his statement . . . ," it was held that this is the very evil which Paragraph B of this rule seeks to prevent and that it was appropriate to confine the question to credibility under Rule 11-608. *Baum v. Orosco*, 106 N.M. 265, 742 P.2d 1 (Ct. App. 1987).

Admissibility of prior convictions not involving dishonesty for impeachment purposes. - Some of the factors which should be considered by the trial court when deciding whether to admit evidence of prior convictions not involving dishonesty, for impeachment purposes, include: (1) the nature of the crime in relation to its impeachment value as well as its inflammatory impact; (2) the date of the prior conviction and the witness' subsequent history; (3) similarities, and the effect thereof, between the past crime and the crime charged; (4) a correlation of standards expressed in Rule 11-609 with the policies reflected in this rule; (5) the importance of the defendant's testimony; and (6) the centrality of the credibility issue. *State v. Lucero*, 98 N.M. 311, 648 P.2d 350 (Ct. App. 1982).

Essential considerations for judge. - Generally, evidence of a distinct criminal offense independent of the offense with which defendant is charged and for which he is being tried is inadmissible; however, there are exceptions to this rule. The probative force of such evidence must bear directly on some material element of the crime with which defendant is charged. Evidence of this nature should not be received when the overwhelming result would be nothing more than establishing defendant's bad character or his disposition or propensity to commit crime. *State v. Lopez*, 80 N.M. 599, 458 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

Prejudicial character of relevant evidence of collateral offenses does not render evidence inadmissible. *State v. Garcia*, 80 N.M. 21, 450 P.2d 621 (1969).

Evidence offered "for other purposes" such as "intent" does not fall within prohibitions of Rule 11-608 (relating to impeachment of witnesses). However, determination must be made whether danger of undue prejudice outweighs probative value of evidence in view of availability of other means of proof. *State v. Marquez*, 87 N.M. 57, 529 P.2d 283 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

In determining whether evidence admissible under Paragraph B should be excluded under Rule 11-403, the probative value of the evidence is to be considered. In considering the probative value, a factor is the availability of other means of proof. *State v. Fuson*, 91 N.M. 366, 574 P.2d 290 (Ct. App. 1978).

Previous injury probative of child abuse. - In a prosecution for child abuse resulting in the death of a child, a doctor's testimony concerning his treatment of the child's fractured leg less than two months before the child's death was properly admitted under Paragraph B; the probative value of the testimony concerning the fracture is not outweighed by its prejudicial impact. *State v. Robinson*, 93 N.M. 340, 600 P.2d 286 (Ct. App.), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Refusal to sever not error. - Where the strength and quality of the evidence on various counts convinces the appellate court that the defendant was not prejudiced by the failure to sever multiple counts submitted to the jury, the trial court did not err in refusing to sever. *State v. Montano*, 93 N.M. 436, 601 P.2d 69 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Past sexual conduct of rape victim in itself indicates nothing concerning consent in particular case. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Rather defendant must make preliminary showing of relevancy. - A defendant claiming that a rape victim's past sexual conduct is relevant to the issue of consent must make a preliminary showing which indicates relevancy, and the question of relevancy is not raised by mere assertion; there must be a showing of a reasonable basis for believing that past sexual conduct is pertinent to the consent issue. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

False accusations during cross-examination of violent criminal charges cannot bear upon defendant's character. *State v. Bartlett*, 96 N.M. 415, 631 P.2d 321 (Ct. App. 1981).

And statement's probative value diminished by remoteness. - A factor which diminishes the probative value of a statement made seven years earlier confessing to possible acts of rape is its remoteness. *State v. Beachum*, 96 N.M. 566, 632 P.2d 1204 (Ct. App. 1981).

Error violates substantial right to fair trial. - Evidence of a collateral offense is generally inadmissible in a criminal prosecution to establish a specific crime unless case falls within an applicable exception under these rules, and trial court's admission of evidence of a past offense not allowed by these rules was prejudicial error which violated defendant's substantial right to a fair trial. *State v. Ross*, 88 N.M. 1, 536 P.2d 265 (Ct. App. 1975).

11-405. Methods of proving character.

A.

Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

B.

Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of his conduct.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 405 of the Federal Rules of Evidence.

Rule 11-403 resolves potential conflict between this rule and 30-9-16 NMSA 1978. - There is no conflict between this rule and 30-9-16 NMSA 1978, which limits admissibility of evidence of a sex offense victim's past sexual conduct, because the balancing approach of Rule 11-403 is applicable to exclude evidence admissible under this rule. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580

P.2d 972 (1978).

Evidence must be relevant to pertinent character trait. - The distinction between proof of reputation and proof of specific acts is not applied by the evidence rules when a pertinent trait of character of the victim is offered by an accused as an essential element of a defense, but since the trait of character must be pertinent the question of relevance remains. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Methods of proving character used circumstantially. - Where character evidence is used to suggest that a person acted consistently with his character, the evidence is circumstantial and problems of relevancy exist; in such cases character may be proved only by evidence of reputation or opinion evidence, not by specific instances of conduct. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Methods of proving character as element of crime or defense. - Where character is an element of the crime, claim or defense, there is no question as to relevancy; character evidence of this type is not covered by Rule 11-404 (relating to evidence of character and other acts), and is admissible under Rule 11-402 which relates to admission of relevant evidence. Such character evidence may be proved by evidence of reputation, by opinion evidence or by specific instances of conduct. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Inquiry into basis of witness' information, accuracy and credibility is almost universally admissible. *State v. Christopher*, 94 N.M. 648, 615 P.2d 263 (1980).

Where witnesses testify to defendant's reputation for peacefulness, the prosecutor is permitted to test the witnesses' grounds of knowledge. *State v. Christopher*, 94 N.M. 648, 615 P.2d 263 (1980).

Specific conduct evidence is not admissible to prove a pertinent trait of character under Rule 11-404. *State v. Montoya*, 95 N.M. 433, 622 P.2d 1053 (Ct. App.), writ quashed, 95 N.M. 426, 622 P.2d 1046 (1981).

When Rule 11-404 is authority for admission of character evidence, the method of proof must be in conformity with Paragraph A. *State v. Montoya*, 95 N.M. 433, 622 P.2d 1053 (Ct. App.), writ quashed, 95 N.M. 426, 622 P.2d 1046 (1981).

False accusations during cross-examination of violent criminal charges cannot bear upon defendant's character. *State v. Bartlett*, 96 N.M. 415, 631 P.2d 321 (Ct. App. 1981).

Hearsay evidence admissible under Rule 11-404 as to collateral matters is within the trial court's discretionary control. *State v. Montoya*, 95 N.M. 433, 622 P.2d 1053 (Ct. App.), writ quashed, 95 N.M. 426, 622 P.2d 1046 (1981).

Victim's aggravated battery conviction inadmissible where no direct knowledge by defendant. - Where defendant in a murder trial testified that he heard of instances where the victim had stabbed several persons, but there was no evidence that defendant knew that the victim had been convicted of aggravated battery, the aggravated battery conviction was not admissible. *State v. McCarter*, 93 N.M. 708, 604 P.2d 1242 (1980).

Evidence in will contest of character of beneficiary. - Evidence of the character of the beneficiary may be admitted when a will is contested on the grounds of undue influence even when the disposition to exert undue influence is not considered an element of the claim. Such evidence may concern actions occurring, or reputation formed, after the will was executed. *Thorp v. Cash*, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Admissibility of evidence of specific acts in cases involving claim of self-defense. - Whenever a specific act by reason of its character, or its relationship in time, place or circumstance to the other facts in a case involving a claim of self-defense would legitimately and reasonably either affect the defendant's apprehensions or throw light on the question of aggression, or upon the conduct or motives of the parties at the time of an affray, it should be admitted. *State v. Melendez*, 97 N.M. 740, 643 P.2d 609 (Ct. App. 1981), rev'd on other grounds, 97 N.M. 738, 643 P.2d 607 (1982).

Where self-defense is claimed, there seems to be inconsistent authority in New Mexico as to whether the evidence of specific acts of violence would be admissible. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App. 1977), implies that the victim's traits of aggressiveness and recklessness are "essential elements" of the defense of self-defense and that evidence of specific acts demonstrating the victim's aggressiveness are thus admissible whenever self-defense is asserted. However, *State v. Ewing*, 97 N.M. 235, 638 P.2d 1080 (1982), (quoting *State v. McCarter*, 93 N.M. 708, 604 P.2d 1242, 1246 (1980)) states that "evidence of specific acts of violence on the part of the deceased could be introduced by a defendant if there was evidence that the defendant had been informed of, or had knowledge of, those acts at the time of the homicide". *Trujillo v. Sullivan*, 815 F.2d 597 (10th Cir.), cert. denied, 484 U.S. 929, 108 S. Ct. 296,

98 L. Ed. 2d 256 (1987).

Absent claim of self-defense, victim's character traits were not essential elements of defense in a prosecution for assault with intent to commit a violent felony and were not provable by specific acts of conduct. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Evidence of prior convictions properly excluded where defendant had no knowledge of them. - Trial court did not err in holding that prejudicial effect of victim's 32- and 33-year-old convictions offered to prove the victim was the aggressor outweighed their probative effect where there was no evidence that defendant knew of victim's prior convictions. *Ewing v. Winans*, 749 F.2d 607 (10th Cir. 1984).

Law reviews. - For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

For article, "Evidence II: Evidence of Other Crimes as Proof of Intent," see 13 N.M.L. Rev. 423 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 336, 343 to 351.

Admissibility of evidence showing plaintiff's antecedent intemperate habits, in personal injury motor vehicle accident action, 46 A.L.R.2d 103.

Admissibility, in incest prosecution, of evidence of alleged victim's prior sexual acts with persons other than accused, 97 A.L.R.3d 967.

Use of plea bargain or grant of immunity as improper vouching for credibility of witness - state cases, 58 A.L.R.4th 1229.

Opinion evidence as to character of accused under Rule 405(a) of Federal Rules of Evidence, 64 A.L.R. Fed. 244.

23 C.J.S. Criminal Law §§ 816 to 825; 32 C.J.S. Evidence §§ 422 to 437; 98 C.J.S. Witnesses §§ 489, 491 to 537.

11-406. Habit; routine practice.

A.

Admissibility. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

B.

Method of proof. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 406 of the Federal Rules of Evidence.

"Habit" construed. - Habit describes one's regular response to a repeated specific situation; it is a regular practice of meeting a particular kind of situation with a specific type of conduct. *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); *Ohlson v. Kent Nowlin Constr. Co.*, 99 N.M. 539, 660 P.2d 1021 (Ct. App. 1983).

Admission of evidence is discretionary with the trial court, and discretion is not abused when the evidence at trial shows by a preponderance of the evidence that the item is what it purports to be. *State v. Sanchez*, 98 N.M. 781, 652 P.2d 1232 (Ct. App. 1982).

Admission of blood test results found not to be error. - See *State v. Sanchez*, 98 N.M. 781, 652 P.2d 1232 (Ct. App. 1982).

Incidents too dissimilar to show habit. - In a negligence suit against a restaurant owner for injuries sustained in a barroom brawl in 1972, subsequent incidents in 1975 (a drunken and abusive state leading to charges of driving while under the influence of liquor, an abusive state involving disorderly conduct, a battery conviction and a shooting

at the Club Amor) were dissimilar to the 1972 incident. *De La O v. Bimbo's Restaurant, Inc.* 558 P.2d 69 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Relevancy of evidence of subsequent habit. - Absent evidence tending to show that a habit existed in 1972, a 1975 habit would not be relevant to a 1972 incident. *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).

"Instances of conduct sufficient in number" construed. - This rule contemplates introduction of evidence concerning sufficient instances of routine practice to warrant a finding that the practice was routine, and here the "sufficient in number" requirement was not satisfied since only one instance of an arguably similar incident was given. *State v. Ross*, 88 N.M. 1, 536 P.2d 265 (Ct. App. 1975).

Law reviews. - For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Survey of New Mexico Law, 1982-83: Evidence," see 14 N.M.L. Rev. 161 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 303, 316 to 318.

Admissibility of evidence showing plaintiff's antecedent intemperate habits, in personal injury motor vehicle accident action, 46 A.L.R.2d 103.

Proof of mailing by evidence of business or office custom, 45 A.L.R.4th 476.

Products liability: admissibility of defendant's evidence of industry custom or practice in strict liability action, 47 A.L.R.4th 621.

Habit or routine practice evidence under Uniform Evidence Rule 406, 64 A.L.R.4th 567.

Admissibility of evidence of habit or routine practice under Rule 406, Federal Rules of Evidence, 53 A.L.R. Fed. 703.

23 C.J.S. Criminal Law § 830; 32 C.J.S. Evidence §§ 582, 597.

11-407. Subsequent remedial measures.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 407 of the Federal Rules of Evidence.

Cumulative evidence not necessarily admissible. - This rule does not mandate that subsequent remedial measures be admitted once the issue of the feasibility of those measures has been controverted: When such evidence would be strictly cumulative, its exclusion is harmless. *Davila v. Bodelson*, 103 N.M. 243, 704 P.2d 1119 (Ct. App. 1985).

Law reviews. - For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 275, 309, 628.

Admissibility of evidence of repairs, change of conditions or precautions taken after accident, 64 A.L.R.2d 1296.

Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence, 50 A.L.R. Fed. 935.

65A C.J.S. Negligence §§ 221, 224, 225.

11-408. Compromise and offers to compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not

admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution.

Committee commentary. - This rule was changed to conform to federal rule. Addition of the third sentence makes facts disclosed during compromised negotiation admissible if otherwise discoverable.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 408 of the Federal Rules of Evidence.

Rule protects only those who are parties to a compromise. Where a defendant is not a party to the compromise, she cannot avail herself of its protection. *State v. Martinez*, 95 N.M. 795, 626 P.2d 1292 (Ct. App. 1979).

Evidence of compromise proper to show other than liability or invalidity. - Since this rule excludes evidence only when its purpose is proving validity or invalidity of the claim or its amount, an offer for another purpose is not within this rule, and evidence of a compromise may be used to prove any other consequential material fact in issue. *Jesko v. Stauffer Chem. Co.*, 89 N.M. 786, 558 P.2d 55 (Ct. App. 1976).

Proper to show agent's authority. - Authority of a certain agent was a consequential material fact in issue (other than validity of plaintiff's claim or its amount), and the agent's dealings with third parties accordingly were not excluded by this rule. *Jesko v. Stauffer Chem. Co.*, 89 N.M. 786, 558 P.2d 55 (Ct. App. 1976).

In negligence action for failure of a retail store to control crowds, causing plaintiff to fall down an escalator, plaintiff could introduce evidence of the store operations manager's purported promise that the store would pay for any medical bills related to her fall, for the purpose of establishing that the manager had actual or apparent authority to bind the store to pay those expenses. *Romero v. Mervyn's*, 106 N.M. 389, 744 P.2d 164 (1987).

Lien not governed by recording act. - A tax lien is not within the class of written instruments governed by the New Mexico Recording Act, § 14-9-3 NMSA 1978. *Cano v. Lovato*, 105 N.M. 522, 734 P.2d 762 (Ct. App. 1986).

And witness's bias. - Defendant on trial for assaulting peace officer had the right to cross-examine prosecuting witness about an offer made through the district attorney to dismiss charges against defendant and abandon a possible civil suit for \$20,000, since cross-examination was for the purpose of showing bias and lack of credibility of the witness and not for the purpose of proving the validity or invalidity of either the criminal charge of the prospective civil suit. *State v. Doak*, 89 N.M. 532, 554 P.2d 993 (Ct. App. 1976).

Result of compromise itself in issue. - If acceptance of a compromise results in an enforceable contract which is subsequently repudiated in suit on contract, aggrieved party can obviously prove the offer of compromise, its acceptance and the surrounding circumstances. *Jesko v. Stauffer Chem. Co.*, 89 N.M. 786, 558 P.2d 55 (Ct. App. 1976).

Impeachment testimony is admissible as offered for "another purpose". - This rule does not prohibit the introduction of all evidence derived from settlement negotiation. Impeachment testimony comes within evidence offered for "another purpose," and is admissible. *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 98 N.M. 570, 651 P.2d 105 (Ct. App. 1982).

Law reviews. - For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For article, "Survey of New Mexico Law, 1982-83: Evidence," see 14 N.M.L. Rev. 161 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 624, 629 to 632.

Prejudicial effect of reference on voir dire examination of jurors to settlement efforts or negotiations, 67 A.L.R.2d 560.

Admissibility of admissions made in connection with offers or discussions of

compromise, 15 A.L.R.3d 13.

Evidence involving compromise or offer of compromise as inadmissible under Rule 408 of Federal Rules of Evidence, 72 A.L.R. Fed. 592.

15A C.J.S. Compromise and Settlement § 52 et seq.; 31A C.J.S. Evidence §§ 285 to 290.

11-409. Payment of medical and similar expenses.

Evidence of furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an injury is not admissible as an admission of liability for the injury.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 409 of the Federal Rules of Evidence.

Proper to show agent's authority. - In negligence action for failure of a retail store to control crowds, causing plaintiff to fall down an escalator, plaintiff could introduce evidence of the store operations manager's purported promise that the store would pay for any medical bills related to her fall, for the purpose of establishing that the manager had actual or apparent authority to bind the store to pay those expenses. *Romero v. Mervyn's*, 106 N.M. 389, 744 P.2d 164 (1987).

Offer to pay bills not admissible. - Store manager's statement to customer who slipped and fell on premises that store would "take full responsibility" was part of an offer to pay the customer's medical bills and did not constitute an admission against interest. *Holguin v. Smith's Food King Properties, Inc.*, 105 N.M. 737, 737 P.2d 96 (Ct. App. 1987).

Law reviews. - For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence § 624.

Admissibility of evidence showing payment, or offer or promise of payment, of medical, hospital and similar expenses of injured party by opposing party, 65 A.L.R.3d 932.

31A C.J.S. Evidence §§ 285 to 291.

11-410. Offer to plead guilty; nolo contendere; withdrawn plea of guilty.

Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 410 of the Federal Rules of Evidence.

This rule embodies public interest in encouraging negotiations concerning pleas between the criminal defendant and the state. *State v. Trujillo*, 93 N.M. 724, 605 P.2d 232 (1980).

Plain import of rule is to prohibit admissibility of statements made during plea negotiations in any proceeding. *State v. Trujillo*, 93 N.M. 724, 605 P.2d 232 (1980).

If plea is never entered or entered and withdrawn at trial it is to appear as though the earlier plea and/or plea discussions never took place. *State v. Trujillo*, 93 N.M. 724, 605 P.2d 232 (1980).

Incriminating statement made during plea negotiation may not be admitted at trial for either substantive or impeachment purposes. *State v. Trujillo*, 93 N.M. 724, 605 P.2d 232 (1980).

Law reviews. - For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 528, 701, 702.

Withdrawal of plea of guilty or nolo contendere, before sentence, under Rule 32(d) of Federal Rules of Criminal Procedure, 6 A.L.R. Fed. 665.

Withdrawal of plea of guilty or nolo contendere, after sentence, under Rule 32(d) of Federal Rules of Criminal Procedure, 9 A.L.R. Fed. 309.

23 C.J.S. Criminal Law § 882 et seq.; 31A C.J.S. Evidence § 300.

11-411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership or control, or bias or prejudice of a witness.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 411 of the Federal Rules of Evidence.

Rule has codified the general rule that evidence that a defendant carries liability insurance is inadmissible in an action for negligence because it is immaterial to the issues tried and prejudicial. *Cardoza v. Town of Silver City*, 96 N.M. 130, 628 P.2d 1126 (Ct. App.), cert. denied, 96 N.M. 116, 628 P.2d 686 (1981).

Evidence that party is insured is generally inadmissible because it is immaterial to the issues tried and prejudicial, but insurance may be mentioned when it is highly relevant to an issue in the lawsuit. *Mac Tyres, Inc. v. Vigil*, 92 N.M. 446, 589 P.2d 1037 (1979).

Trial court has great deal of discretion in applying this rule and Rule 11-403 and its ruling can only be held to be reversible error in the event of an abuse of that discretion. *Mac Tyres, Inc. v. Vigil*, 92 N.M. 446, 589 P.2d 1037 (1979).

Punitive damages liability coverage is not an asset which can be used to measure true punishment and, therefore, it should not be considered by the jury in assessing a defendant's financial standing. *Baker v. Armstrong*, 106 N.M. 395, 744 P.2d 170 (1987).

Exclusion of evidence of insurance coverage may result in reversible error only when, in addition to abuse of discretion by the trial court, prejudice from the exclusion is found. *Davila v. Bodelson*, 103 N.M. 243, 704 P.2d 1119 (Ct. App. 1985).

Rules for determining admissibility of evidence of insurance coverage. - See *Martinez v. Teague*, 96 N.M. 446, 631 P.2d 1314 (Ct. App. 1981).

Insurance evidence admissible except on issue of negligence. - Evidence that a person was or was not insured against liability is admissible when offered for any purpose which is relevant and basic to a fair trial, except upon the issue whether he acted negligently or otherwise wrongfully. *Grammer v. Kohlhaas Tank & Equip. Co.*, 93 N.M. 685, 604 P.2d 823 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Insurance-disclosing evidence is prohibited when the proponent is plainly offering it to show that the insured party was any more or less negligent or wrongful by virtue of his insured status. *Safeco Ins. Co. of Am. v. United States Fid. & Guar. Co.*, 101 N.M. 148, 679 P.2d 816 (1984).

And admissible to rebut earlier testimony. - Evidence of insurance, not used to show the wrongful acts of the insured, is admissible to rebut the discrediting effect and correct any wrong impression of earlier testimony by a witness. *Martinez v. Teague*, 96 N.M. 446, 631 P.2d 1314 (Ct. App. 1981).

Insurance evidence relevant on issue of damages. - Evidence that plaintiffs in a personal injury suit filed a proof of loss for injuries resulting from a later accident was relevant on the issue of damages, and the collateral source rule was not a proper basis for excluding the tendered evidence. *Selgado v. Commercial Whse. Co.*, 86 N.M. 633, 526 P.2d 430 (Ct. App. 1974).

Insurance evidence relevant to establish family purpose theory. - Fact defendant's father held an insurance policy on the vehicle driven by his daughter was admissible for purpose of establishing father's responsibility for his daughter's negligence on the family purpose theory. *Bloom v. Lewis*, 97 N.M. 435, 640 P.2d 935 (Ct. App. 1980).

Unfair prejudice remaining consideration. - Even if evidence of insurance is relevant, it still may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Phillips v. Smith*, 87 N.M. 19, 528 P.2d 663 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974). See Rule 11-403.

Prompt admonishment following improper statement avoids mistrial. - Where a defense counsel's reference to insurance in an opening statement is improper, prompt admonishment thereof by the court is sufficient to avoid a mistrial because the admonishment eliminates any prejudicial effect. *Cardoza v. Town of Silver City*, 96 N.M. 130, 628 P.2d 1126 (Ct. App.), cert. denied, 96 N.M. 116, 628 P.2d 686 (1981).

And irresponsible or inadvertent answer not grounds for mistrial. - If a lawyer propounds a question which calls for proper evidence, the fact that an irresponsible or inadvertent answer includes a reference to insurance will not be grounds for declaring a mistrial. *Cardoza v. Town of Silver City*, 96 N.M. 130, 628 P.2d 1126 (Ct. App.), cert. denied, 96 N.M. 116, 628 P.2d 686 (1981).

But prejudicial for party to intentionally offer insurance evidence. - To be prejudicial, a party must offer evidence that a defendant is covered by insurance, or intentionally use some circuitous method of informing the jury of liability insurance, followed by the admission thereof. *Cardoza v. Town of Silver City*, 96 N.M. 130, 628 P.2d 1126 (Ct. App.), cert. denied, 96 N.M. 116, 628 P.2d 686 (1981).

Law reviews. - For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For article, "Survey of New Mexico Law, 1979-80: Torts," see 11 N.M.L. Rev. 217 (1981).

For article, "Evidence I," see 13 N.M.L. Rev. 407 (1983).

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. - 29 Am. Jur. 2d Evidence §§ 404 to 407.

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.

Propriety and prejudicial effect of trial counsel's reference or suggestion in medical malpractice case that defendant is insured, 71 A.L.R.4th 1025.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 A.L.R. Fed. 541.

31A C.J.S. Evidence § 164; 98 C.J.S. Witnesses §§ 567, 568.

11-412. Use of evidence obtained under immunity order precluded.

Evidence compelled under an order requiring testimony or the production of a record, document or other object notwithstanding a privilege against self-incrimination, or any information directly or indirectly derived from such evidence, may not be used against the person compelled to testify or produce in any criminal case, except a prosecution for perjury committed in the course of the testimony or in a contempt proceeding for failure to comply with the order.

Committee commentary. - This rule was added in conjunction with adoption of witness immunity rule. See also Rule 5-116. The New Mexico rules were derived from the federal statute. See 18 U.S.C. § 6003.

COMPILER'S ANNOTATIONS

Judicial authority to grant use immunity. - Taken together, Crim. P. Rule 58 (now Rule 5-116), this rule, and § 31-6-15 give the trial court the authority to grant use immunity when it is applied for by the prosecutor. *State v. Summerall*, 105 N.M. 84, 728 P.2d 835 (Ct. App. 1986).

Immunity may be given from prosecution for past perjury. *State v. Summerall*, 105 N.M. 84, 728 P.2d 835 (Ct. App. 1986).

Witness may not be given permission to testify untruthfully in any immunity order. *State v. Summerall*, 105 N.M. 84, 728 P.2d 835 (Ct. App. 1986).

Use immunity under New Mexico law is available to witnesses only at request of the state and there is no statutory or judicial provision for a defendant's invocation of use immunity for a witness; defendant suffered no prejudice necessary to find ineffective assistance of counsel as result of failure of his attorney to find use immunity statute where defendant did not demonstrate that prosecution would have granted witness immunity, thereby permitting witness to testify even if defense attorney had discovered the statute. *McGee v. Crist*, 739 F.2d 505 (10th Cir. 1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 210 to 216, 221, 222; 81 Am. Jur. 2d Witnesses §§ 518, 568.

Right of immune jury witness to obtain access to government affidavits and other supporting materials in order to challenge legality of court-ordered wiretap, 60 A.L.R. Fed. 706.

98 C.J.S. Witnesses § 439.

11-413. Sex crimes; testimony; limitations; in camera hearing.

A.

Evidence of the victim's past sexual conduct. In prosecutions under Sections 30-9-11 to 30-9-15 NMSA 1978, evidence of the victim's past sexual conduct, opinion evidence thereof or of reputation for past sexual conduct shall not be admitted unless, and only to the extent that the court finds, that evidence of the victim's past sexual conduct is material and relevant to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

B.

Pretrial motion required. If such evidence is proposed to be offered, the defendant must file a written motion prior to trial. The court shall hear such pretrial motion prior to trial at an in camera hearing to determine whether such evidence is admissible under Paragraph A of this rule. If new information, which the defendant proposes to offer under Paragraph A of this rule, is discovered prior to or during the trial, the judge shall order an in camera hearing to determine whether the proposed evidence is admissible under Paragraph A of this rule. If such proposed evidence is deemed admissible, the court shall issue a written order stating what evidence may be introduced by the defendant and stating the specific questions to be permitted.

COMPILER'S ANNOTATIONS

Evidence of prior rape complaints concern past sexual conduct and will pass the initial relevancy test of 30-9-16 NMSA 1978 and this rule if the prior complaints are demonstrably false or unsubstantiated. State v. Johnson, 102 N.M. 110, 692 P.2d 35 (Ct. App. 1984).

Evidence of victim's prior sexual conduct and prior rape excluded. - In prosecution for second-degree criminal sexual penetration where theory of defense was that of fabrication of the rape and consensual intercourse, trial properly excluded evidence of prior rape of victim and victim's prior sexual conduct. State v. Fish, 101 N.M. 329, 681 P.2d 1106 (1984).

Suppression of past sexual encounter of victim and third party. - Trial court acted within its discretion in suppressing evidence of a past sexual encounter of the victim and a third party during which the victim allegedly affixed the ropes found on the bed to restrain the third party in the course of consensual sexual activity, where such evidence was irrelevant to defendant's culpability for the crimes charged, advanced no legitimate defense, excuse, or justification for the crimes charged, and were likely to inject false issues and confuse the jury. State v. Swafford, N.M. , 782 P.2d 385 (Ct. App. 1989).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Admissibility in rape case, under Rule 412 of Federal Rules of Evidence, of victim's past sexual behavior, 65 A.L.R. Fed. 519.

Article 5

Privileges

11-501. Privileges recognized only as provided.

Except as otherwise required by constitution, and except as provided in these rules or in other rules adopted by the supreme court, no person has a privilege to:

- A. refuse to be a witness; or
- B. refuse to disclose any matter; or
- C. refuse to produce any object or writing; or

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

COMPILER'S ANNOTATIONS

Cross-references. - For privilege against self-incrimination, see N.M. Const., art. II, § 15.

As to privileged communications generally, see 38-6-6 NMSA 1978.

Common-law evidentiary privileges abrogated. - This rule is very different from Rule 501 of the Federal Rules of Evidence, which states that privileges are "governed by the privileges of the common law." The fact that New Mexico did not follow the approach of congress but instead limited the privileges available to those recognized by the constitution, the Rules of Evidence or other rules of the supreme court manifests the abrogation and inapplicability of the common-law evidentiary privileges. *State ex rel. Attorney Gen. v. First Judicial Dist. Court*, 96 N.M. 254, 629 P.2d 330 (1981).

Conflict between rules and statutes resolved in favor of rules. - Any conflict between rules of evidence and statutes that relate to procedure must be resolved in favor of the rules. *Maestas v. Allen*, 97 N.M. 230, 638 P.2d 1075 (1982).

And statutory privilege invalid. - Under this rule, no one has a privilege, unless provided by the constitution, the Rules of Evidence or a supreme court rule, to refuse to be a witness or to disclose any matter. Indeed, if any portion of the Medical Malpractice Act or its internal operating rules could be construed to grant such a privilege, it would be an invalid provision under this rule. *Salazare v. St. Vincent Hosp.*, 96 N.M. 409, 631 P.2d 315 (Ct. App.), *aff'd in part and rev'd in part*, 95 N.M. 147, 619 P.2d 823 (1980).

If 40-5-11 NMSA 1978 (now repealed) is an attempt by the legislature to create an evidentiary privilege, this statutory provision must fall because it is in conflict with the New Mexico Rules of Evidence. *Maestas v. Allen*, 97 N.M. 230, 638 P.2d 1075 (1982).

No statutory privilege created. - Section 41-9-5 NMSA 1978, establishing the confidentiality of records of a health care provider review organization does not create an evidentiary privilege in civil litigation, and thus does not come into direct conflict with this rule. *Southwest Community Health Servs. v. Smith*, 107 N.M. 196, 755 P.2d 40 (1988).

Statutory privilege unconstitutional. - In view of the clear and unambiguous assertion of the supreme court in this rule that no person has a privilege, except as provided by constitution or rule of the court, and since under N.M. Const., art. VI, § 3, and art. III, § 1, power to prescribe rules of evidence and procedure is vested exclusively in the supreme court, and legislature lacks power to prescribe rules by statute, the privilege purportedly created by 38-6-7 NMSA 1978 (relating to news sources and information) is constitutionally invalid and cannot be relied upon or enforced in judicial proceedings. *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).

Patient agreeing to doctor's communication when attorney is present. - Although there is no longer a physician-patient privilege in New Mexico, when the patient objects to ex parte communications between his doctor and anyone else, there is no logical reason for ordering that type of discovery, disclosure, or communication - particularly when the patient willingly agrees that the communication may occur when his attorney is also present. *Smith v. Ashby*, 106 N.M. 358, 743 P.2d 114 (1987).

Physician's affidavit held not covered by privilege. - Affidavit of physician who had previously treated plaintiff submitted in support of defendant's motion for partial summary judgment was properly obtained and submitted since testimony was not covered by physician-patient privilege. *Trujillo v. Puro*, 101 N.M. 408, 683 P.2d 963 (Ct. App. 1984).

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. - 81 Am. Jur. 2d Witnesses § 141 et seq.

Right of one against whom testimony is offered to invoke privilege of communication between others, 2 A.L.R.2d 645.

Admissibility in divorce action for adultery of wife's statement that husband was not father of her child, 4 A.L.R.2d 567.

Conversations between husband and wife relating to property or business as within rule excluding private communications between them, 4 A.L.R.2d 835.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse, 10 A.L.R.2d 1389.

Crimes against spouse within exception permitting testimony by one spouse against

other in criminal prosecution, 11 A.L.R.2d 646.

Privilege of communications or reports between liability or indemnity insurer and insured, 22 A.L.R.2d 659.

Inferences arising from refusal of witness other than accused to answer question on the ground that answer would tend to incriminate him, 24 A.L.R.2d 895.

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician, 25 A.L.R.2d 1429.

Dead man's statute as applicable to spouse of party disqualified from testifying, 27 A.L.R.2d 538.

Court's power to determine, upon government's claim of privilege, whether official information contains state secrets or other matters disclosure of which is against public interest, 32 A.L.R.2d 391.

Effect of divorce or annulment on competency of one former spouse as witness against other in criminal prosecution, 38 A.L.R.2d 570.

Privilege of communications by or to nurse or attendant, 47 A.L.R.2d 742.

Party's waiver of privilege as to communications with counsel by taking stand and testifying, 51 A.L.R.2d 521.

Right of physician, notwithstanding physician-patient privilege, to give expert testimony based on hypothetical question, 64 A.L.R.2d 1056.

Privilege as to communications to attorney in connection with drawing of will, 66 A.L.R.2d 1302.

Waiver of attorney-client privilege by personal representative or heir of deceased client or by guardian of incompetent, 67 A.L.R.2d 1268.

Calling or offering accused's spouse as witness for prosecution as prejudicial misconduct, 76 A.L.R.2d 920.

Admissibility of inculpatory statements made in presence of accused to which he refuses to answer on advice of counsel, 77 A.L.R.2d 463.

Husband or wife as competent witness for or against cooffender with spouse, 90 A.L.R.2d 648.

Federal courts as following law of forum state with respect to privileged communications, 95 A.L.R.2d 320.

Persons other than client or attorney affected by, or included within, attorney-client privilege, 96 A.L.R.2d 125.

Who may waive privilege of confidential communication to physician by person since deceased, 97 A.L.R.2d 393.

Right of corporation to assert attorney-client privilege, 98 A.L.R.2d 241.

Testimony as to communications or observations as to mental condition of patient treated for other condition, 100 A.L.R.2d 648.

Applicability of attorney-client privilege to communications with respect to contemplated tortious acts, 2 A.L.R.3d 861.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 A.L.R.3d 1244.

Privilege of newspaper or magazine and persons connected therewith not to disclose communications to or information acquired by such person, 7 A.L.R.3d 591.

Applicability in criminal proceedings of privilege as to communications between physician and patient, 7 A.L.R.3d 1458.

Implied obligation not to use trade secrets or similar confidential information disclosed during unsuccessful negotiations for sale, license or the like, 9 A.L.R.3d 665.

Attorney-client privilege as affected by communications between several attorneys, 9 A.L.R.3d 1420.

Attorney-client privilege as affected by its assertion as to communications, or transmission of evidence relating to crime already committed, 16 A.L.R.3d 1029.

Disclosure of name, identity, address, occupation or business of client as violation of attorney-client privilege, 16 A.L.R.3d 1047.

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.

Power of trustee in bankruptcy to waive privilege of communications available to bankrupt, 31 A.L.R.3d 557.

Propriety and prejudicial effect of comment or instruction by court with respect to party's refusal to permit introduction of privileged testimony, 34 A.L.R.3d 775.

Communications by corporation as privileged in stockholders' action, 34 A.L.R.3d 1106.

Competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction, 36 A.L.R.3d 820.

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.

Witness' refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions, 43 A.L.R.3d 1413.

Privilege, in judicial or quasi-judicial proceedings, arising from relationship between psychiatrist or psychologist and patient, 44 A.L.R.3d 24.

Who is "clergyman" or the like entitled to assert privilege attaching to communications to clergymen or spiritual advisers, 49 A.L.R.3d 1205.

Communications to social worker as privileged, 50 A.L.R.3d 563.

Right of member, officer, agent or director of private corporation or unincorporated association to assert personal privilege against self-incrimination with respect to production of corporate books or records, 52 A.L.R.3d 636.

Libel and slander: employer's privilege as to communications to news media concerning employees, 52 A.L.R.3d 739.

Defense attorney as witness for his client in state criminal case, 52 A.L.R.3d 887.

Confidentiality of records as to recipients of public welfare, 54 A.L.R.3d 768.

Applicability of attorney-client privilege to matters relating to drafting of nonexistent or unavailable nontestamentary documents, 55 A.L.R.3d 1322.

Admissibility, in criminal prosecution, of evidence obtained by electronic surveillance of prisoner, 57 A.L.R.3d 172.

Libel and slander: privileged nature of communications made in course of grievance or arbitration procedure provided for by collective bargaining agreement, 60 A.L.R.3d

1041.

Libel and slander: privileged nature of communication to other employees or employees' union of reasons for plaintiff's discharge, 60 A.L.R.3d 1080.

Matters to which the privilege covering communications to clergyman or spiritual adviser extends, 71 A.L.R.3d 794.

Privilege of witness to refuse to give answers tending to disgrace or degrade him or his family, 88 A.L.R.3d 304.

Competency of one spouse to testify against other in prosecution for offense against child of both or either, 93 A.L.R.3d 1018.

Testimonial privilege for confidential communications between relatives other than husband and wife - state cases, 6 A.L.R.4th 544.

Testimony before or communications to private professional society's judicial commission, ethics committee, or the like, as privileged, 9 A.L.R.4th 807.

Physician-patient privilege as extending to patient's medical or hospital records, 10 A.L.R.4th 522.

Privileged communications between accountant and client, 33 A.L.R.4th 539.

Presence of child at communication between husband and wife as destroying confidentiality of otherwise privileged communication between them, 39 A.L.R.4th 480.

Physician's tort liability for unauthorized disclosure of confidential information about patient, 48 A.L.R.4th 668.

What constitutes privileged communications with preparer of federal tax returns so as to render communication inadmissible in federal tax prosecution, 36 A.L.R. Fed. 686.

Situations in which federal courts are governed by state law of privilege under Rule 501 of Federal Rules of Evidence, 48 A.L.R. Fed. 259.

Propriety of court's failure or refusal to strike direct testimony of government witness who refuses, on grounds of self-incrimination, to answer questions on cross-examination, 55 A.L.R. Fed. 742.

"Scholar's privilege" under Rule 501 of Federal Rules of Evidence, 81 A.L.R. Fed. 904.

Academic peer review privilege in federal court, 85 A.L.R. Fed. 691.

97 C.J.S. Witnesses § 252; 98 C.J.S. Witnesses §§ 430 to 457.

11-502. Required reports privileged by statute.

A person, corporation, association or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report or other failure to comply with the law in question.

COMPILER'S ANNOTATIONS

Rule not applicable to primary testimony leading to privileged report. - By its terms, this rule refers to written documents; it does not apply to proof of primary testimony which may have contributed to the content of a privileged report or return. *Salazare v. St. Vincent Hosp.*, 96 N.M. 409, 631 P.2d 315 (Ct. App.), *aff'd in part and rev'd in part*, 95 N.M. 147, 619 P.2d 823 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses § 143.

97 C.J.S. Witnesses § 264.

11-503. Lawyer-client privilege.

A.

Definitions. As used in this rule:

(1) a "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer or a representative of a lawyer with a view to obtaining professional legal services from him;

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

(3) a "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services;

(4) a communication is "confidential" if not intended to be disclosed to third persons

other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

B.

General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client,

(1) between himself or his representative and his lawyer or his lawyer's representative, or

(2) between his lawyer and the lawyer's representative, or

(3) by him or his lawyer to a lawyer representing another in a matter of common interest, or

(4) between representatives of the client or between the client and a representative of the client, or

(5) between lawyers representing the client.

C.

Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee or similar representative of a corporation, association or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

D.

Exceptions. There is no privilege under this rule:

(1)

Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2)

Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the

claims are by testate or intestate succession or by inter vivos transaction; or

(3)

Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or

(4)

Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5)

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

COMPILER'S ANNOTATIONS

Cross-references. - For statutory attorney-client privilege, see 38-6-6 NMSA 1978. But see also Rule 11-501 and notes thereto.

Defendant objecting to discovery of doctor's report prepared for defendant's counsel under court order has burden of establishing existence of lawyer-client privilege. *State v. Gallegos*, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Presence of another attorney will not destroy confidential nature of communication, and this is especially true when both attorneys, as in this case, are considered to be representing the client. *State v. Valdez*, 95 N.M. 70, 618 P.2d 1234 (1980).

Testimony of informant's former attorney inadmissible. - The testimony of an informant's former attorney offered for the purpose of impeaching the informant's reputation for truthfulness violates the attorney-client privilege and is inadmissible under the Rules of Evidence. *State v. Hinojos*, 95 N.M. 659, 625 P.2d 588 (Ct. App. 1980).

Witness waives attorney-client privilege by voluntary disclosure of discussion of "turning state's evidence". - A witness opens up the area of attorney-client communications regarding the subject matter of granting immunity in exchange for favorable prosecution

testimony by a voluntary disclosure of a discussion of "turning state's evidence." The trial court cannot then refuse to allow the witness to be questioned on this matter, or refuse to permit the defense to subpoena the witness' lawyer, on the alleged grounds of attorney-client privilege. *State v. Ballinger*, 99 N.M. 707, 663 P.2d 366 (Ct. App. 1983), rev'd on other grounds, 100 N.M. 583, 673 P.2d 1316 (1984).

Confession made by potential defense witness to defense attorney held privileged. - Federal court did not err in declining to overrule New Mexico supreme court ruling that confession made by potential defense witness to defense attorney was privileged where, although defense attorney did not actually represent the witness, defense attorney was, in effect, the witness' "attorney" because witness was being represented by member of defense attorney's public defender staff in another proceeding. *Valdez v. Winans*, 738 F.2d 1087 (10th Cir. 1984).

Law reviews. - For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses §§ 172 to 229.

Privilege of communication to attorney as affected by termination of employment, 5 A.L.R. 728.

Privilege of communication to attorney by client in attempt to establish false claim, 5 A.L.R. 977; 9 A.L.R. 1081.

Privileges as to communications to attorney in connection with drawing of will, 64 A.L.R. 184; 66 A.L.R.2d 1302.

Attorney-client privilege as affected by wrongful or criminal character of contemplated acts or course of conduct, 125 A.L.R. 508.

Physician-patient, attorney-client or priest-penitent privilege as applicable in nonjudicial proceeding or investigation, 133 A.L.R. 732.

Attorney-client privilege as applicable to communications between attorney and client's agent, employee, spouse or relative, 139 A.L.R. 1250.

Attorney-client privilege as applied to communications in presence of two or more persons interested in the subject matter to which the communications relate, 141 A.L.R. 553.

Casualty report by insured as within privilege extended to communications from client to attorney, 22 A.L.R.2d 659.

Admissibility of testimony by an attorney as to unperformed compromise agreement, 26 A.L.R.2d 864.

Proof of due execution of lost will as effected by privilege attaching to attorney-client communications, 41 A.L.R.2d 401.

Waiver by party: of privilege as to communications with counsel by taking stand and testifying, 51 A.L.R.2d 521.

Who may claim privilege as to communications to attorney in connection with drawing of will, 66 A.L.R.2d 1302.

Waiver of attorney-client privilege by personal representative or heir of deceased client or by guardian of incompetent, 67 A.L.R.2d 1268.

Corporation's right to assert attorney-client privilege, 98 A.L.R.2d 241.

Applicability of attorney-client privilege to communications with respect to contemplated tortious acts, 2 A.L.R.3d 861.

Attorney-client privilege as affected by communications between several attorneys, 9 A.L.R.3d 1420.

Attorney-client privilege as affected by its assertion as to communications, or transmission of evidence, relating to crime already committed, 16 A.L.R.3d 1029.

Disclosure of name, identity, address, occupation or business of client as violation of attorney-client privilege, 16 A.L.R.3d 1047.

Power of trustee in bankruptcy to waive privilege of communications available to bankrupt, 31 A.L.R.3d 557.

Censorship of convicted prisoners' "legal" mail, 47 A.L.R.3d 1150.

Censorship and evidentiary use of unconvicted prisoners' mail, 52 A.L.R.3d 548.

Defense attorney as witness for his client in criminal case, 52 A.L.R.3d 887.

Applicability of attorney-client privilege to communications relating to drafting of documents, 55 A.L.R.3d 1322.

Admissibility of defense communications made in connection with plea bargaining, 59 A.L.R.3d 441.

Rights and duties of attorney in a criminal prosecution where client informs him of intention to present perjured testimony, 64 A.L.R.3d 385.

Failure to communicate with client as basis for disciplinary action against attorney, 80 A.L.R.3d 1240.

Applicability of attorney-client privilege to communications made in presence of or solely to or by third person, 14 A.L.R.4th 594.

Attorney-client privilege as extending to communications relating to contemplated civil fraud, 31 A.L.R.4th 458.

Privilege as to communications between lay representative in judicial or administrative proceedings and client, 31 A.L.R.4th 1226.

Who is "representative of the client" within state statute or rule privileging communications between an attorney and the representative of the client, 66 A.L.R.4th 1227.

Attorney's disclosure, in federal proceedings, of identity of client as violating attorney-client privilege, 84 A.L.R. Fed. 852.

97 C.J.S. Witnesses §§ 16, 254, 276 to 292, 303.

11-504. Psychotherapist-patient privilege.

A.

Definitions.

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is

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

(b) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

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

B.

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

C.

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

D.

Exceptions.

(1)

Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2)

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

(3)

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

COMPILER'S ANNOTATIONS

There is no state physician-patient privilege except as provided in this rule. *Sanchez v. Wohl Shoe Co.*, 108 N.M. 276, 771 P.2d 984 (Ct. App. 1989).

The purpose of this rule is to encourage persons who need medical consultation, examination or interview to seek the advice and opinion of a psychotherapist without fear of betrayal. *State ex rel. Human Servs. Dep't v. Levario*, 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

A communication includes: (1) verbal communication of a patient to the psychotherapist; (2) information or knowledge gained by observation and personal examination of the patient; (3) inferences and conclusions drawn therefrom; and (4) exhibiting the body or any part thereof to the psychotherapist for an opinion, examination or diagnosis. *State ex rel. Human Servs. Dep't v. Levario*, 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

Prerequisites to status as "confidential" communication. - Communications between psychotherapists and patients are not ipso facto confidential. To be confidential, two conditions must be present: (1) the patient intends the communications to be undisclosed; and (2) nondisclosure would further the interest of the patient. *State ex rel. Human Servs. Dep't v. Levario*, 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

Confidential nature of communication must be conveyed by patient to psychotherapist. - It is not sufficient for a patient to say that in the patient's mind the communications were confidential and furthered her own interest. It must be manifested in some fashion with words or words and conduct which lead a psychotherapist to understand or believe that the information obtained is intended to be confidential. *State ex rel. Human Servs. Dep't v. Levario*, 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

Section 61-6-14(B)(5) does not create a privilege. - Section 61-6-14(B)(5) NMSA 1978, precluding physician from "willfully or negligently divulging a professional secret," does not create a privilege; it only describes ethical constraints placed upon a physician, and because there is no physician-patient privilege in New Mexico, except as provided in this rule, statements by a treating physician concerning his patient do not involve ethical issues unless they relate to matters revealed to a physician by his patient in confidence. *Trujillo v. Puro*, 101 N.M. 408, 683 P.2d 963 (Ct. App. 1984) (decided under prior law).

Privilege arises where department of human services induces individual to obtain counseling. - If the department of human services induces a person to be examined and counseled by psychologists, something she would not do but for such inducement, the department is estopped by such conduct to use the psychologists' testimony. *State ex*

rel. Human Servs. Dep't v. Levario, 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

Defendant's letter constituted communication in course of court-ordered examination. - Letter written by defendant while in jail and addressed to a doctor who had participated in a court-ordered psychiatric examination was a communication made in the course of a court-ordered examination; it was not privileged under this rule because the trial court had not ordered otherwise. State v. Milton, 86 N.M. 639, 526 P.2d 436 (Ct. App. 1974).

Privilege inapplicable to court-ordered examinations. - To the extent that a psychologist's testimony regarding a mother's mental condition is based on court-ordered examinations, the psychotherapist-patient privilege is inapplicable. State Health & Social Servs. Dep't v. Smith, 93 N.M. 348, 600 P.2d 294 (Ct. App.), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Reliance on mental condition as defense precludes exercise of privilege. - Where communications to psychologists are relevant to a person's mental condition, but, in a later proceeding, that person relies on her mental condition in opposing the termination of her parental rights, there is no privilege as to those communications under Subparagraph D(3). State ex rel. Human Servs. Dep't v. Levario, 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

Objection limited to privileged testimony. - In a parental termination hearing, where the mother does not attempt to distinguish between nonprivileged testimony and testimony allegedly subject to the privilege, but objects to the entire testimony, the objection is properly overruled. State Health & Social Servs. Dep't v. Smith, 93 N.M. 348, 600 P.2d 294 (Ct. App.), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Law reviews. - For comment, "Mental Health Law - Temporary Detention of 'Voluntary' Patients by Hospital Authorities: Due Process Issues," see 12 N.M.L. Rev. 791 (1982).

For article, "Survey of New Mexico Law, 1982-83: Evidence," see 14 N.M.L. Rev. 161 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses §§ 230 to 283.

Waiver by beneficiary or personal representative, in actions on insurance policy, of privilege of communications to physician, 15 A.L.R. 1544.

Privilege as to family matters or affairs incidentally learned by physician while

professionally attending patient, 24 A.L.R. 1202.

Validity, construction and effect of stipulation in application or policy of insurance waiving privilege as to communication to or testimony by physician, 54 A.L.R. 412.

Privilege as to facts learned on autopsy or post-mortem examination, 58 A.L.R. 1134.

Classes of persons within term "physician" in rule as to privileged communications, 68 A.L.R. 176.

Privilege in respect of testimony of physician or surgeon that he noticed odor of liquor on patient's breath or other indications of recent use of liquor, 79 A.L.R. 1131.

Presence of third person as affecting privileged character of communications between patient and physician, 96 A.L.R. 1419.

Voluntary disclosure at trial of one's physical condition at certain time as waiver of privilege as regards testimony by physician as to condition at earlier time, 98 A.L.R. 1284.

Physician-patient privilege as affected by contention that purpose was examination and not treatment, 107 A.L.R. 1495.

When testimony by patient deemed to waive physician-patient privilege, 114 A.L.R. 798.

Physician-patient, attorney-client or priest- penitent privilege as applicable in nonjudicial proceeding or investigation, 133 A.L.R. 732.

Right of defendant in criminal case to claim privilege as to communication between physician and alleged victim, 2 A.L.R.2d 645.

Waiver under statutory provision relaxing, in event of action for personal injuries, rule in respect of communications between physician and patient, 25 A.L.R.2d 1429.

Privileged nature of hospital record relating to intoxication or sobriety of patient, 38 A.L.R.2d 778.

Privilege of communications by or to nurse or attendant, 47 A.L.R.2d 742.

Hypothetical question, right of physician, notwithstanding physician-patient privilege, to give expert testimony based on, 64 A.L.R.2d 1056.

Death, who may waive privilege of confidential communication to physician by person since deceased, 97 A.L.R.2d 393.

Testimony as to communications or observations as to mental condition of patient

treated for other condition, 100 A.L.R.2d 648.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 A.L.R.3d 1244.

Applicability in criminal proceedings of privilege as to communications between physician and patient, 7 A.L.R.3d 1458.

Physician's tort liability, apart from defamation, for unauthorized disclosure of confidential information about plaintiff, 20 A.L.R.3d 1109.

Admissibility of physician's testimony as to patient's statements or declarations, other than res gestae, during medical examinations, 37 A.L.R.3d 778.

Privilege, in judicial or quasi-judicial proceedings, arising from relationship between psychiatrist or psychologist and patient, 44 A.L.R.3d 24.

Discovery, in medical malpractice action, of names of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 74 A.L.R.3d 1055.

Discovery: physician-patient privilege as applied to physician's testimony concerning wound required to be reported to public authority, 85 A.L.R.3d 1196.

Applicability of attorney-client privilege to evidence or testimony in subsequent action between parties originally represented contemporaneously by same attorney, with reference to communication to or from one party, 4 A.L.R.4th 765.

Liability of doctor, psychiatrist, or psychologist for failure to take steps to prevent patient's suicide, 17 A.L.R.4th 1128.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Validity, construction, and application of statute limiting physician-patient privilege in judicial proceedings relating to child abuse or neglect, 44 A.L.R.4th 649.

Compelling testimony of opponent's expert in state court, 66 A.L.R.4th 213.

Attorney's work product privilege, under Rule 26(b)(3) of the Federal Rules of Civil Procedure, as applicable to documents prepared in anticipation of terminated litigation, 41 A.L.R. Fed. 123.

97 C.J.S. Witnesses §§ 283 to 289, 293 to 301.

11-505. Husband-wife privileges.

A.

Definition. As used in this rule, a communication is "confidential" if made privately and not intended for further disclosure.

B.

General rule of privileges. A person has a privilege in any proceeding to refuse to disclose and to prevent another from disclosing a confidential communication by the person to that person's spouse while they were husband and wife.

C.

Who may claim the privilege. The privilege under Paragraph B may be claimed by the spouse who made the confidential communication, by his guardian or conservator, or by his personal representative if he is deceased. The spouse to whom the confidential communication was made may claim the privilege on behalf of the other. The spouse's authority to do so is presumed in the absence of evidence to the contrary.

D.

Exceptions. There is no privilege under this rule:

(1) in proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse;

(2) as to matters occurring prior to the marriage; or

(3) in a civil action brought by or on behalf of one spouse or a child of either against the other spouse or a child of either.

Committee commentary. - This rule was completely rewritten in 1976 to include a privilege for confidential communications between husband and wife. This rule is not in the federal rules.

COMPILER'S ANNOTATIONS

Cross-references. - For statutory privilege as to communications between husband and wife, see 38-6-6 NMSA 1978. But see also Rule 11-501.

"Confidential communications". - The "communication" contemplated under this rule should be limited to an utterance or expressive act intended by one spouse to convey a meaning or message to the other. State v. Teel, 103 N.M. 684, 712 P.2d 792 (Ct. App. 1985).

Observations by one spouse of the noncommunicative acts of the other, especially acts which are open to the view of others, are not "confidential" communications. State v. Teel, 103 N.M. 684, 712 P.2d 792 (Ct. App. 1985).

Negating presumption of privacy. - Any presumption of privacy granted a marital communication is negated by proof of the presence of a third party at the time the communication was made, or proof that the information communicated was meant to be conveyed to a third person. State v. Teel, 103 N.M. 684, 712 P.2d 792 (Ct. App. 1985).

Privilege inapplicable to testimony of mistress. - Claim that witness and defendant were living together "as man and wife" is insufficient to show a marriage under New Mexico statutes (40-1-1 to 40-1-20 NMSA 1978) and therefore is insufficient to show that witness was defendant's spouse. Testimony of mistress or concubine, being not a legal wife, is admissible, and the privilege contained in this rule does not apply. State v. Lard, 86 N.M. 71, 519 P.2d 307 (Ct. App. 1974).

Defendant's decision not to call wife as witness sufficient exercise of privilege. - It is not necessary for a husband or wife to go upon the stand and there affirmatively "exercise" the marital privilege not to testify; rather the decision of a husband not to call his wife as a witness is a sufficient exercise of the privilege to justify invocation of the protection. State v. Frank, 92 N.M. 456, 589 P.2d 1047 (1979) (decided prior to 1980 amendment).

No child abuse exception if child is unrelated. - In a prosecution for child abuse, where the child involved is neither the natural child, adopted child, nor stepchild of either the defendant or his wife, no exception to the husband-wife privilege may be established. State v. Howell, 93 N.M. 64, 596 P.2d 277 (Ct. App. 1979).

Admission of wife's testimony held harmless error. - Where the defendant was sentenced to death for the killing of a peace officer, the admission of his wife's testimony that the defendant knew the victim was a police officer was harmless error. State v. Compton, 104 N.M. 683, 726 P.2d 837 (1986).

Law reviews. - For note, "The Privilege for Marital Communications in New Mexico," see 4 Nat. Resources J. 123 (1964).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses §§ 148 to 171.

Applicability and effect in suit for alienation of affections of rule excluding confidential communications between husband and wife, 36 A.L.R. 1068; 82 A.L.R. 825.

Effect of knowledge of third person acquired by overhearing or seeing communication between husband and wife upon rule as to privileged communication, 63 A.L.R. 107.

Conversations between husband and wife relating to property or business as within rule excluding private communications between them, 4 A.L.R.2d 835.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse, 10 A.L.R.2d 1389.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution, 11 A.L.R.2d 646.

Effect of divorce or annulment on competency of one former spouse as witness against other in criminal prosecution, 38 A.L.R.2d 570.

Calling or offering accused's spouse as witness for prosecution as prejudicial misconduct, 76 A.L.R.2d 920.

Spouse as competent witness for or against cooffender with other spouse, 90 A.L.R.2d 648.

Competency of one spouse to testify against another in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction, 36 A.L.R.3d 820.

Competency of one spouse to testify against other in prosecution for offense against child of both or either, 93 A.L.R.3d 1018.

Effect, on competency to testify against spouse or on marital communication privilege, of separation or other marital instability short of absolute divorce, 98 A.L.R.3d 1285.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident) - state case, 1 A.L.R.4th 673.

Spouse's betrayal or connivance as extending marital communications privilege to testimony of third person, 3 A.L.R.4th 1104.

Communication between unmarried couple living together as privileged, 4 A.L.R.4th 422.

Testimonial privilege for confidential communications between relatives other than husband and wife - state cases, 6 A.L.R.4th 544.

Existence of spousal privilege where marriage was entered into for purpose of barring testimony, 13 A.L.R.4th 1305.

Applicability of marital privilege to written communications between spouses inadvertently obtained by third person, 32 A.L.R.4th 1177.

Communications between spouses as to joint participation in crime as within privilege of interspousal communications, 62 A.L.R.4th 1134.

Marital privilege under Rule 501 of Federal Rules of Evidence, 46 A.L.R. Fed. 735.

Immunity's sufficiency to meet federal grand jury witness' claim of privilege against adverse spousal testimony, 82 A.L.R. Fed. 600.

97 C.J.S. Witnesses §§ 266 to 275, 303.

11-506. Communications to clergymen.

A.

Definitions. As used in this rule:

(1) a "clergyman" is a minister, priest, rabbi or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him;

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

B.

General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

C.

Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses §§ 144, 284 to 286.

Priest-penitent privilege as applicable in nonjudicial proceeding or investigation, 133 A.L.R. 732.

Who is "clergyman" or the like entitled to assert privilege attaching to communications to clergymen or spiritual advisers, 49 A.L.R.3d 1205.

Matters to which the privilege covering communications to clergyman or spiritual adviser extends, 71 A.L.R.3d 794.

97 C.J.S. Witnesses §§ 263, 303.

11-507. Political vote.

Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 26 Am. Jur. 2d Elections § 236.

29 C.J.S. Elections § 201.

11-508. Trade secrets.

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work

injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses § 28.

98 C.J.S. Witnesses § 430.

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

A.

Definitions. As used in this rule:

(1) "probation officer" means a person employed by the probation services of a judicial district who conducts preliminary inquiries pursuant to the Children's Code and Children's Court Rules of Procedure;

(2) "social services worker" means a person employed by the Social Services Division of Human Services Department who conducts preliminary inquiries pursuant to the Children's Code and Children's Court Rules of Procedure; and

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

B.

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

C.

Who may claim privilege. The privilege may be claimed by the child alleged to be delinquent or in need of supervision or by the parent, guardian or custodian who allegedly neglected his child. The claim of privilege may be asserted by the attorney, the probation officer or social services worker on behalf of said child, parent, guardian or custodian.

Committee commentary. - This rule was added in conjunction with the adoption of N.M.R. Child. Ct. This rule is not in the federal rules. The purpose of the rule is to facilitate informal settlement of juvenile matters at the preliminary inquiry stage.

COMPILER'S ANNOTATIONS

Cross-references. - For Rules of Procedure for the Children's Court, see Rule 10-101 et seq.

Children's Code. - "Children's Code" is the short title of Laws 1972, ch. 97, presently compiled as 32-1-1 to 32-1-45.

Law reviews. - For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses §§ 287, 289, 290, 296.

Privilege of communication made to public officers, 9 A.L.R. 1099; 59 A.L.R. 1555.

Communications to social worker as privileged, 50 A.L.R.3d 563.

Confidentiality of records as to recipients of public welfare, 54 A.L.R.3d 768.

97 C.J.S. Witnesses §§ 264, 303.

11-510. Identity of informer.

A.

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

B.

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

C.

Exceptions:

(1)

Voluntary disclosure; informer a witness. No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the state.

(2)

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

(3)

Legality of obtaining evidence. If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed. The judge may permit the disclosure to be made in camera or make any other order which justice requires. All counsel concerned with the issue of legality shall be permitted to be present at every stage at which any counsel is permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed except by order of a court having jurisdiction.

COMPILER'S ANNOTATIONS

Scope of review. - Only concern of court upon appellate review of trial court's determination under this rule is to insure that the lower court did not abuse its discretion. *State v. Robinson*, 89 N.M. 199, 549 P.2d 277 (1976).

Rule extends only to a determination of when informer's identity will be required by the court to be disclosed. *State v. Sandoval*, 96 N.M. 506, 632 P.2d 741 (1981).

The language of this rule clearly indicates that it applies only when the issue of the identity of an informer arises at a trial on the merits, when a trial judge can require the disclosure. *McCormick v. Francoeur*, 100 N.M. 560, 673 P.2d 1293 (1983).

Rule is a recognition by the judiciary that certain privileges are necessary to aid law enforcement officers and the legislature in obtaining information through investigations and hearings without having to be concerned with being subpoenaed into court or having to disclose sources of information. *State ex rel. Attorney Gen. v. First Judicial Dist. Court*, 96 N.M. 254, 629 P.2d 330 (1981).

Disclosure of identity. To come within the exception of Subparagraph (2) of Paragraph C, a defendant must show that disclosure of the identity of an informer would help his case, that it would help him more than hurt the police, and that he would be prejudiced by the lack of an in camera hearing concerning the identification. *State v. Hernandez*, 104 N.M. 268, 720 P.2d 303 (Ct. App. 1986).

Disclosure decision requires balancing of interests. - Question of disclosure of informer calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense, and whether balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, possible defenses, possible significance of informer's testimony and other relevant factors. *State v. Robinson*, 89 N.M. 199, 549 P.2d 277 (1976).

To require state to reveal informer's identity in every instance where that person has witnessed and helped arrange a drug transaction, without first determining whether informer's testimony will be at all relevant or necessary to the defense, would unreasonably cripple state's efforts at drug law enforcement. *State v. Robinson*, 89 N.M.

199, 549 P.2d 277 (1976).

Rule provides systematic method for balancing state's interest in protecting flow of information against individual's right to prepare his defense by giving trial court opportunity to determine through in camera hearing whether identity of informer must be disclosed or not. Where it appears to trial judge from the evidence that informer's testimony will not be relevant and helpful to accused's defense or necessary to fair determination of issue of guilt or innocence, then identity of informer can remain undisclosed so that that person will not be exposed unnecessarily to the highly dangerous position of being a known informant. *State v. Robinson*, 89 N.M. 199, 549 P.2d 277 (1976); *State v. Sandoval*, 96 N.M. 506, 632 P.2d 741 (1981).

Magistrate judge at a preliminary hearing does not have authority to require the state to reveal the identity of a confidential informant pursuant to this rule of evidence. *McCormick v. Francoeur*, 100 N.M. 560, 673 P.2d 1293 (1983).

Privilege extends only to officer furnished information by person in criminal investigation. - It is only where information relating to or assisting in an investigation of a possible violation of law is furnished to the attorney general as a law enforcement officer that he would have a privilege under this rule to refuse to disclose the identity of the person who furnished the information. *State ex rel. Attorney Gen. v. First Judicial Dist. Court*, 96 N.M. 254, 629 P.2d 330 (1981).

To invoke an in camera hearing under Rule 11-501, the defendant is not required to specifically move for such a hearing; however, he is required to fairly invoke a ruling by the trial court as to whether such a hearing should be held. *State v. Martinez*, 97 N.M. 316, 639 P.2d 603 (Ct. App. 1982).

In camera hearing, sua sponte, not required whenever justified. - The trial court is not required to conduct an in camera hearing under Subparagraph (2) of Paragraph C, sua sponte, whenever such a hearing can be justified by the evidence. *State v. Martinez*, 97 N.M. 316, 639 P.2d 603 (Ct. App. 1982).

Items submitted for in camera inspection are not public records. - Physical evidence, documents, wiretaps and video recordings which are not marked as exhibits or received into evidence are not public records. Neither are items submitted for court perusal for in camera inspection. *State ex rel. Bingaman v. Brennan*, 98 N.M. 109, 645 P.2d 982 (1982).

Informer's testimony must be relevant to defense or necessary for fairness. - Before exception in Subparagraph (2) of Paragraph C applies, it must appear from the evidence in the case or from other showing by a party that an informer can give testimony either relevant and helpful to the defense or necessary to a fair determination of guilt or innocence. Where issue at trial went to defendant's constructive possession of heroin and evidence was that informer knew that defendant's wife had concealed "package" in patrol car and knew where and when it had been concealed, but it did not appear from the evidence that the informer would be able to give testimony helpful to defense of defendant, then defendant had not made showing sufficient to invoke Subparagraph (2) of Paragraph C. State v. Bauske, 86 N.M. 484, 525 P.2d 411 (Ct. App. 1974).

Where informant in testimony in in camera hearing neither contradicted nor varied police reports and there was no showing in any court involved in the matter that informant's disclosure would be relevant or helpful to the defense or necessary to a fair determination of guilt or innocence, then trial court's refusal to disclose identity of informer was not an abuse of discretion. State v. Robinson, 89 N.M. 199, 549 P.2d 277 (1976).

Court conducts in camera hearing to determine whether eyewitness' identity subject to disclosure. - Where an informer's testimony, pursuant to Paragraph C, discloses the identity of a possible eyewitness to a crime, the trial court, under the disclosure requirements of Rule 5-501 and Rule 5-505 should conduct an in camera hearing to determine, first, whether the possible eyewitness would be able to give testimony that is relevant and helpful to the defense of the accused or is necessary to a fair determination of the defendant's guilt or innocence, and, second, whether disclosure would subject the possible eyewitness to a substantial risk of harm outweighing any usefulness of the disclosure to defense counsel. State v. Gallegos, 96 N.M. 54, 627 P.2d 1253 (Ct. App. 1981).

On showing of necessity, hearing must be held. - Once the necessity of an in camera hearing is shown, it must be held; the trial court may not dismiss a criminal information because the state, attempting to protect its witness, did not specifically request the in camera hearing. State v. Perez, 102 N.M. 663, 699 P.2d 136 (Ct. App. 1985).

Relevancy of informer's testimony shown. - The defendant's claim that an informer was an active participant - an arranger and participant in the narcotics sales meets the test of relevancy in Subparagraph (2) of Paragraph C. State v. Beck, 97 N.M. 312, 639 P.2d 599 (Ct. App. 1982).

And response from prosecutor required. - The defendant's specific claim that an informer was the arranger and participant in alleged narcotic sales cannot be characterized as an unsupported suggestion and the trial court should require a response from the prosecutor in order to learn whether defendant's claim is contested. State v. Beck, 97 N.M. 312, 639 P.2d 599 (Ct. App. 1982).

Necessity of informer's testimony shown. - The defendant's claim, that, apart from the defendant, an informer is the only nonpolice witness, uncontradicted by the prosecutor, is a sufficient showing of the necessity of the informer's testimony for a fair determination of guilt or innocence. State v. Beck, 97 N.M. 312, 639 P.2d 599 (Ct. App. 1982).

Cross-examination of informant not barred where no privilege. - Whether an informant's presence at a drug transaction waived her privilege or whether the privilege never applied because defendant always knew the identity of the confidential informant, this rule was not a ground for the trial court's denial of defendant's right to cross-examine the informant as to her relationship with the police, since no privilege existed going into trial. State v. Chambers, 103 N.M. 784, 714 P.2d 588 (Ct. App. 1986).

State must account for nonappearance of informer. - Where defendant's demand under Subparagraph (2) of Paragraph C was timely made approximately four months prior to trial and state could not produce informer for in camera hearing ordered by court, the state was required to satisfy court as to why it could not reasonably be expected to produce the informer and as to state's diligence as regards his disappearance. Uncontradicted evidence produced by state detailing efforts to locate informer after trial court's order, in addition to officer's testimony that he had made many prior efforts for other cases, was sufficient to sustain ruling of trial court that state had made diligent search and inquiry to ascertain whereabouts of informer; trial court did not err in refusing to dismiss indictment because of state's inability to produce the informer. State v. Carrillo, 88 N.M. 236, 539 P.2d 626 (Ct. App. 1975).

Defendant entitled to new trial if informer's testimony relevant. - Where defendant's case rested on misidentification by police officer and informer supposedly knew man who sold heroin to officer, defendant, although not entitled to disclosure of informant's identity, was entitled to an in camera hearing to determine relevance of informer's testimony and to a new trial if trial court in that hearing determined that informant's testimony was relevant. State v. Debarry, 86 N.M. 742, 527 P.2d 505 (Ct. App. 1974).

After identity disclosed, government must show reasonable attempt to locate informer. - After the disclosure of an informer's identity, where a court has determined that such disclosure is necessary under this rule, the government must show only that it made

reasonable attempts to acquire the information needed to locate the informer and that it disclosed all the information it possesses which is useful in locating the informer; a failure to make such a showing would justify dismissal of the charges. *State v. Sandoval*, 96 N.M. 506, 632 P.2d 741 (1981).

Informant need not disclose current alias. - A trial court's ruling that an informant need not disclose his current alias does not violate Subparagraph (1) of Paragraph C where the informant's true identity and background are disclosed. *State v. Hinojos*, 95 N.M. 659, 625 P.2d 588 (Ct. App. 1980).

Belief of receiver, not informer, examined. - Under Subparagraph (3) of Paragraph C,, the trial court examines the reasonable belief of the person receiving the information from the informer; the trial court does not examine the reliability of the informer. *State v. Cervantes*, 92 N.M. 643, 593 P.2d 478 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979).

Subparagraph (3) of Paragraph C applies in civil action for defamation. *Ammerman v. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 572 P.2d 1258 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977), 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Law reviews. - For note, "Judicial Discretion to Withhold Disclosure of Informant's Identity: *State v. Robinson*," see 7 N.M.L. Rev. 241 (1977).

For article, "Criminal Procedure," see 12 N.M.L. Rev. 271 (1982).

For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses §§ 289, 294.

Informer, prosecution's privilege against disclosure of identity of, 76 A.L.R.2d 262.

97 C.J.S. Witnesses § 265.

11-511. Waiver of privilege by voluntary disclosure.

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the

matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

COMPILER'S ANNOTATIONS

Cross-references. - For statutory provision as to waiver of privilege, see 38-6-6 NMSA 1978. But see also Rule 11-501 and notes thereto.

This rule applies to predecessor of party asserting claim, and covers both consent to a disclosure of "any significant part of the matter or communication" as well as outright disclosure. *State v. Jackson*, 97 N.M. 467, 641 P.2d 498 (1982).

Voluntary disclosure of results of medical examination constitutes waiver of defendant's right against forced disclosure and also destroys any privileges claimed by the defense. *State v. Jackson*, 97 N.M. 467, 641 P.2d 498 (1982).

Witness waives attorney-client privilege by voluntary disclosure of discussion of "turning state's evidence". - A witness opens up the area of attorney-client communications regarding the subject matter of granting immunity in exchange for favorable prosecution testimony by a voluntary disclosure of a discussion of "turning state's evidence." The trial court cannot then refuse to allow the witness to be questioned on this matter, or refuse to permit the defense to subpoena the witness' lawyer, on the alleged grounds of attorney-client privilege. *State v. Ballinger*, 99 N.M. 707, 663 P.2d 366 (Ct. App. 1983), rev'd on other grounds, 100 N.M. 583, 673 P.2d 1316 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses § 146.

Who may waive privilege of confidential communication to physician by person since deceased, 97 A.L.R.2d 393.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 A.L.R.3d 1244.

97 C.J.S. Witnesses §§ 306 to 314.

11-512. Privileged matter disclosed under compulsion or without opportunity to claim privilege.

Evidence of a statement or other disclosure of privileged matter is not admissible

against the holder of the privilege if the disclosure was

A. compelled erroneously or

B. made without opportunity to claim the privilege.

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses §§ 36, 40, 66 to 68.

98 C.J.S. Witnesses § 435 et seq.

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

A.

Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

B.

Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

C.

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

COMPILER'S ANNOTATIONS

District attorney may not comment on defendant's failure to testify. *State v. Sneed*, 76 N.M. 349, 414 P.2d 858 (1966) (decided before enactment of this rule).

Comment by prosecutor on defendant's silence constitutes fundamental error and mandates a new trial, even if defendant fails to timely object. *State v. Ramirez*, 98 N.M. 268, 648 P.2d 307 (1982).

But defendant may waive right to object. - Where prosecutor's comment on defendant's failure to take the stand was made in response to defendant's own argument, defendant, under prior law, waived any right which he might have had to claim violation of privilege against compulsory self-incrimination because of the prosecutor's comment. *State v. Paris*, 76 N.M. 291, 414 P.2d 512 (1966).

Prosecutor's comments on failure of spouse to testify are improper. *State v. Frank*, 92 N.M. 456, 589 P.2d 1047 (1979).

And may be grounds for reversal. - If there is a reasonable possibility that the inappropriate remarks of a prosecutor caused a jury to consider the failure of a spouse to testify as evidence against the defendant spouse or caused it to reach a verdict that it otherwise might not have reached, then such arguments are grounds for reversal. *State v. Frank*, 92 N.M. 456, 589 P.2d 1047 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 705, 940.

23A C.J.S. Criminal Law §§ 1186 to 1188, 1263, 1264; 88 C.J.S. Trial §§ 50, 182, 266, 299; 97 C.J.S. Witnesses § 305; 98 C.J.S. Witnesses § 454.

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

A.

Definitions. Unless a different meaning clearly appears from the context of this rule, as used in this rule:

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

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

(3) "news" means any written, oral or pictorial information gathered, procured,

transmitted, compiled, edited or disseminated by, or on behalf of any person engaged or employed by a news media and so procured or obtained while such required relationship is in effect;

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

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

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

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

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

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

B.

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

(1) the confidential source from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered in the course of pursuing his professional activities; and

(2) any confidential information obtained in the course of pursuing his professional activities.

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

The provisions of this rule insofar as it relates to television stations shall not apply

unless the television station maintains and keeps open for inspection by a person affected by the broadcast, for a period of at least one year from the date of an actual telecast, an exact recording, transcription, kinescope film or certified written transcript of the actual telecast.

C.

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

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

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

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

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

D.

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

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

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

Evidence submitted to the court in camera, and any record of the in camera proceedings, shall be sealed and preserved to be made available to an appellate court, in the event of an appeal, and the contents shall not otherwise be revealed without the

consent of the person asserting the privilege.

All counsel and parties shall be permitted to be present at every stage of the proceedings under this rule, except at the in camera hearing, at which no counsel or party, except the person asserting the privilege, and counsel for that person, shall be permitted to be present.

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

COMPILER'S ANNOTATIONS

Law reviews. - For article, "Survey of New Mexico Law, 1982-83: Evidence," see 14 N.M.L. Rev. 161 (1984).

For article, "Defamation in New Mexico," see 14 N.M.L. Rev. 321 (1984).

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).

Article 6

Witnesses

11-601. General rule of competency.

Every person is competent to be a witness except as otherwise provided in these rules.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 601 of the Federal Rules of Evidence.

Generally as to proper testimony. - Witness may not give testimony in a cause unless he is placed under oath and the other party is given an opportunity to cross-examine him. *Crabtree v. Measday*, 85 N.M. 20, 508 P.2d 1317 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973) (decided under former Rule 43, N.M.R. Civ. P., deemed superseded by New Mexico Rules of Evidence). See Rule 11-603 for requirement of

oath or affirmation.

Burden is on party asserting incompetency. - Ordinarily burden of showing incompetency of a witness is upon the party asserting the incompetency. *State v. Manlove*, 79 N.M. 189, 441 P.2d 229 (Ct. App.), cert. denied, 79 N.M. 159, 441 P.2d 57 (1968).

Party questioning competency must request examination outside jury's presence. - Question as to competency of a witness is a matter to be resolved by the court, and voir dire examination as to competency need not be conducted in the absence of the jury although generally better practice would be to conduct this examination outside the presence of the jury. Party questioning competency of the witness must request examination outside the presence of the jury if he so desires; absent such a request he cannot later be heard to complain that the examination was conducted in the jury's presence. *State v. Manlove*, 79 N.M. 189, 441 P.2d 229 (Ct. App.), cert. denied, 79 N.M. 159, 441 P.2d 57 (1968).

Proper considerations in determining competency of child witness. - In determining whether a child is competent to testify, the trial court must determine from inquiries the child's capacities of observation, recollection and communication and also the child's appreciation or consciousness of a duty to speak the truth; it then lies within the sound discretion of the trial court to determine, from the child's intelligence and consciousness of a duty to be truthful, whether or not the child is competent to testify as a witness. *State v. Noble*, 90 N.M. 360, 563 P.2d 1153 (1977).

Where prior to a young girl's testimony about the murder of her mother an extensive examination out of the presence of the jury was made by the defense counsel, the prosecutor and the judge concerning the girl's understanding of her obligation to tell the truth, and the record of that examination clearly demonstrated that she understood her duty to tell the truth, the court properly determined that the young girl was a competent witness. *State v. Noble*, 90 N.M. 360, 563 P.2d 1153 (1977).

Capacity of children to testify is not determined alone on age. - In each instance the capacity of a child of tender years is to be investigated, and the trial court must determine from inquiries the child's capacities of observation, recollection and communication and also the child's appreciation or consciousness of a duty to speak the truth; it then lies within the sound discretion of the trial court to determine therefrom whether or not the child is competent to testify as a witness. *State v. Manlove*, 79 N.M. 189, 441 P.2d 229 (Ct. App.), cert. denied, 79 N.M. 159, 441 P.2d 57 (1968).

Whether the two boys in a sexual assault were competent to testify was a matter to be resolved by the trial court in the exercise of its discretion, and boys' capacity to testify was not to be determined solely on the basis of their age. *State v. Barnes*, 83 N.M. 566, 494 P.2d 979 (Ct. App.), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972).

There is no precise age at which a child's evidence is absolutely excluded; permitting a 10-year-old child to testify was not an abuse of discretion. *State v. Manlove*, 79 N.M. 189, 441 P.2d 229 (Ct. App.), cert. denied, 79 N.M. 159, 441 P.2d 57 (1968).

Nor on understanding nature of oath. - Fact that a child states in express terms that he does not understand the nature of an oath is not of itself sufficient ground for his exclusion as a witness where it clearly appears that the child has sufficient intelligence to understand the nature of an oath and to narrate the facts accurately and that he knows that it is wrong to tell an untruth and right to tell the truth and that if he told an untruth he would be punished and where other facts show that he is competent. *State v. Manlove*, 79 N.M. 189, 441 P.2d 229 (Ct. App.), cert. denied, 79 N.M. 159, 441 P.2d 57 (1968).

Scope of review of trial court's determination. - Appellate courts will not review discretion of the trial court in permitting a child of tender years to testify except in a clear case of abuse of discretion. *State v. Manlove*, 79 N.M. 189, 441 P.2d 229 (Ct. App.), cert. denied, 79 N.M. 159, 441 P.2d 57 (1968).

Any competent witness may make criminal complaint. - Anyone who is a competent witness and has knowledge of the facts may make a complaint or issue a citation in a criminal case or for violation of a city ordinance. A 19-year-old minor could legally serve citations, was fully capable to properly evaluate 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) (decided before enactment of this rule and of 28-6-1 NMSA 1978, which provides that 18 is age of majority).

Use of pretrial hypnosis to revive memory of witness. - The testimony of a witness who has undergone pretrial hypnosis to revive the memory of the witness without the administration of any drugs is neither automatically inadmissible nor subject to a blanket proscription. *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981).

Absent protective order, there is nothing to stay deposition of witness whose competency is questioned. - Party seeking protective order to stay taking of deposition of witness, pending determination of 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).

Deputy sheriff's testimony. - Trial court did not abuse its discretion in admitting the testimony of a deputy sheriff in his capacity as a deputy sheriff in a criminal prosecution, even though he was not a registered voter as required by 4-41-10 NMSA 1978. *State v. Martinez*, 104 N.M. 584, 725 P.2d 263 (Ct. App. 1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error § 522; 5 Am. Jur. 2d Appeal and Error §§ 611, 884; 29 Am. Jur. 2d Evidence § 257; 75 Am. Jur. 2d Trial § 375.

Application of dead man's statute in proceeding involving account of personal representative, 2 A.L.R.2d 349.

Dead man's statute as applicable to testimony denying transaction or communication between witness and person since deceased, 8 A.L.R.2d 1094.

Alleged incompetent as witness in lunacy inquisition, 22 A.L.R.2d 756.

Death of one coparty to contract or transaction, including copartner, as affecting competency of adverse party or surviving coparty to testify as against each other or as against estate of decedent, 22 A.L.R.2d 1068.

Introduction of decedent's books of account by his personal representative as waiver of "dead man's statute," 26 A.L.R.2d 1009.

Dead man's statute as applicable to spouse of party disqualified from testifying, 27 A.L.R.2d 538.

Examination and the like of one witness incompetent under dead man statute as waiver of incompetency of other witnesses, 33 A.L.R.2d 1440.

Admissibility of testator's declarations upon issue of genuineness or due execution of purported will, 62 A.L.R.2d 855.

Applicability of dead man statute to proceedings to determine liability for succession, estate or inheritance tax, 66 A.L.R.2d 714.

Competency of witness in wrongful death action as affected by dead man statute, 77 A.L.R.2d 676.

Testimony to facts of automobile accident as testimony to a "transaction" or "communication" with a deceased person, within dead man statute, 80 A.L.R.2d 1296.

Competency of young child as witness in civil case, 81 A.L.R.2d 386.

Competency, under dead man statute, of witness to testify as to payment or nonpayment of an obligation owing to deceased person, 84 A.L.R.2d 1356.

Husband or wife as competent witness for or against cooffender with spouse, 90 A.L.R.2d 648.

Person performing services as competent to testify as to their value, 5 A.L.R.3d 947.

Competency of interested witness to testify to signature or handwriting of deceased, 13 A.L.R.3d 404.

Statute excluding testimony of one person because of death of another as applied to testimony in respect of lost or destroyed instrument, 18 A.L.R.3d 606.

Taking deposition or serving interrogatories in civil case as waiver of incompetency of witness, 23 A.L.R.3d 389.

Personal representative's loss of rights under dead man statute by prior institution of discovery proceedings, 35 A.L.R.3d 955.

Prosecuting attorney as a witness in criminal case, 54 A.L.R.3d 100.

Use of drugs as affecting competency or credibility of witness, 65 A.L.R.3d 705.

Admissibility of hypnotic evidence at criminal trial, 92 A.L.R.3d 442.

Right to cross-examine prosecuting witness as to his pending or contemplated civil action against accused for damages arising out of same transaction, 98 A.L.R.3d 1060.

Admissibility of evidence concerning words spoken while declarant was asleep or unconscious, 14 A.L.R.4th 802.

Admissibility of testimony regarding spontaneous declarations made by one incompetent to testify at trial, 15 A.L.R.4th 1043.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witness - state cases, 45 A.L.R.4th 602.

Deaf-mute as witness, 50 A.L.R.4th 1188.

Dead man's statutes as affected by Rule 601 of the Uniform Rules of Evidence and similar state rules, 50 A.L.R.4th 1238.

Witnesses: child competency statutes, 60 A.L.R.4th 369.

Compelling testimony of opponent's expert in state court, 66 A.L.R.4th 213.

97 C.J.S. Witnesses §§ 49 to 314.

11-602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 11-703, relating to opinion testimony by expert witnesses.

COMPILER'S ANNOTATIONS

Cross-references. - For admissibility of opinion testimony by lay witnesses, see Rule 11-701.

Compiler's notes. - This rule is similar to Rule 602 of the Federal Rules of Evidence.

Knowledge of identity. - Opinion of witness as to identity need not be based upon recognition of face and features, but may be based upon voice, size, gait and movements of the person whose identity is in question. *State v. Fore*, 37 N.M. 143, 19 P.2d 749 (1933); *State v. Quintana*, 69 N.M. 51, 364 P.2d 120 (1961).

Witness' testimony limited to matters about which he had personal knowledge. - In seller's action against buyer for purchase price in contract of sale and buyer's counterclaim for breach of contract, court did not abuse its discretion in permitting seller's sales manager to testify, where sales manager's only connection with case was a telephone conversation with buyer and where court carefully restricted sales manager's testimony to matters relating to conduct of seller's business about which he had personal knowledge. *Kirk Co. v. Ashcraft*, 101 N.M. 462, 684 P.2d 1127 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence § 259.

Competency of nonexpert witness to testify, in criminal case, based upon personal observation, as to whether person was under the influence of drugs, 21 A.L.R.4th 905.

97 C.J.S. Witnesses § 54.

11-603. Oath or affirmation.

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

COMPILER'S ANNOTATIONS

Cross-references. - For form of affirmation in lieu of oath, see 14-13-2 NMSA 1978.

Compiler's notes. - This rule is similar to Rule 603 of the Federal Rules of Evidence.

This rule is deemed to have superseded, as to witnesses, former Rule 43(d), N.M.R. Civ. P., which permitted affirmation in lieu of oath.

Child need not expressly understand nature of oath. - Fact that child states in express terms that he does not understand nature of an oath is not of itself sufficient ground for his exclusion as a witness where it clearly appears that child has sufficient intelligence to understand nature of an oath and to narrate facts accurately and that he knows that it is wrong to tell an untruth and right to tell the truth and that if he told an untruth he would be punished and where other facts show that he is competent. *State v. Manlove*, 79 N.M. 189, 441 P.2d 229 (Ct. App.), cert. denied, 79 N.M. 159, 441 P.2d 57 (1968).

De novo appeal hearing witnesses must be sworn. - Environmental planning commission erred in failing to require that witnesses appearing at a de novo appeal hearing be sworn. *State ex rel. Battershell v. City of Albuquerque*, 108 N.M. 658, 777 P.2d 386 (Ct. App. 1989).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses §§ 413, 415.

98 C.J.S. Witnesses § 320.

11-604. Interpreters.

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

COMPILER'S ANNOTATIONS

Cross-references. - As to testimony by experts, see Rules 11-702 to 11-706.

Compiler's notes. - This rule is similar to Rule 604 of the Federal Rules of Evidence.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses §§ 100, 413.

Right of accused to have evidence or court proceedings interpreted, 36 A.L.R.3d 276.

Disqualification, for bias, of one offered as interpreter of testimony, 6 A.L.R.4th 158.

23A C.J.S. Criminal Law § 1152; 88 C.J.S. Trial § 42.

11-605. Competency of judge as witness.

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 605 of the Federal Rules of Evidence.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses § 101.

Judge as witness in case not on trial before him, 86 A.L.R.3d 633.

Admissibility of hypnotic evidence at criminal trial, 92 A.L.R.3d 442.

4 C.J.S. Appeal and Error § 294; 97 C.J.S. Witnesses §§ 105 to 114.

11-606. Competency of juror as witness.

A.

At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

B.

Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes.

Committee commentary. - Paragraph B was changed to conform to federal rule. New Mexico did not follow the proposed federal rule in 1973. The amendment broadens the exception for a juror's testimony concerning extraneous prejudicial information brought to the attention of the jury.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 606 of the Federal Rules of Evidence.

Paragraph A also applies to grand jurors. *State v. Aaron*, 102 N.M. 187, 692 P.2d 1336 (Ct. App. 1984).

Party seeking new trial must make preliminary showing that extraneous material reached jury; if the party makes such a showing, and if there is a reasonable possibility the material prejudiced the defendant, the trial court should grant a new trial. *State v. Doe*, 101 N.M. 363, 683 P.2d 45 (Ct. App. 1983); *State v. Sena*, 105 N.M. 686, 736 P.2d 491 (1987).

Party adversely affected by improper communication to jury enjoys rebuttable "presumption of prejudice." *State v. Doe*, 101 N.M. 363, 683 P.2d 45 (Ct. App. 1983).

And presumption of prejudice meets due process requirements. - While Paragraph B effectively precludes defendant from being able to prove that the improper communication to jury affected the jury's verdict, the presumption that the improper communication amounted to prejudice meets due process requirements. *State v. Melton*, 102 N.M. 120, 692 P.2d 45 (Ct. App. 1984).

Juror's inner reactions not subject to inquiry. - The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment; therefore, inquiry as to a juror's inner reaction in arriving at a verdict is prohibited. *State v. Barela*, 91 N.M. 634, 578 P.2d 335 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978).

If court determines that extraneous information reached jury, the court must inquire into prejudice, and relevant inquiries include how the material was received, how long it was available to the jury, the extent to which the jury discussed the material, whether they considered it before they reached a verdict or after, and, if before, at what point in the deliberations they received the material. *State v. Doe*, 101 N.M. 363, 683 P.2d 45 (Ct. App. 1983).

Jurors should not be permitted to impeach their verdict by affidavits made after discharge. *Skeet v. Wilson*, 76 N.M. 697, 417 P.2d 889 (1966).

Juror's letter impeaching verdict is not consideration for new trial. - It is improper for a trial court to consider a letter from one of the jurors which allegedly impeached a verdict as basis for granting a new trial. *State v. Chavez*, 98 N.M. 682, 652 P.2d 232 (1982).

Rule does not involve qualifications of jurors. - Paragraph B deals with the general subject of when a juror may impeach a verdict, and was inapplicable where the issue did not involve impeaching the verdict, but rather the qualifications of one of the jury members to serve as a juror. Trial court, therefore, erred in ruling that it would not permit defendant to question the juror concerning the truthfulness of her answers on voir dire. *State v. Martinez*, 90 N.M. 595, 566 P.2d 843 (Ct. App. 1977).

Paragraph B does not preclude testimony by jurors subject to subpoena. *State v. Doe*, 101 N.M. 363, 683 P.2d 45 (Ct. App. 1983).

Paragraph B precludes the use of jurors' affidavits to explain their verdicts. *Lamkin v. Garcia*, 106 N.M. 60, 738 P.2d 932 (Ct. App. 1987).

Mistrial jury foreman's affidavit not used to prove double jeopardy. - Where defendant was tried for second time on murder and manslaughter charges, affidavit of the foreman of first jury stating that the jury had unanimously voted to acquit defendant of murder, and offered to show that defendant was twice placed in jeopardy by being retried for murder, was properly disregarded by the trial court, even where a mistrial had been

declared in the first trial without a conviction or acquittal. *State v. Castrillo*, 90 N.M. 608, 566 P.2d 1146 (1977).

Impeachment of verdict permitted when extraneous influence involved. - When several jurors make independent speed tests in an automobile accident case, the speed tests may constitute extraneous evidence. If so, that extraneous evidence may be improperly brought to the jury's attention. Paragraph B permits impeachment of a verdict by juror affidavit or testimony when such extraneous influence is involved. *Duran v. Lovato*, 99 N.M. 242, 656 P.2d 905 (Ct. App. 1982).

Communication not affecting verdict. - While the state did not show that a communication between court and jury, out of the defendant's presence, occurred after the jury was ready to return a verdict, it nonetheless showed through testimony elicited from the foreperson, and affidavits signed by all the jurors, that the communication did not affect the verdict. This was not contrary to the provision of Paragraph B, the purpose of which is to prevent tampering and harassment of the jury and inquiry into its deliberations to the end of casting doubt on the jury's competence. *State v. Zinn*, 106 N.M. 544, 746 P.2d 650 (1987).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 58 Am. Jur. 2d New Trial §§ 210 to 213; 81 Am. Jur. 2d Witnesses § 102.

Admissibility in civil case of affidavit or testimony of juror in support of verdict attacked on ground of bias or disqualification of juror, 30 A.L.R.2d 914.

Competency of jurors' statements or affidavits to show that they never agreed to purported verdict, 40 A.L.R.2d 1119.

Admissibility, in civil case, of juror's affidavit or testimony to show bias, prejudice or disqualification of a juror not disclosed on voir dire examination, 48 A.L.R.2d 971.

Admissibility and effect, in criminal case, of evidence as to juror's statements, during deliberations, as to facts not introduced into evidence, 58 A.L.R.2d 556.

Use of intoxicating liquor by jurors: civil cases, 6 A.L.R.3d 934.

Use of intoxicating liquor by jurors: criminal cases, 7 A.L.R.3d 1040.

Prejudicial effect, in criminal case, of communications between witnesses and jurors, 9

A.L.R.3d 1275.

Admissibility, in civil case, of juror's affidavit or testimony relating to juror's misconduct outside jury room, 32 A.L.R.3d 1356.

Trial jurors as witnesses in same state court or related case, 86 A.L.R.3d 781.

23A C.J.S. Criminal Law § 1418; 66 C.J.S. New Trial §§ 169, 172; 97 C.J.S. Witnesses §§ 105 to 114.

11-607. Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling him.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Prior Inconsistent Statements.
- III. Bias.
- IV. Character.
- V. Mental Incapacity.
- VI. Procedural Matters.

I. General Consideration.

Cross-references. - As to attacking and supporting credibility of declarant of hearsay, see Rule 11-806.

Compiler's notes. - This rule is similar to Rule 607 of the Federal Rules of Evidence.

This rule, in conjunction with Rule 11-611, is deemed to supersede former Rule 43(b), N.M.R. Civ. P. Those cases decided pursuant to former Rule 43(b), N.M.R. Civ. P., and relating to the subject matter of this rule, are annotated below.

Right to impeach witness is basic to fair trial. *Mac Tyres, Inc. v. Vigil*, 92 N.M. 446, 589 P.2d 1037 (1979).

Constitutional protection of right to cross-examine fully. - The comprehensiveness of cross-examination does not lie solely within the limitation of these rules. The right to fully cross-examine, particularly when the evidence sought to be developed is such as would allow inferences of motive to lie because of the witness's vulnerable status as a parolee or a suspect, is protected by the federal and state constitutions. *State v. Baldizan*, 99 N.M. 106, 654 P.2d 559 (Ct. App. 1982).

There are five main lines of attack upon credibility of a witness: an attack by proof that the witness on a previous occasion has made statements inconsistent with his present testimony; an attack by a showing that the witness is biased on account of emotional influences such as kinship for one party or hostility to another, or motives of pecuniary interest, whether legitimate or corrupt; an attack upon the character of the witness; an attack by showing a defect of capacity in the witness to observe, remember or recount the matters testified about; and proof by other witnesses that material facts are otherwise than as testified to by the witness under attack. *State v. Hermosillo*, 88 N.M. 424, 540 P.2d 1313 (Ct. App. 1975).

Credibility judged even when testimony uncontradicted. - Even though the testimony of the plaintiff was not contradicted, the trial court could still determine his credibility from all the facts and circumstances, as well as his demeanor on the stand, his interest or bias shown by his testimony, his conduct, the inherent probability or improbability of his statements, and from all these matters determine the truthfulness of his testimony. *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).

While party is not bound by the testimony of an adverse witness called under former Rule 43(b), N.M.R. Civ. P., this means only that he was free to cross-examine, contradict and impeach these witnesses, and that even if the testimony was not contradicted, the trial court was not required to accept it as true. *Hutchison v. Boney*, 72 N.M. 194, 382 P.2d 525 (1963).

Accused on stand not protected from cross-examination. - When an accused takes the witness stand he is in the same position as any other witness. He is not entitled to have his testimony falsely cloaked with reliability by having his credibility protected against the truth-searching process of cross-examination. *State v. Duran*, 83 N.M. 700, 496 P.2d 1096 (Ct. App.), cert. denied, 83 N.M. 699, 496 P.2d 1095 (1972).

Cannot impeach when evidence fails to directly address testimony. - Where defendant doctor in malpractice action testified that he had warned approximately 250 patients who had undergone operations similar to plaintiff's of the possible hazards and consequences of such an operation, plaintiff could not show, for purposes of

impeachment, that defendant did not warn one particular patient where there was no evidence that the patient was one of the 250 whom defendant had warned the past year, and where defendant did not claim to have warned every patient, or where that patient was not called to defendant's attention during cross-examination. *Valencia v. Beaman*, 85 N.M. 82, 509 P.2d 274 (Ct. App. 1973).

Cross-examination concerning prior inconclusive lie detector test proper. - Where defendant sought to enhance his credibility by his offer, in the presence of the jury, to take a lie detector test, the prosecutor's cross-examination concerning a prior inconclusive test was a proper attack on defendant's credibility. *State v. Trujillo*, 93 N.M. 728, 605 P.2d 236 (Ct. App. 1979), *aff'd*, 93 N.M. 724, 605 P.2d 232 (1980).

Admissibility of hearsay evidence of coconspirator's or codefendant's guilty plea. - Hearsay evidence of a coconspirator's or codefendant's guilty plea may not be admitted when the witness himself does not testify, nor when that evidence is offered solely to prove the defendant's guilt. *State v. Gilbert*, 98 N.M. 77, 644 P.2d 1066 (Ct. App. 1982).

Court may limit cross-examination to inability to identify facial features. - Where a witness has already stated positively that she could identify the defendant, except that she cannot identify his facial features, the trial court does not abuse its discretion in restricting cross-examination on this point. *State v. Quintana*, 69 N.M. 51, 364 P.2d 120 (1961) (decided under former law).

Law reviews. - For survey, "Evidence: Prior Crimes and Prior Bad Acts Evidence," see 6 N.M.L. Rev. 405 (1976).

For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d *Witnesses* §§ 422, 518, 619.

Contingent fee informant testimony in state prosecutions, 57 A.L.R.4th 643.

Propriety, in federal court action, of attack on witness' credibility by rebuttal evidence pertaining to cross-examination testimony on collateral matters, 60 A.L.R. Fed. 8.

Competency of juror as witness, under Rule 606(b) of Federal Rules of Evidence, upon inquiry into validity of verdict or indictment, 65 A.L.R. Fed. 835.

Propriety, under Federal Rule of Evidence 607, of impeachment of party's own witness,

89 A.L.R. Fed. 13.

98 C.J.S. Witnesses §§ 474 to 480.

II. Prior Inconsistent Statements.

Before witness may be impeached by proof of former contradictory statements, his attention must first be directed to what may be brought forward for that purpose. And this must be done with particularity as to time, place and circumstances so that he can deny it or make any explanation intending to reconcile what he formerly said with what he is now testifying. *State v. Thompson*, 68 N.M. 219, 360 P.2d 637 (1961); *State v. Fletcher*, 36 N.M. 47, 7 P.2d 936 (1932).

III. Bias.

It is accepted doctrine that bias of a witness will affect his credibility and although the existence of bias does not necessarily imply conscious falsehood, it is quite likely to shade at least, though unwittingly, a witness's testimony in favor of one side or against the other. Thus, granted its existence, it may be appropriately taken into consideration in weighing the testimony. *State v. Hermosillo*, 88 N.M. 424, 540 P.2d 1313 (Ct. App. 1975).

Bias of a witness is always relevant. Therefore pendency of a civil action by a prosecuting witness seeking damages for an assault being tried in a criminal action is a proper subject of inquiry; however, the trial court did not err in prohibiting defendant in an aggravated battery prosecution from questioning of a witness (the victim) concerning an unidentified civil suit where counsel gave the court no information about the suit, made no tender of evidence and never informed the court that the witness himself had anything to do with the suit. *State v. Santillanes*, 86 N.M. 627, 526 P.2d 424 (Ct. App. 1974).

Evidence discrediting witness by showing possible bias is admissible. *State v. Martin*, 101 N.M. 595, 686 P.2d 937 (1984).

Testimony discrediting witness as to bias and interest is never excluded on the ground of being collateral. *State v. White*, 58 N.M. 324, 270 P.2d 727 (1954).

May show bias or interest by independent evidence. - If testimony is relevant to the case in any respect, it is proper by independent evidence to show his bias or interest. State v. White, 58 N.M. 324, 270 P.2d 727 (1954).

Existence of bias determined circumstantially. - Since bias is a state of mind, its existence can be determined only circumstantially. These circumstances may consist of relationships, dealings or encounters calculated to develop a prejudice, conduct or utterances. State v. Hermosillo, 88 N.M. 424, 540 P.2d 1313 (Ct. App. 1975).

Among the circumstances that may be relevant to show bias of a witness are all those involving some intimate family relationship to one of the parties by blood or marriage or illicit intercourse, or some such relationship to a person, other than a party, who is involved on one or the other side of the litigation, or is otherwise prejudiced for or against one of the parties. The relation of employment present or past, by one of the parties, is also usually relevant. State v. Hermosillo, 88 N.M. 424, 540 P.2d 1313 (Ct. App. 1975).

Competent to show relationships creating motive to suppress truth. - It is clearly competent on cross-examination to show the relationship existing between the witness and the parties to the case, the friendship or enmity existing between the witness and the parties and any other fact that will enable the jury to determine whether the witness has any motive for suppressing or discoloring the truth. State v. Hermosillo, 88 N.M. 424, 540 P.2d 1313 (Ct. App. 1975).

IV. Character.

Juvenile probation officer's rebuttal testimony is prejudicial. - The admission of a juvenile probation officer's rebuttal testimony regarding the officer's opinion of the defendant's reputation for truthfulness is impermissibly prejudicial. State v. Guess, 98 N.M. 438, 649 P.2d 506 (Ct. App. 1982).

V. Mental Incapacity.

Defendant adjudged incompetent is competent to testify in own defense. - Defendant who had been adjudged incompetent was found fully competent to testify in his own defense as a witness subject to objections and evidence as to his credibility. Rasmussen v. Martin, 60 N.M. 180, 289 P.2d 327 (1955) (decided under former law).

VI. Procedural Matters.

Jury determines credibility and weight. - The determination of the credibility of a witness and the weight to be given to his testimony is the function of the jury. *State v. Tapia*, 81 N.M. 365, 467 P.2d 31 (Ct. App. 1970).

Or trial court as trier of facts. - The credibility of the witnesses and the weight to be given to their testimony are to be determined by the trial court, as the trier of the facts, and are not matters to be determined by an appellate court. *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).

Supreme court will not substitute its judgment for that of the trial court as to the credibility of the witness. *Arretche v. Griego*, 77 N.M. 364, 423 P.2d 407 (1967).

Appellate court will not substitute judgment for that of trier of facts. - Even though appellate court may have made a finding contrary to that of the trial court, an appellate court will not substitute its judgment for that of the trial court who heard all the evidence and observed the demeanor of the witness. *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).

Adverse party's unfavorable but possibly truthful testimony not ignored. - A defendant or party may call and interrogate a hostile witness or an adverse party without yielding the right to impeach such witness, but this does not mean that unfavorable testimony of an adverse party which bears the impression of truth and is undisputed may be ignored. *Lumpkins v. McPhee*, 59 N.M. 442, 286 P.2d 299 (1955).

Defendant may impeach own doctor using his deposition as refresher. - Trial court did not abuse its discretion in allowing defendants to impeach their own doctor by use of the doctor's deposition where defendants interrogated the doctor, on redirect, as a hostile witness, deposition was not offered in evidence and defendants were simply refreshing the witness's recollection. *Torres v. Kansas City Structural Steel Co.*, 82 N.M. 511, 484 P.2d 353 (Ct. App. 1971).

11-608. Evidence of character and conduct of witness.

A.

Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness, and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

B.

Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 11-609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness

(1) concerning his character for truthfulness or untruthfulness, or

(2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Committee commentary. - Paragraph A was changed to conform to federal rule. The amendment merely transposes the words "reputation or opinion."

Paragraph B was changed to conform to federal rule. The changes emphasize the discretionary power of the court to permit cross-examination to test credibility with specific instances of misconduct. The amendment also restructures the rule for purposes of clarity.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Opinion and Reputation Evidence.
- III. Specific Instances of Conduct.
 - A. In General.
 - B. Examples.

I. General Consideration.

Cross-references. - As to admissibility of character evidence and methods of proving it, see Rules 11-404 and 11-405.

Compiler's notes. - This rule is similar to Rule 608 of the Federal Rules of Evidence.

Most of the following cases were decided pursuant to 20-2-4, 1953 Comp. (repealed by Laws 1973, ch. 223, § 2), which was similar to this rule.

Trial court is vested with broad discretion in allowing cross-examination to test the credibility of a witness. *State v. Biswell*, 83 N.M. 65, 488 P.2d 115 (Ct. App.), cert. denied, 83 N.M. 57, 488 P.2d 107 (1971).

Nothing in this rule requires the prosecutor to announce its intention to use evidence so that the trial court may make a prior determination of whether the use of the evidence would violate any self-incrimination rights. *State v. Clark*, 105 N.M. 10, 727 P.2d 949 (Ct. App. 1986).

Evidence admissible for one purpose is not excluded because inadmissible for another purpose. *State v. Wyman*, 96 N.M. 558, 632 P.2d 1196 (Ct. App. 1981).

Evidence offered for other purposes such as "intent" does not fall within the prohibitions of this rule. However, the determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof. *State v. Marquez*, 87 N.M. 57, 529 P.2d 283 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

No question of relevancy when character an element of defense. - Where character is an element of the crime, claim or defense, there is no question as to relevancy; character evidence of this type is not covered by Rule 11-404 and is admissible under Rule 11-402, which relates to the admission of relevant evidence. Such character evidence may be proved by evidence of reputation, opinion evidence or by specific instances of conduct. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

But victim's character evidence properly excluded when proof deficient. - Where defendant failed to pose any questions to any witness concerning any character trait of the victim and merely claimed that a certain witness could testify concerning his reputation for aggressiveness and recklessness, without revealing the substance of the evidence either as to such character traits or his reputation in connection with those traits, the offer of proof as to reputation or opinion evidence was deficient, and there

was no error in exclusion of this evidence. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

When rule governs admissibility of motive evidence. - If motive evidence is no more than evidence of character and conduct attacking the credibility of a witness, its admissibility would be governed by this rule. *State v. Lovato*, 91 N.M. 712, 580 P.2d 138 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Cannot frame questions to infer false denials of guilt. - Question concerning a witness's conduct or bad moral character may not be so framed and repeated as to plant in the minds of the jury a distrust of the witness through inferences that he had falsely denied his guilt relating to collateral matters. *State v. Hargrove*, 81 N.M. 145, 464 P.2d 564 (Ct. App. 1970).

Prosecutor cannot multiply negative-response misconduct questions unfairly. - While denials of bad moral character or misconduct are binding upon the cross-examiner and extraneous evidence is inadmissible to contradict such denials, the jury is not bound to accept the word of the witness. Hence, the prosecutor may not in fairness multiply the questions or so frame them as to amount to a charge of misconduct rather than an interrogation. *State v. Hargrove*, 81 N.M. 145, 464 P.2d 564 (Ct. App. 1970).

Prosecutor cannot unduly prejudice accused with suggestions of bad character. - All reasonable care and the utmost good faith must be exercised by the prosecutor, when questioning an accused, to the end that an accused is not unduly prejudiced by suggestions tending to prove his bad character. *State v. Hargrove*, 81 N.M. 145, 464 P.2d 564 (Ct. App. 1970).

Otherwise defendant is denied a fair trial. - It was an abuse of discretion on the part of the trial court to permit the cross-examination of a witness concerning witness's bad moral character or misconduct to be conducted to the extent and in the manner disclosed by the record with the result that a fair trial was denied defendant. *State v. Hargrove*, 81 N.M. 145, 464 P.2d 564 (Ct. App. 1970).

Vices at time of trial immaterial. - Since the tendered testimony did not purport to cover appellee's drinking habits, particularly of whiskey, at the time of the assault, the attempted impeachment was on a collateral issue. What his drinking habits were at the time of trial was immaterial. *Mead v. O'Connor*, 66 N.M. 170, 344 P.2d 478 (1959).

Absent any claim of self-defense victim's asserted character traits were not essential elements of the defense in a prosecution for assault with intent to commit a violent felony and were not provable by specific acts of conduct, but were only of one circumstantial type provable by reputation or opinion evidence. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Cautionary instruction on informer's credibility unnecessary when testimony corroborated. - Refusal of defendant's requested cautionary instruction on the credibility of informer is not error when informer's testimony is adequately corroborated. *State v. Tapia*, 81 N.M. 365, 467 P.2d 31 (Ct. App. 1970).

Impeachment entitles court to ignore uncontradicted evidence. - A court may not disregard uncontradicted evidence on a material issue and find to the contrary thereof, but certain circumstances may be considered as relieving a characterization of it as arbitrary. These are: (1) 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; (2) that the testimony is equivocal or contains inherent improbabilities; (3) that there are suspicious circumstances surrounding the transactions testified to; and (4) 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. *Bank of N.M. v. Rice*, 78 N.M. 170, 429 P.2d 368 (1967); *Galvan v. Miller*, 79 N.M. 540, 445 P.2d 961 (1968); *Gallegos v. Wilkerson*, 79 N.M. 549, 445 P.2d 970 (1968).

Appellate issue is abuse of discretion. - Whether evidence is admissible for purposes of cross-examination under this rule, or whether its prejudicial effect outweighs its probative value, is a discretionary ruling; the appellate issue is whether the trial court abused its discretion. *State v. Cervantes*, 92 N.M. 643, 593 P.2d 478 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979).

Law reviews. - For article, "Impeachment of a Witness's Character in New Mexico," see 2 *Nat. Resources J.* 575 (1962).

For article, "Rape Law: The Need for Reform," see 5 *N.M.L. Rev.* 279 (1975).

For survey, "Evidence: Prior Crimes and Prior Bad Acts Evidence," see 6 *N.M.L. Rev.* 405 (1976).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 *N.M.L. Rev.* 159 (1981).

For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

For article, "Evidence I," see 13 N.M.L. Rev. 407 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 341, 343 to 351; 81 Am. Jur. 2d Witnesses §§ 563, 564, 591, 592, 594.

Admissibility and effect of evidence or comment on party's military service or lack thereof, 9 A.L.R.2d 606.

Impeachment of witness by evidence or inquiry as to arrest, accusation or prosecution, 20 A.L.R.2d 1421.

Prejudicial effect of admission of evidence as to communist or other subversive affiliation or association of accused, 30 A.L.R.2d 589.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 75 A.L.R.2d 508.

Admissibility of evidence as to other's character or reputation for turbulence on question of self-defense by one charged with assault or homicide, 1 A.L.R.3d 571.

Impeachment of witness with respect to intoxication, 8 A.L.R.3d 749.

Necessity and admissibility of expert testimony as to credibility of witness, 20 A.L.R.3d 684.

Admissibility, in disputed paternity proceedings, of evidence to rebut mother's claim of prior chastity, 59 A.L.R.3d 659.

Cross-examination of character witness for accused with reference to particular acts or crimes - modern state rules, 13 A.L.R.4th 796.

Propriety of using otherwise inadmissible statement, taken in violation of Miranda rule, to impeach criminal defendant's credibility - state cases, 14 A.L.R.4th 676.

Impeachment of defense witness in criminal case by showing witness' prior silence or failure or refusal to testify, 20 A.L.R.4th 245.

Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity not having resulted in arrest or charge - modern state cases, 24 A.L.R.4th 333.

Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity for which witness was arrested or charged, but not convicted - modern state cases, 28 A.L.R.4th 505.

Permissibility of impeaching credibility of witness by showing verdict of guilty without judgment or sentence thereon, 28 A.L.R.4th 647.

Impeachment of defendant in criminal case by showing defendant's prearrest silence - state cases, 35 A.L.R.4th 731.

Admissibility of impeached witness' prior consistent statement - modern state civil cases, 54 A.L.R.4th 1000.

Admissibility of impeached witness' prior consistent statement - modern state criminal cases, 58 A.L.R.4th 1014.

Use of plea bargain or grant of immunity as improper vouching for credibility of witness - state cases, 58 A.L.R.4th 1229.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons, 71 A.L.R.4th 448.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 A.L.R.4th 469.

Attacking or supporting credibility of witness by evidence in form of opinion or reputation, under Rule 608(a) of Federal Rules of Evidence, 52 A.L.R. Fed. 440.

Propriety, in federal court action, of attack on witness' credibility by rebuttal evidence pertaining to cross-examination testimony on collateral matters, 60 A.L.R. Fed. 8.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witnesses - federal cases, 78 A.L.R. Fed. 23.

98 C.J.S. Witnesses §§ 491 to 496, 502 to 513.

II. Opinion and Reputation Evidence.

This rule allows attack upon credibility of a witness only by reference to evidence of truthfulness or untruthfulness and is inapplicable, without the proper foundation, where the character of the defendant for truthfulness had not been attacked by opinion or reputation evidence or otherwise. *State v. Ross*, 88 N.M. 1, 536 P.2d 265 (Ct. App.

1975).

Credibility of witness may be impeached by general evidence of bad moral character. *Mead v. O'Conner*, 66 N.M. 170, 344 P.2d 478 (1959).

But cannot use extrinsic evidence to attack credibility. - Although this rule allows evidence of specific instances of conduct to attack a witness's credibility, such evidence may not be extrinsic. *State v. Ross*, 88 N.M. 1, 536 P.2d 265 (Ct. App. 1975).

State may rebut sweeping denial of any wrongdoing. - Where witness goes beyond a mere denial of crime of which he is charged and makes sweeping claim that he has never been in trouble of any kind previously, the state may introduce rebuttal evidence not otherwise available to it to attack the credibility of the witness. *State v. Moultrie*, 58 N.M. 486, 272 P.2d 686 (1954).

Evidence of acting consistently with character proved only by reputation. - Where character evidence is used to suggest that a person acted consistently with his character, the evidence is circumstantial and problems of relevancy exist; this evidence may be proved only by evidence of reputation or opinion evidence, and the offering party may not prove character evidence of this type by specific instances of conduct. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Witness may be impeached by general reputation evidence. - Section 20-2-4, 1953 Comp. (now repealed) permits impeachment of a witness by general evidence that his general reputation for truth and veracity or his moral character is bad. *State v. Anderson*, 24 N.M. 360, 174 P. 215 (1918).

Bad reputation could impeach person's dying declarations. - A person whose dying declarations are admitted in evidence is subject to impeachment in the same manner as other witnesses under this rule; he may be impeached by evidence that he bore a bad reputation for morality. *State v. Gallegos*, 28 N.M. 403, 213 P. 1030 (1923).

Court may allow expert witnesses to impeach credibility of other witnesses. *State v. Tafoya*, 94 N.M. 762, 617 P.2d 151 (1980).

Juvenile probation officer's rebuttal testimony is prejudicial. - The admission of a juvenile probation officer's rebuttal testimony regarding the officer's opinion of the

defendant's reputation for truthfulness is impermissibly prejudicial. *State v. Guess*, 98 N.M. 438, 649 P.2d 506 (Ct. App. 1982).

Formerly permissible to show bad moral character. - It was proper, for the purpose of impeachment under former 20-2-4, 1953 Comp. (similar to this rule), to show bad moral character by eliciting from the witness's testimony as to specific acts of misconduct. *State v. Sharpe*, 81 N.M. 637, 471 P.2d 671 (Ct. App. 1970).

Formerly error to limit impeaching testimony to truthfulness reputation. - It was error for the court to limit impeaching testimony to the reputation of a witness for truth and veracity. *State v. Perkins*, 21 N.M. 135, 153 P. 258 (1915).

III. Specific Instances of Conduct.

A. In General.

Conduct not excluded because adjudication based on conduct excluded. - Specific conduct, admissible on cross-examination to attack credibility, is not to be excluded because an adjudication based on that conduct is excluded. *State v. Wyman*, 96 N.M. 558, 632 P.2d 1196 (Ct. App. 1981).

But questioning concerning prior juvenile adjudications permitted. - Although Rule 11-609 generally excludes evidence of juvenile adjudications from the permitted questioning concerning prior convictions, this exclusion does not prohibit questioning permitted by Paragraph B of this rule. *State v. Wyman*, 96 N.M. 558, 632 P.2d 1196 (Ct. App. 1981).

Limited waiver of privilege against self- incrimination. - Under the last paragraph of this rule waiver of the privilege against self-incrimination is limited. *State v. Archunde*, 91 N.M. 682, 579 P.2d 808 (Ct. App. 1978).

Requirement that evidence be probative of truthfulness is safeguard. - Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principle witness himself. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently, safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. *State v. Marquez*, 87 N.M. 57, 529 P.2d 283 (Ct.

App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

Within court's discretion to permit or limit cross-examination misconduct questioning. - In view of the fact that the questions related to specific acts of misconduct, the court was well within its exercise of sound discretion in permitting or limiting the extent of cross-examination of prosecutrix in indecent exposure case on grounds it was attack on credibility. State v. McKinzie, 72 N.M. 23, 380 P.2d 177 (1963).

Extent of misconduct evidence controllable through judicial discretion. - Although proof of a witness's misconduct is permissible for the purpose of attacking credibility, the extent of such showing is controllable through the exercise of judicial discretion. State v. Hargrove, 81 N.M. 145, 464 P.2d 564 (Ct. App. 1970).

And the discretion is not reviewable. - The exercise of judicial discretion concerning the admissibility of proof of witness's misconduct is not reviewable. State v. Hargrove, 81 N.M. 145, 464 P.2d 564 (Ct. App. 1970).

Impeachment by insinuations based on unsubstantiated allegations of prior misconduct irrelevant and prejudicial. - The impeachment of a witness by insinuations based on unsubstantiated allegations of prior misconduct provides the trier of fact with no information relevant to the witness' credibility and carries a great potential for prejudice. State v. Robinson, 99 N.M. 674, 662 P.2d 1341, cert. denied, 464 U.S. 851, 104 S. Ct. 161, 78 L. Ed. 2d 147 (1983).

Prior to enactment of rules of evidence, court of appeals held that the bad moral character of a witness, including the accused, when a witness in his own behalf, could be shown for the purpose of attacking the credibility through securing from the witness on cross-examination admissions of specific acts of misconduct. State v. Sluder, 82 N.M. 755, 487 P.2d 183 (Ct. App. 1971).

Formerly witness could be interrogated concerning acts of moral misconduct. - Under former 20-2-4, 1953 Comp., a witness could be interrogated upon cross-examination concerning specific acts of moral misconduct and specific acts of wrongdoing of such witness to affect the credibility of such witness and the weight to be given to his or her testimony, but the cross-examiner was bound by the answers given to such questions and could not produce other and independent evidence with reference to such matters beyond that given by the assailed witness. This rule applied to any witness, adult or juvenile. Martinez v. Avila, 76 N.M. 372, 415 P.2d 59 (1966).

But his answer was conclusive of matter under inquiry. - Under former 20-2-4, 1953 Comp., the bad moral character of a witness could be shown for the purpose of attacking his credibility by eliciting from the witness specific acts of misconduct, but the answer of the witness was conclusive of the matter under inquiry. *Martinez v. Avila*, 76 N.M. 372, 415 P.2d 59 (1966).

Credibility may be impeached by extracting admissions of specific misconduct. - The credibility of a witness may be impeached by extracting from him on cross-examination admission of specific acts of misconduct or wrongdoing if admissions can be secured in such manner. *State v. Moultrie*, 58 N.M. 486, 272 P.2d 686 (1954).

But only by cross-examination. - A witness may not be impeached regarding specific acts of misconduct by the testimony of other witnesses, but only by cross-examination. *State v. McKinzie*, 72 N.M. 23, 380 P.2d 177 (1963).

Defendant may be questioned as to specific acts of misconduct, on cross-examination, even if defendant has not opened up the matter. *State v. Madrid*, 83 N.M. 603, 495 P.2d 383 (Ct. App. 1972).

Bad moral character of a witness, including accused when witness in his own behalf, may be shown for the purpose of attacking credibility through securing from the witness on cross-examination admissions of specific acts of misconduct. *State v. Hargrove*, 81 N.M. 145, 464 P.2d 564 (Ct. App. 1970).

Bad moral character of witness may be shown by eliciting from the witness specific acts of misconduct. In such case, the answer of the witness is conclusive of the matter under inquiry. *Mead v. O'Connor*, 66 N.M. 170, 344 P.2d 478 (1959).

Facts tending to disgrace witness are relevant. - Tendency is to regard all facts as relevant which will enable the jurors to decide to what extent the testimony of the witness can be relied on, which includes specific facts, not too remote in time, that may tend to disgrace him, and counsel will be bound by his answers. *Borrego v. Territory*, 8 N.M. 446, 46 P. 349 (1896).

Admissions of specific acts of misconduct by witness are admissible as a matter of impeachment under 20-2-4, 1953 Comp. (now repealed). *State v. Martinez*, 57 N.M. 158, 255 P.2d 987 (1953).

Nondefendant misconduct may be examined where credibility crucial. - Under former rule of evidence (20-2-4, 1953 Comp.), the trial court did not err in permitting cross-examination of nondefendant witnesses as to misconduct where, except for one instance, not prejudicial to defendant, none of the questions involved the defendant, and where credibility was crucial in the case. *State v. McFerran*, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969).

Where prosecutor knew that nondefendant witnesses would invoke their constitutional privilege when questioned as to their misconduct, and where the trial court in its discretion decided that the legitimate effect of such questioning-the attack on credibility-was not outweighed by prejudice to the defendant, the prosecutor's questioning was not improper and defendant was not denied due process. *State v. McFerran*, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969).

Entrapment defense does not require evidence of accuser's past behavior. - While, once defendant raised the defense of entrapment, he automatically placed his own past behavior at issue (in order for the state to show preexisting disposition to commit the offense), it does not follow that once this happens the undercover agent's prior behavior, except for activities which led up to the entrapment, would likewise become relevant. *State v. Mordecai*, 83 N.M. 208, 490 P.2d 466 (Ct. App. 1971).

B. Examples.

Improper questions as to defendant's character for truthfulness. - Questions involving hiring a person to kill or threaten people are not questions concerning defendant's character for truthfulness and are not proper questions under this rule. *State v. Miller*, 92 N.M. 520, 590 P.2d 1175 (1979).

And proper questions involving dishonesty. - Questions concerning the buying or selling of stolen property, an arrangement to sell illegal drugs, and failing to account for the proceeds of the sale of a diamond ring involve dishonesty and are proper questions under this rule. *State v. Miller*, 92 N.M. 520, 590 P.2d 1175 (1979).

Prosecutor's questioning of defendant on cross-examination regarding his use of an altered driver's license to carry out forgeries for which he had been convicted was proper to show a specific instance of conduct which was probative of his truthfulness. *State v. Clark*, 105 N.M. 10, 727 P.2d 949 (Ct. App. 1986).

Cross-examination concerning embezzlement, burglary, theft and larceny proper. - Questions concerning embezzlement, burglary, auto theft and larceny involve dishonesty, are probative as to truthfulness and are proper under cross-examination under this rule. *State v. Wyman*, 96 N.M. 558, 632 P.2d 1196 (Ct. App. 1981).

Subsequent brawling not probative of truthfulness or untruthfulness. - In a negligence suit against a restaurant owner for injuries sustained in a barroom brawl, specific subsequent instances involving plaintiff's drunken and abusive conduct, resisting arrest, a municipal court battery conviction and an instance where plaintiff shot a third person with a pistol were held not probative of truthfulness or untruthfulness, and hence, the trial court did not err in excluding such evidence on the question of plaintiff's truthfulness or untruthfulness. *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).

Prior shooting incident not admissible under this rule. - A carnival shooting incident two days before the crimes in question bore upon the intent of the defendant when he shot the decedent and his friend showing the state of mind of the defendant, and his characteristic conduct in the use of a gun, and though not admissible under this rule, because not probative of credibility or lack thereof was properly admitted under Rule 11-404. *State v. Marquez*, 87 N.M. 57, 529 P.2d 283 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

Defendant offering to testify is subject to cross-examination the same as any other witness; and she may be asked if she has not for some time sustained illicit relations with one to whom she was not married. *Territory v. de Gutman*, 8 N.M. 92, 42 P. 68 (1895).

Evidence that victim gave truthful answers during polygraph examination is admissible under this rule when the defendant attacks the credibility of the victim by questioning his ability to perceive. *State v. Gallegos*, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

When truthfulness of answers in polygraph exam not extrinsic evidence. - Testimony that a witness was truthful during a polygraph examination, relevant to issues in a trial for aggravated battery with a deadly weapon, is not extrinsic evidence of the conduct of the witness. *State v. Gallegos*, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

In assault prosecution defense may ask wife of illicit affair. - In a prosecution of a husband for assault with intent to murder his wife, defendant's counsel may ask the wife

on cross-examination if she was not at the time pregnant by a man other than her husband. *Territory v. Garcia*, 15 N.M. 538, 110 P. 838 (1910).

Defendant has right to cross-examine rape prosecutrix on prior misconduct. - While the extent to which a witness may be cross-examined rests largely in the discretion of the court, it is reversible error to refuse defendant the right to cross-examine the prosecutrix in a rape case as to prior acts of misconduct for the purpose of impeaching her. *State v. Cruz*, 34 N.M. 507, 285 P. 500 (1930).

Introduction of extrinsic evidence of crimes not charged violated Paragraph B. - See *State v. Vigil*, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985) (prosecution for criminal sexual contact of a minor).

Not improper to cross-examine on cause of alibi. - Under 20-2-4, 1953 Comp. (now repealed), where defendant, accused of aggravated assault, testified that he had gone to hospital to visit his injured brother on the night of the assault, it was not improper for prosecutor to ask defendant on cross-examination how his brother was injured, and thereby elicit answer that defendant had broken his brother's jaw. *State v. Torres*, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

But professor's testimony on probable cause question deemed extrinsic. - Tendered testimony of a law professor that a police officer had probable cause to obtain a search warrant but did not, offered for the purpose of attacking the credibility of the officer, is extrinsic evidence and is not admissible under this rule. *State v. Barela*, 91 N.M. 634, 578 P.2d 335 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978).

Testimony of informant's former attorney inadmissible. - The testimony of an informant's former attorney offered for the purpose of impeaching the informant's reputation for truthfulness violates the attorney-client privilege and is inadmissible under the Rules of Evidence. *State v. Hinojos*, 95 N.M. 659, 625 P.2d 588 (Ct. App. 1980).

Showing of probative value necessary. - When the question is under Paragraph B, a prosecutor, who seeks to have a defendant make an admission concerning a felony when there has been no conviction, hazards a reversal absent a showing of probative value on the question of the defendant's credibility because of the prejudicial nature of the question. *State v. Miller*, 92 N.M. 520, 590 P.2d 1175 (1979).

No error in refusing expert testimony where probative value slight. - The trial court does not err in refusing to admit the testimony of an expert as to the credibility of the victims

of a sexual offense where the probative value of the testimony was slight, based upon the lack of personal observation by the expert. *State v. Tafoya*, 94 N.M. 762, 617 P.2d 151 (1980).

Being arrested, charged, or being suspect is not prior act of misconduct to be inquired into on cross-examination. *State v. Herrera*, 102 N.M. 254, 694 P.2d 510, cert. denied, 471 U.S. 1103, 105 S. Ct. 2332, 85 L. Ed. 2d 848 (1985).

Impeachment inquiry based on "rap sheets" improper. - Impeachment inquiry charges of misconduct was improper because it was based only upon the "rap sheets" and therefore was not in good faith. *State v. Herrera*, 102 N.M. 254, 694 P.2d 510, cert. denied, 471 U.S. 1103, 105 S. Ct. 2332, 85 L. Ed. 2d 848 (1985).

Evidence of officer's alleged prior untruthfulness. - Where police officer denied saying a prior complaint of excessive use of force was valid, party would have had to call another witness to prove the untruthfulness, but Paragraph B prohibits the use of extrinsic evidence to prove specific instances of conduct, and the trial court did not commit error in refusing to admit this evidence. *Baum v. Orosco*, 106 N.M. 265, 742 P.2d 1 (Ct. App. 1987).

Cross-examination regarding prior complaints properly refused. - There was no abuse of discretion in refusing to allow the defense to cross-examine the complainant regarding prior complaints in order to impeach her credibility where the defendant offered no proof that the accusations were false, since the probative value of the fact that the victim made prior complaints is nonexistent, while its prejudicial effect is great. *State v. Johnson*, 102 N.M. 110, 692 P.2d 35 (Ct. App. 1984).

Evidence of alibi witness' motive to testify falsely admissible. - Evidence that alibi witness had previously committed criminal sexual penetration is admissible to show motive of the alibi witness to testify falsely, where the defendant is charged with the same offense. *State v. Worley*, 100 N.M. 720, 676 P.2d 247 (1984).

Cross-examination of state's witness on witness' prior drug addiction held inadmissible. *State v. Blea*, 101 N.M. 323, 681 P.2d 1100 (1984).

Residence with drug rehabilitation organization shows nothing concerning witness's character for truthfulness or untruthfulness; questions on cross-examination concerning such residence were not admissible. *State v. Mills*, 94 N.M. 17, 606 P.2d 1111 (Ct.

App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Cross-examination on violation of regulation not probative of truthfulness. - In a prosecution for false imprisonment of a school bus driver, the trial court had the discretion to deny cross-examination of the victim concerning whether she violated a school regulation which prohibited drivers from giving rides to individuals who are not enrolled school children, since such inquiry was not probative of the victim's truthfulness or untruthfulness. State v. Muise, 103 N.M. 382, 707 P.2d 1192 (Ct. App. 1985).

Violation of city ordinance can show specific act of wrongdoing. - Where the court ruled that the violation of a city ordinance was admissible to show a specific act of wrongdoing by the defendant and the court specified the kind of ordinance conviction about which it would permit defendant to be cross-examined, it cannot be said that the court permitted questions that were not limited in extent, range and form. State v. Biswell, 83 N.M. 65, 488 P.2d 115 (Ct. App.), cert. denied, 83 N.M. 57, 488 P.2d 107 (1971).

City ordinance conviction impeaches as bad moral character. - Where the court ruled that "conviction of violating a city ordinance of that kind, is admissible for the purpose of showing a specific act of wrongdoing," the trial court did not permit the question under 20-2-3, 1953 Comp. (now repealed but similar to Rule 11-609), which authorized questions concerning convictions of felonies and misdemeanors, but rather the question was permitted under former 20-2-4, 1953 Comp., which permitted impeachment by showing "bad moral character," which may be shown by specific acts of misconduct. State v. Biswell, 83 N.M. 65, 488 P.2d 115 (Ct. App.), cert. denied, 83 N.M. 57, 488 P.2d 107 (1971).

11-609. Impeachment by evidence of conviction of crime.

A.

General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime

(1) was punishable by death or imprisonment in excess of one (1) year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or

(2) involved dishonesty or false statement, regardless of the punishment.

B.

Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

C.

Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The judge may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

D.

Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Committee commentary. - Paragraph A was changed to conform to federal rule. The change requires that (1) the evidence of the prior conviction is only admissible if admitted by the witness or established by a public record and (2) the court determines that the probative value outweighs the prejudice to the defendant.

Paragraph B was changed to conform to first part of federal rule. Unlike the federal rule, the New Mexico rule establishes an absolute 10-year limit on the use of the prior conviction.

The 1976 amendment struck all of former Subdivision (c), which had excluded evidence of a prior conviction if the witness had been paroled, etc. That subdivision is retained in the federal rules. The remaining subdivisions were retitled as (c) and (d). The amendment to new Paragraph C conforms to the federal rule and constitutional law. It makes it clear that a witness, other than the accused in a criminal case, may be impeached by evidence of a prior juvenile adjudication.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Evidence of Prior Conviction.
 - A. In General.
 - B. Proof of Conviction.
 - C. Permissible.
 - D. Impermissible.
- III. Juvenile Adjudications.
- IV. Pendency of Appeal.

I. General Consideration.

Cross-references. - As to admissibility of character evidence and methods of proving it, see Rules 11-404 and 11-405.

Compiler's notes. - This rule is similar to Rule 609 of the Federal Rules of Evidence.

Most of the following cases were decided pursuant to 20-2-3, 1953 Comp. (now repealed by Laws 1973, ch. 223, § 2), which was similar to this rule.

Constitutional protection of right to cross-examine fully. - The comprehensiveness of cross-examination does not lie solely within the limitation of these rules. The right to fully cross-examine, particularly when the evidence sought to be developed is such as would allow inferences of motive to lie because of the witness's vulnerable status as a parolee or a suspect, is protected by the federal and state constitutions. *State v. Baldizan*, 99 N.M. 106, 654 P.2d 559 (Ct. App. 1982).

Allowing evidence of prior convictions not violation of due process. - Defendant, during direct examination at trial, testified to a prior conviction. Reasoning that he was forced to introduce this evidence in order to diminish the prejudicial effect of the state doing so during cross-examination he claimed that 20-2-3, 1953 Comp. (now repealed) violates due process because testimony as to prior convictions prejudices his right to testify in his own behalf. This argument failed because when an accused takes the witness stand he is in the same position as any other witness and is not entitled to have his testimony falsely cloaked with reliability by having his credibility protected against the truth-searching process of cross-examination. *State v. Duran*, 83 N.M. 700, 496 P.2d 1096 (Ct. App.), cert. denied, 83 N.M. 699, 496 P.2d 1095 (1972).

The balancing provision of Subparagraph A(1), applicable in criminal cases, should not apply to civil cases in New Mexico. *Lenz v. Chalamidas*, N.M. , 782 P.2d 85 (1989).

Subparagraph A(1) evidence is always subject to possible exclusion under Rule 11-403, relating to exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. *Lenz v. Chalamidas*, N.M. , 782 P.2d 85 (1989).

This rule contains the test to be applied when defendant attempts to keep evidence out; it simply does not deal with the situation where defendant is introducing evidence on a past conviction. *State v. Noland*, 104 N.M. 537, 724 P.2d 246 (Ct. App. 1986).

Purpose of questioning witness as to prior convictions is to test the credibility of the witness, and newly discovered evidence as to prior convictions could only be used for impeachment and would have been cumulative to the impeachment testimony introduced at the trial. *Sierra Blanca Sales Co. v. Newco Indus., Inc.*, 84 N.M. 524, 505 P.2d 867 (Ct. App.), cert. denied, 84 N.M. 512, 505 P.2d 855 (1972).

Conviction is fact and not open to explanation. - Where conviction of a criminal offense is shown against a witness for purpose of affecting his credibility, such conviction should stand as a fact and not be open to explanation by the witness. *Territory v. Garcia*, 15 N.M. 538, 110 P. 838 (1910).

"Convicted" includes a jury verdict of guilty; that verdict may be used to impeach a witness. *State v. Keener*, 97 N.M. 295, 639 P.2d 582 (Ct. App. 1981).

Pardon restores competency but not credit as witness. - The pardon of a convict operates to restore his competency as a witness, but does not restore his credibility. The conviction of an infamous offense is evidence of bad character for truth. *Territory v. Chavez*, 8 N.M. 528, 45 P. 1107 (1896).

Evidence of prior conviction is admissible within confines of trial court's discretion. *State v. Baca*, 86 N.M. 144, 520 P.2d 872 (Ct. App. 1974).

Community correctional center as state prison. - An out-of-state community correctional center, to which the defendant had been transferred following his prior conviction, was a state prison for purposes of the time limitation set forth in Paragraph B. *State v. Hall*, 107 N.M. 17, 751 P.2d 701 (Ct. App. 1987).

Trial court is allowed broad discretion in controlling extent of cross-examination of an accused directed at testing his credibility. The primary responsibility is on the trial court to determine when the cross-examination should be limited, because the legitimate probative value on the credibility of the accused may be outweighed by its illegitimate tendency, effect or purpose to prejudice him as a defendant. The discretion of the trial court in making this determination will not be disturbed on appeal, unless the appellate court can say the trial judge's action was obviously erroneous, arbitrary and unwarranted. *State v. Williams*, 76 N.M. 578, 417 P.2d 62 (1966).

Probative value determination of prior conviction cross-examination within court's discretion. - The trial court must exercise its discretion in determining the probative value of cross-examination concerning defendant's prior convictions and having done

so, that discretion in making this determination will not be disturbed on appeal, unless the appellate court can say the trial judge's action was erroneous, arbitrary and unwarranted. *State v. Sibold*, 83 N.M. 678, 496 P.2d 738 (Ct. App. 1972).

Evidence admissible for one purpose is not excluded because inadmissible for another purpose. *State v. Wyman*, 96 N.M. 558, 632 P.2d 1196 (Ct. App. 1981).

And conduct not excluded because adjudication excluded. - Specific conduct, admissible on cross-examination to attack credibility, is not to be excluded because an adjudication based on that conduct is excluded. *State v. Wyman*, 96 N.M. 558, 632 P.2d 1196 (Ct. App. 1981).

All reasonable care, and utmost good faith, must be exercised by the prosecutor when questioning an accused about prior convictions, to the end that an accused is not prejudiced by suggestions that he has been convicted of a misdemeanor or felony, when in fact he has not been so convicted. *State v. Williams*, 76 N.M. 578, 417 P.2d 62 (1966); *State v. Robinson*, 99 N.M. 674, 662 P.2d 1341, cert. denied, 464 U.S. 851, 104 S. Ct. 161, 78 L. Ed. 2d 147 (1983).

No prejudicial guilt by association with felons shown. - Where two of the state's witnesses pled guilty to an offense arising out of the same mortgage brokering business in which defendant was involved, the jury was entitled to know that the witnesses were convicted felons, and the mere fact that defendant was associated with people who, at one time, were convicted of a felony did not show the requisite prejudice to warrant a reversal of defendant's convictions for general fraud and securities fraud. *State v. Ross*, 104 N.M. 23, 715 P.2d 471 (Ct. App. 1986).

Law reviews. - For article, "Impeachment of a Witness's Character in New Mexico," see 2 Nat. Resources J. 575 (1962).

For article, "Rape Law: The Need for Reform," see 5 N.M.L. Rev. 279 (1975).

For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

For article, "Evidence I," see 13 N.M.L. Rev. 407 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 327 to 330; 81 Am. Jur. 2d Witnesses §§ 569, 571, 575 to 580.

Conviction in another jurisdiction as disqualifying witness, 2 A.L.R.2d 579.

Admissibility and effect of evidence or comment on party's military service or lack thereof, 9 A.L.R.2d 606.

Cross-examination of automobile driver in civil action with respect to arrest or conviction for previous traffic offenses, 20 A.L.R.2d 1217; 88 A.L.R.3d 74.

Impeachment of witness by evidence or inquiry as to arrest, accusation or prosecution, 20 A.L.R.2d 1421.

Impeachment of witness by showing conviction of contempt, 49 A.L.R.2d 845.

Effect of prosecuting attorney asking defense witness other than accused as to prior convictions where he is not prepared to offer documentary proof in event of denial, 3 A.L.R.3d 965.

Permissibility of impeaching credibility of witness by showing former conviction, as affected by pendency of appeal from conviction or motion for new trial, 16 A.L.R.3d 726.

Use of unrelated traffic offense conviction to impeach general credibility of witness in state civil case, 88 A.L.R.3d 74.

Use of unrelated misdemeanor conviction (other than for traffic offense) to impeach general credibility of witness in state civil case, 97 A.L.R.3d 1150.

Conviction by court-martial as proper subject of cross-examination for impeachment purposes, 7 A.L.R.4th 468.

Cross-examination of character witness for accused with reference to particular acts or crimes - modern state rules, 13 A.L.R.4th 796.

Adequacy of defense counsel's representation of criminal client regarding prior convictions, 14 A.L.R.4th 227.

Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity not having resulted in arrest or charge - modern state cases, 24 A.L.R.4th 333.

Construction and application of Rule 609(a) of the Federal Rules of Evidence permitting impeachment of witness by evidence of prior conviction of crime, 39 A.L.R. Fed. 570.

Construction and application of Rule 609(c) of the Federal Rules of Evidence, providing that evidence of conviction is not admissible to attack credibility of witness if conviction has been subject of pardon, annulment, or other procedure based on finding of rehabilitation or innocence, 42 A.L.R. Fed. 942.

Construction and application of Rule 609(b) of Federal Rules of Evidence, setting time limit on admissibility of evidence of conviction of crime to attack credibility of witness, 43 A.L.R. Fed. 398.

Review on appeal, where accused does not testify, of trial court's preliminary ruling that evidence of prior convictions will be admissible under Rule 609 of the Federal Rules of Evidence if accused does testify, 54 A.L.R. Fed. 694.

98 C.J.S. Witnesses §§ 503, 507.

II. Evidence of Prior Conviction.

A. In General.

Purpose of the 1976 amendment of Subparagraph A(1) was to emphasize concern for the defendant when prior felony convictions of any witness are offered in evidence. *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct. App. 1978).

Proof of commission of another crime, for impeachment purposes, held prejudicial error. *Casaus v. State*, 94 N.M. 58, 607 P.2d 596 (1980).

Prejudicial impact alone does not render evidence inadmissible. - While there was a certain similarity between the prior crime of assault with a deadly weapon upon a peace officer and the present crime of murdering a peace officer with a firearm and, because of the similarity, the possibility existed that the introduction of evidence of that prior crime would have had at least some prejudicial impact against the defendant, this, by itself, did not render the evidence inadmissible. The trial court had to determine whether the probative value of the prior conviction, for impeachment purposes only, outweighed

its prejudicial effect. *State v. Hall*, 107 N.M. 17, 751 P.2d 701 (Ct. App. 1987).

Erroneous admission of evidence of accused's prior crimes is error in absence of special circumstances. *Casaus v. State*, 94 N.M. 58, 607 P.2d 596 (1980).

Proof of separate convictions not generally admissible. - It is generally held that proof of convictions of other and separate criminal offenses by the defendant is not admissible and that it is prejudicial error to admit such proof. *State v. Rowell*, 77 N.M. 124, 419 P.2d 966 (1966).

And damage caused by questioning not repaired by sustaining objection. - The damage implicit in the asking of the question concerning defendant's past convictions of crimes was in no way repaired by virtue of the fact that the objection was sustained. Neither was it overcome by the admonitions given the jury, therefore, the asking of such a question constituted reversible error. *State v. Rowell*, 77 N.M. 124, 419 P.2d 966 (1966).

But there are exceptions to general rule. - There are several exceptions to the general rule that evidence of offenses and crimes, other than that for which the defendant is on trial, cannot be introduced. Among these exceptions are proof of motive, intent, absence of a mistake or accident, a common scheme or plan or the identity of the person charged with the commission of the crime. *State v. Lopez*, 85 N.M. 742, 516 P.2d 1125 (Ct. App. 1973).

Factors for consideration. - Some of the factors which should be considered by the trial court when deciding whether to admit evidence of prior convictions not involving dishonesty, for impeachment purposes, include: (1) the nature of the crime in relation to its impeachment value as well as its inflammatory impact; (2) the date of the prior conviction and the witness's subsequent history; (3) similarities, and the effect thereof, between the past crime and the crime charged; (4) a correlation of standards expressed in Paragraph A of this rule with the policies reflected in Rule 11-404; (5) the importance of the defendant's testimony; and (6) the centrality of the credibility issue. *State v. Lucero*, 98 N.M. 311, 648 P.2d 350 (Ct. App. 1982).

Subparagraph A(1) contemplates admission into evidence of felony convictions, regardless of whether they concerned dishonesty or false statement. The supreme court's adoption of this rule is tantamount to a determination that any felony punishable by imprisonment in excess of one year bears on credibility. *State v. Lucero*, 98 N.M. 311, 648 P.2d 350 (Ct. App. 1982).

Accused on witness stand cannot avoid cross-examination. - When an accused takes the witness stand he is in the same position as any other witness and he is not entitled to have his testimony falsely cloaked with reliability by having his credibility protected against the truth-searching process of cross-examination. *State v. Lindsey*, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969), cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

And prior criminal convictions may thereby be shown. - On cross-examination, the state may establish through the accused the fact of his prior conviction and the name of the particular felony or misdemeanor of which he has been convicted. *State v. Lindsey*, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969), cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

Cross-examination on past convictions may modify and supplement direct questions. - Where the state's questions concerning defendant's past criminal conduct pertained to matters inquired of in the direct examination, the cross-examination modified and supplemented the testimony on direct examination and was proper under *State v. Wilcoxson*, 51 N.M. 501, 188 P.2d 611 (1948); *State v. Garcia*, 78 N.M. 136, 429 P.2d 334 (1967).

Instruction given when prior conviction questions asked is sufficient. - Defendants in a traffic accident suit were not prejudiced by the failure of the trial court to give an instruction concerning proof of a witness's conviction of a crime under former 20-2-3, 1953 Comp. The trial court instructed the jury at the time the questions were propounded and such instruction left the jury correctly informed. *Bailey v. Jeffries-Eaves, Inc.*, 76 N.M. 278, 414 P.2d 503 (1966).

Inability to lay foundation moot when prior conviction subsequently proved. - The error of the district court in sustaining an objection to a question to lay the foundation for impeachment is not available to the appellant when he is later permitted to prove that the witness had been convicted of the crime inquired about. *State v. Roybal*, 33 N.M. 540, 273 P. 919 (1928).

Where record does not disclose nature of district attorney's information concerning the prior forgery conviction, appellate court does not have sufficient information before it to hold, as a matter of law, that the district attorney acted improperly in asking about "any other" convictions. *State v. Biswell*, 83 N.M. 65, 488 P.2d 115 (Ct. App.), cert. denied, 83 N.M. 57, 488 P.2d 107 (1971).

Appellate review of admission of prior conviction. - Where it is contended that the probative nature of a prior conviction was outweighed by its prejudicial impact upon the jury, the appellate question is whether the trial court abused its discretion in permitting a question concerning the prior conviction. *Jaramillo v. Fisher Controls Co.*, 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985).

Although defense counsel objected to introduction of prior convictions under this rule, the "specific grounds" stated related to juvenile convictions and stale convictions and as defendant did not assert the inadmissibility of convictions of crimes punishable by imprisonment for less than one year, this issue is raised for the first time on appeal and will not be heard. *State v. Cardona*, 86 N.M. 373, 524 P.2d 989 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

No review of discretionary action when proceedings not in transcript. - Where the lower court has ruled that the offense charged was a violation of a city ordinance, and was a mere civil matter and not a misdemeanor, the ruling cannot be reviewed where the ordinance and proceedings are not in the transcript. *State v. Knowles*, 32 N.M. 189, 252 P. 987 (1927).

B. Proof of Conviction.

Indictment not followed by a corresponding conviction is not a "conviction" within the meaning of this rule. *State v. Shoemaker*, 97 N.M. 253, 638 P.2d 1098 (Ct. App. 1981).

Question of impropriety exists if prosecutor cannot prove conviction. - If a prosecutor inquires concerning a prior conviction and is unable to prove the conviction, a determination as to whether he acted improperly depends on the facts and circumstances. *State v. Garcia*, 80 N.M. 247, 453 P.2d 767 (Ct. App. 1969).

Must offer copies of laws violated. - To impeach a witness because of a prior criminal record, a party must offer the trial judge copies of the statutes or city ordinances which were the bases of the conviction and must offer evidence that the conviction was for an offense punishable by imprisonment for more than one year or involved dishonesty or false statement. *State v. Bobbin*, 103 N.M. 375, 707 P.2d 1185 (Ct. App. 1985).

Prosecutor must go further than "rap sheet" to verify conviction. - Cross-examination of an accused based solely on information contained in an "F.B.I. rap sheet" cannot ordinarily be said to be consistent with the exercise of all reasonable care and the utmost good faith. Generally, the prosecutor has the burden of going further to verify the

prior conviction, before he can properly proceed to question the accused concerning the same. *State v. Williams*, 76 N.M. 578, 417 P.2d 62 (1966).

Testimony concerning seeing defendant handcuffed not evidence of prior conviction. - Testimony in response to a question propounded to the witness concerning some earlier testimony to the effect that the witness had never seen the defendant handcuffed, without particular reference to either defendant, falls short of being evidence of a prior conviction. *State v. Carlton*, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

Violating city ordinance not admissible as prior conviction. - Where the court ruled that "conviction of violating a city ordinance of that kind, is admissible for the purpose of showing a specific act of wrongdoing," the trial court did not permit the question under 20-2-3, 1953 Comp. (now repealed), which authorizes questions concerning convictions of felonies and misdemeanors, but rather the question was permitted under 20-2-4, 1953 Comp. (now repealed but similar to Rule 11-608), which permits impeachment by showing "bad moral character," which may be shown by specific acts of misconduct. *State v. Biswell*, 83 N.M. 65, 488 P.2d 115 (Ct. App.), cert. denied, 83 N.M. 57, 488 P.2d 107 (1971).

Evidence of arrest and payment of costs not proof of conviction. - Witness's testimony that he had been arrested for stealing crossties, and paid the costs of the suit, was properly stricken as not proving conviction. *State v. McCabe*, 41 N.M. 428, 70 P.2d 758 (1937).

C. Permissible.

District attorney on cross-examination was entitled to show all prior convictions and the names of the particular offenses. *State v. Ocanas*, 61 N.M. 484, 303 P.2d 390 (1956).

And name of particular felony or misdemeanor. - On cross-examination the state may establish by the accused the fact of a prior conviction and the name of the particular felony or misdemeanor of which he had been convicted. *State v. Williams*, 76 N.M. 578, 417 P.2d 62 (1966).

But only the conviction and name thereof. - On cross-examination, the state may go no further than to show the conviction of a witness and the name of the particular felony or misdemeanor of which he had been convicted. *State v. Ocanas*, 61 N.M. 484, 303 P.2d

390 (1956).

Showing conduct probative of truthfulness. - Prosecutor's questioning of defendant on cross-examination regarding his use of an altered driver's license to carry out forgeries for which he had been convicted was proper to show a specific instance of conduct which was probative of his truthfulness. *State v. Clark*, 105 N.M. 10, 727 P.2d 949 (Ct. App. 1986).

May cross-examine as to prior conviction and name of felony. - Under 20-2-3, 1953 Comp. (now repealed), the defendant may be cross-examined concerning the fact of a prior conviction and the name of the particular felony or misdemeanor of which he has been convicted, however, the cross-examination may not go beyond the particular offense. *State v. Clark*, 80 N.M. 91, 451 P.2d 995 (Ct. App.), rev'd on other grounds, 80 N.M. 340, 455 P.2d 844 (1969).

Where state did not attempt to prove details of other criminal offenses and all it did was go into the question of whether prior convictions had, in fact, occurred, such questioning was authorized by 20-2-3, 1953 Comp. (now repealed). *State v. Paul*, 80 N.M. 521, 458 P.2d 596 (Ct. App.), cert. denied, 80 N.M. 746, 461 P.2d 228, 397 U.S. 1044, 90 S. Ct. 1354, 25 L. Ed. 2d 654 (1970).

Not error to ask whether penitentiary sentence served. - Permitting the defendant, a witness in his own behalf, to be asked on cross-examination whether he had been convicted of a felony and served a term in the penitentiary was not error. *State v. Riley*, 40 N.M. 132, 55 P.2d 743 (1936).

Testimony from defendant as to prior convictions relates only to his credibility. *State v. Archunde*, 91 N.M. 682, 579 P.2d 808 (Ct. App. 1978).

Shoplifting as crime involving dishonesty. - Violation of a municipal ordinance prohibiting shoplifting comes within the meaning of crime; it is a crime involving dishonesty. *State v. Melendrez*, 91 N.M. 259, 572 P.2d 1267 (Ct. App. 1977).

Cross-examination of defendant concerning prior robbery conviction is proper whether the particular conviction was for a misdemeanor or a felony, as robbery involves dishonesty. *State v. Day*, 94 N.M. 753, 617 P.2d 142, cert. denied, 449 U.S. 860, 101 S. Ct. 163, 66 L. Ed. 2d 77 (1980).

As is cross-examination concerning embezzlement, burglary, theft and larceny. - Questions concerning embezzlement, burglary, auto theft and larceny involve dishonesty, are probative as to truthfulness and are proper under cross-examination under this rule. *State v. Wyman*, 96 N.M. 558, 632 P.2d 1196 (Ct. App. 1981).

Exhibit admitted to identify defendant to impeach his credibility. - Trial court properly admitted an entire exhibit relating to defendant's prior conviction, including a penitentiary photograph, fingerprints taken at the penitentiary and a copy of the sentence, because the photographs and fingerprints showed that defendant was the person indicted and convicted in order to impeach his credibility. *State v. Mills*, 94 N.M. 17, 606 P.2d 1111 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Formerly fingerprint evidence from another crime scene was admissible. - Prior to enactment of rules of evidence, evidence of other crimes was admissible if it served to establish the identity of the person charged. Therefore, evidence of defendant's fingerprint at scene of another crime was admissible for impeachment purposes on the issue of identity, since it tended to establish that identity by characteristic conduct. *State v. Turner*, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

But not on question of guilt. - The trial court had wide discretion in dealing with counsel's argument, and did not abuse its discretion in overruling defendant's objections to the prosecutor's closing remarks about collateral offenses committed by defendant where the jury was instructed on three occasions - during the cross-examination of the psychologist, the cross-examination of the psychiatrist and upon final submission of the case to them - that references to such collateral offenses and to the fingerprint went only to the credibility of the experts and were not to be considered on the question of guilt. *State v. Turner*, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

D. Impermissible.

Prejudicial impact of admission into evidence of gun not used in crime being tried outweighed its probative value. *Casaus v. State*, 94 N.M. 58, 607 P.2d 596 (1980).

Policy is that misdemeanor convictions inadmissible unless deal with veracity. - Defense counsel's objection to the prosecutor's questions as to defendant's misdemeanor convictions on grounds of irrelevancy was sufficiently specific to alert the trial court and the prosecution to the impropriety of the questioning, since it implicitly asserted the policy behind this rule, that is, prior convictions of misdemeanors, not dealing with the veracity of the defendant, simply are irrelevant as to his credibility and thus defense counsel did not waive this error, despite his failure to cite the proper rule. *Albertson v.*

State, 89 N.M. 499, 554 P.2d 661 (1976).

Policy behind rule is that prior convictions of misdemeanors, not dealing with the veracity of the defendant, simply are irrelevant as to his credibility. *State v. Melendrez*, 91 N.M. 259, 572 P.2d 1267 (Ct. App. 1977).

Evidence admissible under this rule is subject to exclusion by the trial court under Rule 403. *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct. App. 1978).

Questions concerning "any unlawful act" impermissible. - In permitting questioning concerning "[a]ny unlawful act," the trial court failed to properly perform its affirmative duty of weighing the legitimate probative value of the cross-examination against the illegitimate tendency to prejudice. *State v. Waller*, 80 N.M. 380, 456 P.2d 313 (Ct. App. 1969).

Prosecutor cannot read criminal statutes to jury to imply criminality. - Even if defendant's evidence showed the undercover agent had committed violations of certain statutes, he was not entitled to read these statutes to the jury as evidence that the agent was a criminal and not to be believed, since the defendant did not establish the witness's conviction of a crime as required by 20-2-3, 1953 Comp. (now repealed). *State v. Polsky*, 82 N.M. 393, 482 P.2d 257 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971), cert. denied, 404 U.S. 1015, 92 S. Ct. 688, 30 L. Ed. 2d 662 (1972).

Admissibility of evidence of defendant's dishonorable discharge when defendant puts in issue. - Evidence of a defendant's dishonorable discharge from military service or of specific discreditable acts of conduct during his military tenure are generally inadmissible in a criminal trial when these matters have not been first elicited or put in issue by the defendant. *State v. Ho'o*, 99 N.M. 140, 654 P.2d 1040 (Ct. App. 1982).

Error to compel defendant to relate former offenses' details. - Impeachment under 20-2-3, 1953 Comp. (now repealed) should be limited to show former conviction of another offense and name of the offense; it is prejudicial error to compel defendant to relate details of former offense. *State v. Conwell*, 36 N.M. 253, 13 P.2d 554 (1932).

Cross-examination on multitude of allegations without convictions was error. - Where, on cross-examination, district attorney questioned defendant charged with second-degree murder regarding 33 separate alleged convictions ranging from drunkenness to aggravated assault with no tender of proof of any convictions, and the trial court was alerted to the possible prejudice by pretrial motions, objections during trial, and post-trial

motions, it was reversible error for the trial court to fail to exercise its discretion by limiting this testimony. *State v. Coca*, 80 N.M. 95, 451 P.2d 999 (Ct. App. 1969).

Where cross-examination of character witnesses concerning defendant's convictions not allowed. - Cross-examination of character witnesses concerning defendant's convictions 23 years prior to the trial will not be allowed when: (1) the trial judge conducted no in camera inquiry to determine whether the prior alleged events had occurred; (2) none of the witnesses had known the accused for more than six years; (3) the trial court did not instruct the jury at all concerning the limited purpose of the prosecutor's inquiry on the subject; (4) the defendant offered no evidence of specific prior acts, either good or bad, to the jury; and (5) the defense attorney did specifically object to the inquiry made by the prosecutor. *State v. Christopher*, 94 N.M. 648, 615 P.2d 263 (1980).

Admission of evidence of prior possession misdemeanors is reversible error. - Where the very essence of defendant's defense hinged upon his credibility, questioning the defendant about his prior misdemeanor convictions for possession of marijuana, which easily conjures notions and prejudices in the mind of a juror, could not be rectified by an admonition to disregard such testimony and was reversible error. *Albertson v. State*, 89 N.M. 499, 554 P.2d 661 (1976).

When admission of evidence of defendant's dishonorable military discharge harmless. - The admission of evidence of the defendant's other than honorable discharge from the military service is harmless error where other strong and competent admissible evidence supports the jury verdict. *State v. Ho'o*, 99 N.M. 140, 654 P.2d 1040 (Ct. App. 1982).

Prejudicial, purposeful misconduct may not create double jeopardy barring retrial. - Where during rebuttal argument, the prosecutor told the jury that he had been accused of withholding evidence, but that counsel for defendant objected to the question about a 1964 conviction and thus succeeded in withholding evidence from the jury, this was prejudicial and purposeful misconduct, but such "purposeful" misconduct did not create a double jeopardy bar to the retrial of the defendant. *State v. Day*, 94 N.M. 753, 617 P.2d 142, cert. denied, 449 U.S. 860, 101 S. Ct. 163, 66 L. Ed. 2d 77 (1980).

III. Juvenile Adjudications.

No adjudication by juvenile court was admissible under former 20-2-3, 1953 Comp. *Martinez v. Avila*, 76 N.M. 372, 415 P.2d 59 (1966).

Juvenile court records not admissible even though public records. - Contention that because former 13-8-66, 1953 Comp., made the records of the juvenile court public records, they should have been allowed in evidence to impeach credibility of minor witness was without merit, because even though the records were public records by law, they were not legally admissible. *Martinez v. Avila*, 76 N.M. 372, 415 P.2d 59 (1966).

Questioning concerning prior juvenile adjudications permitted by Rule 11-608. - Although Paragraph C generally excludes evidence of juvenile adjudications from the permitted questioning concerning prior convictions, this exclusion does not prohibit questioning permitted by Rule 11-608. *State v. Wyman*, 96 N.M. 558, 632 P.2d 1196 (Ct. App. 1981).

Juvenile probation officer's rebuttal testimony prejudicial. - The admission of a juvenile probation officer's rebuttal testimony regarding the officer's opinion of the defendant's reputation for truthfulness is impermissibly prejudicial. *State v. Guess*, 98 N.M. 438, 649 P.2d 506 (Ct. App. 1982).

IV. Pendency of Appeal.

Evidence of conviction allowed even when conviction being appealed. - Question of defendant "Have you ever been convicted of felony or misdemeanor?" was proper where murder conviction was pending on appeal and where the defendant was not asked which felony. *State v. Carlton*, 82 N.M. 537, 484 P.2d 757 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754 (1971).

11-610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 610 of the Federal Rules of Evidence.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses § 533.

Prejudicial effect of admission of evidence as to communist or other subversive

affiliation or association of accused, 30 A.L.R.2d 589.

98 C.J.S. Witnesses § 511.

11-611. Mode and order of interrogation and presentation.

A.

Control by judge. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to

(1) make the interrogation and presentation effective for the ascertainment of the truth,

(2) avoid needless consumption of time, and

(3) protect witnesses from harassment or undue embarrassment.

B.

Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

C.

Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions.

Committee commentary. - Paragraph B was changed to conform to federal rules. The change returns New Mexico to the traditional, limited form of cross-examination.

Paragraph C was changed to conform to federal rule. The change allows the use of leading questions in criminal cases to the same extent allowed in civil cases. It also allows witnesses who are "in fact" hostile to be interrogated by leading questions.

COMPILER'S ANNOTATIONS

I. General Consideration.

- II. Control by Judge.
- III. Scope of Cross-examination.

I. General Consideration.

Cross-references. - As to applicability of the Rules of Evidence to the Rules of Criminal Procedure, see Rule 5-613.

Compiler's notes. - This rule is similar to Rule 611 of the Federal Rules of Evidence.

This rule, in conjunction with Rule 11-607, is deemed to supersede former Rule 43(b), N.M.R. Civ. P. Those cases decided pursuant to former Rule 43(b) N.M.R. Civ. P., and relating to the subject matter of this rule, are annotated below.

Former Rule 43(b), N.M.R. Civ. P. afforded only means of calling opposite or adverse party. *Hall v. Stiles*, 57 N.M. 281, 258 P.2d 386 (1953).

Party is not bound by testimony of adverse witness whom he has called for examination. *Carney v. McGinnis*, 63 N.M. 439, 321 P.2d 626 (1958).

Rules of Evidence are applicable to preliminary examinations. - Witnesses may be cross-examined and their credibility and character tested. *State v. Massengill*, 99 N.M. 283, 657 P.2d 139 (Ct. App. 1983).

When leading questions permitted. - Leading questions are often permissible when a witness is immature, timid or frightened. *State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979).

Leading questions on cross-examination. - The fact that counsel is not permitted to lead the opposing party in all instances does not establish abuse. *Jim v. Budd*, 107 N.M. 489, 760 P.2d 782 (Ct. App. 1987).

But leading questions not guise for testimony by prosecutor. - Developing testimony by the use of leading questions must be distinguished from substituting the words of the prosecutor for the testimony of the witness, and where the trial court permitted every word describing the alleged offense to come from the prosecuting attorney rather than from the witness, it abused its discretion in such a manner as to violate principles of

fundamental fairness. *State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979).

Mere declaration that person is being called as adverse witness, absent a showing of prejudice, does not constitute reversible error. *Hall v. Stiles*, 57 N.M. 281, 258 P.2d 386 (1953).

Probative value of adverse witness's testimony determined by fact finder. - Testimony of an adverse witness is evidence in the case to be weighed with all other evidence and given such probative value as the fact finder deems appropriate. *Hutchinson v. Boney*, 72 N.M. 194, 382 P.2d 525 (1963).

Law reviews. - For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence § 250; 31A Am. Jur. 2d Expert and Opinion Evidence §§ 89 to 94, 97, 110 to 116, 125 to 128, 161, 162; 58 Am. Jur. 2d New Trial § 339; 75 Am. Jur. 2d Trial §§ 88, 126, 145, 146, 149; 81 Am. Jur. 2d Witnesses §§ 417, 422, 430, 478 to 480, 507, 509.

Right to show in civil case that party or witness refused to testify on same matter under claim of privilege in previous criminal proceeding, 2 A.L.R.2d 1297.

Cross-examination of automobile driver in civil action with respect to arrest or conviction for previous traffic offenses, 20 A.L.R.2d 1217; 88 A.L.R.3d 74.

Cross-examination of expert witness as to fees, compensation and the like, 33 A.L.R.2d 1170.

Federal Civil Procedure Rule 43(b), and similar state rule, relating to the calling and interrogation of adverse party as witness at trial, 35 A.L.R.2d 756.

Cross-examination of witness in criminal case as to whether, and with whom, he has discussed facts of case, 35 A.L.R.2d 1045.

Cross-examination by leading questions of witness friendly to or biased in favor of

cross-examiner, 38 A.L.R.2d 952.

Right of accused in homicide case to cross-examine prosecution's witness as to latter's pending or contemplated civil action against accused arising out of same transaction, 41 A.L.R.2d 1205.

Right of a defendant in personal injury or death action to cross-examine codefendant, 43 A.L.R.2d 1000.

Right of counsel representing party at trial, but employed by his liability insurer, to cross-examine or impeach him for asserted contradictory statements, 48 A.L.R.2d 1239.

Who is "employee" within statute permitting examination, as adverse witness, of employee of party, 56 A.L.R.2d 1108.

Preventing or limiting cross-examination of prosecution's witness as to his motive for testifying, 62 A.L.R.2d 610.

Cross-examination of plaintiff in personal injury action as to his previous injuries, physical condition, claims or actions, 69 A.L.R.2d 593.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 75 A.L.R.2d 508.

Right to elicit expert testimony from adverse party called as witness, 88 A.L.R.2d 1186.

Limiting number of noncharacter witnesses in civil case, 5 A.L.R.3d 169.

Limiting number of noncharacter witnesses in criminal case, 5 A.L.R.3d 238.

Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses, 17 A.L.R.3d 327.

Propriety of jurors asking questions in open court during course of trial, 31 A.L.R.3d 872.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility, 44 A.L.R.3d 1203.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision, 59 A.L.R.3d 1337.

Right to cross-examine witness as to his place of residence, 85 A.L.R.3d 541.

Closed-circuit television witness examination, 61 A.L.R.4th 1155.

Who is "managing agent" under Rule 43(d) of Rules of Civil Procedure, 1 A.L.R. Fed. 693.

Construction and application of provision of Rule 611(b) of Federal Rules of Evidence that cross-examination should be limited to subject matter of direct examination, 45 A.L.R. Fed. 639.

Propriety of court's failure or refusal to strike direct testimony of government witness who refuses, on grounds of self-incrimination, to answer questions on cross-examination, 55 A.L.R. Fed. 742.

Propriety, in federal court action, of attack on witness' credibility by rebuttal evidence pertaining to cross-examination testimony on collateral matters, 60 A.L.R. Fed. 8.

Jurors questioning witnesses in federal court, 80 A.L.R. Fed. 892.

98 C.J.S. Witnesses §§ 315 to 317, 329 to 338, 377 to 401.

II. Control by Judge.

Cross-examination cannot go beyond subject-matter raised on direct. - Where, at the trial, appellants in personal injury suit called appellee as an adverse witness and, on direct examination, gained appellee's testimony that appellee was the defendant in the case; that he was not present at the restaurant at the time appellant said she was injured; that he was the sole owner and operator of the restaurant premises; and that he owned all of the furnishings in the restaurant, and where despite appellee's objections, the trial court allowed further testimony on cross-examination concerning the photographs of restaurant floor, and further testimony as to the restaurant floor, the restaurant chairs and the circumstances surrounding the accident, this matter went beyond the subject-matter of direct examination and is contrary to the express language of this rule. *Simon v. Akin*, 79 N.M. 689, 448 P.2d 795 (1968).

But formerly scope rested largely within trial court's sound discretion. - Prior to enactment of rules of evidence, court of appeals held that the scope and extent of cross-examination rested largely within the sound discretion of the trial court. *State v. Hamilton*, 85 N.M. 87, 509 P.2d 562 (Ct. App.), cert. denied, 85 N.M. 86, 509 P.2d 561 (1973); *Francis v. Johnson*, 81 N.M. 648, 471 P.2d 682 (Ct. App. 1970). See also.

Trial court may cut off improper action by counsel whose own testimony was improper and where cross-examination of a witness was a part of extended harassment of the witness and irrelevant. *State v. Fuentes*, 91 N.M. 554, 577 P.2d 452 (Ct. App.), cert.

denied, 91 N.M. 610, 577 P.2d 1256 (1978).

And cumulative, prejudicial evidence excluded. - Where testimony as to a witness' purported heroin use would not add to the testimony already before the jury that he was motivated by money, the trial court, in its discretion, may properly exclude the tendered testimony which is cumulative. *State v. Lovato*, 91 N.M. 712, 580 P.2d 138 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Trial court has right to exercise reasonable control over interrogation of witnesses to make the interrogation and presentation effective for the ascertainment of truth, to avoid needless consumption of time and to protect witnesses from harassment or undue embarrassment. *State v. McCarter*, 93 N.M. 708, 604 P.2d 1242 (1980).

And within discretion whether to permit leading questions. - Under Paragraph C, whether to permit counsel to interrogate witnesses with leading questions is wholly within the trial court's discretion. *Jojola v. Baldrige Lumber Co.*, 96 N.M. 761, 635 P.2d 316 (Ct. App. 1981).

Or to sustain objections. - The trial court may, in its discretion, sustain objections to leading questions asked by a lawyer on cross-examination of a hostile witness, or his client called as a hostile witness or adverse party by the opponent. *Jojola v. Baldrige Lumber Co.*, 96 N.M. 761, 635 P.2d 316 (Ct. App. 1981).

Court may admonish prosecution for not having expert explain technical terms. - The trial court may admonish the prosecution, outside the presence of the jury, for not having its ballistics expert fully explain the technical terms that he used in his testimony to the jury, and then allow the prosecution to reopen its case to elicit the information, as long as the court remains impartial. *State v. Crump*, 97 N.M. 177, 637 P.2d 1232 (1981).

Limiting reading of diary entries to jury. - The trial court did not abuse its discretion in limiting the number of entries from the defendant's diaries which could be read to the jury and explained by the defendant, where there were over 1600 entries in the diaries of defendant and all of the diaries were admitted into evidence and available to the jury. *State v. Hovey*, 106 N.M. 300, 742 P.2d 512 (1987).

Responsibility of trial court to determine when cross-examination should be limited. - The trial court is allowed a broad discretion in controlling the extent of cross-examination of an accused directed at testing his credibility. The primary responsibility

is on the trial court to determine when the cross-examination should be limited, because the legitimate probative value on the credibility of the accused is outweighed by its illegitimate tendency, effect or purpose to prejudice him as a defendant. The discretion of the trial court in making this determination will not be disturbed on appeal, unless the appellate court can say the trial judge's action was obviously erroneous, arbitrary and unwarranted. *State v. Garcia*, 83 N.M. 262, 490 P.2d 1235 (Ct. App. 1971).

The trial court has the right to control and limit cross-examination of a witness, and the exercise of discretion in controlling the mode of interrogation will not be disturbed except upon a showing of abuse. *Padilla v. Hooks Int'l, Inc.*, 99 N.M. 121, 654 P.2d 574 (Ct. App. 1982).

Extent of cross-examination rests largely within discretion of trial court. *State v. Quintana*, 69 N.M. 51, 364 P.2d 120 (1961).

And trial court's responsibility to properly limit it. - The trial court is allowed a broad discretion in controlling the extent of cross-examination of an accused directed at testing his credibility. The primary responsibility is on the trial court to determine when the cross-examination should be limited, because the legitimate probative value on the credibility of the accused is outweighed by its illegitimate tendency, effect or purpose to prejudice him as a defendant. The discretion of the trial court in making this determination will not be disturbed on appeal, unless the appellate court can say the trial judge's action was obviously erroneous, arbitrary and unwarranted. *State v. Williams*, 76 N.M. 578, 417 P.2d 62 (1966).

Court intervention to prevent improper questioning not undue interference notwithstanding counsel's failure to object. - Where trial court intervened during defense counsel's direct examination of plaintiff to prevent, inter alia, improper questioning, no undue judicial interference occurred, notwithstanding failure of plaintiff's own counsel to object. *Regenold v. Rutherford*, 101 N.M. 165, 679 P.2d 833 (Ct. App. 1984).

Trial court need not weigh conflicting evidence in dismissing case. - Where testimony of an adverse witness was in part conflicting with the testimony adduced from other of plaintiffs' witnesses, trial court did not have the right and the duty, in dismissing the case, to weigh such conflicting evidence. *Carney v. McGinnis*, 63 N.M. 439, 321 P.2d 626 (1958).

Appellate issue is abuse of discretion. - The manner of cross-examination to test credibility or bias of a witness is largely within the discretion of the trial court, and where the tendered cross-examination has been denied, the appellate issue is whether the trial

court's ruling was an abuse of discretion. *State v. Davis*, 92 N.M. 563, 591 P.2d 1160 (Ct. App. 1979); *State v. Melton*, 102 N.M. 120, 692 P.2d 45 (1984).

The exercise of the judge's discretion in controlling the order of witnesses or the mode of interrogation will not be disturbed except upon a showing of abuse of that discretion. *State v. Smith*, 92 N.M. 533, 591 P.2d 664 (1979).

No error in rulings on cross-examination or attorney's arguments. - See *State v. Muise*, 103 N.M. 382, 707 P.2d 1192 (Ct. App. 1985).

III. Scope of Cross-examination.

Party must be allowed to test credibility on cross-examination. - While the extent to which cross-examination may be allowed is largely within the discretion of the trial court, the right to cross-examine cannot be so restricted as to wholly deprive a party of the opportunity to test the credibility of a witness. *State v. Curtis*, 7 N.M. 128, 529 P.2d 1249 (Ct. App. 1974).

Otherwise a mistrial is mandated. - Where testimony of a codefendant was virtually immune from a test of credibility due to his refusal to answer defense counsel's question on fifth amendment grounds, so that the defendant was effectively denied the opportunity to show that the codefendant might be lying or a reason why he might want to lie, in other words, the defendant's sixth amendment right to be confronted with the witnesses against him was denied, the rights could not be balanced, since they stand on equal footing and the issue must be resolved in favor of both rights, therefore mandating a mistrial. *State v. Curtis*, 87 N.M. 128, 529 P.2d 1249 (Ct. App. 1974).

Cross-examination extends to matters that may modify, supplement, contradict, rebut or make clear facts testified to by a witness. *State v. Baca*, 81 N.M. 686, 472 P.2d 651 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970); *Jaramillo v. Fisher Controls Co.*, 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985) (decided under former law).

Scope may not be expanded to allow irrelevant or prejudicial evidence. - It is within the discretion of the trial court to expand the scope of cross-examination as long as inquiry into additional matters is conducted as if on direct examination, but the trial court may not admit evidence which is otherwise inadmissible because it is irrelevant, or if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Martin*, 101 N.M. 595, 686 P.2d 937 (1984).

Attorney of party called as witness may not introduce new matters on cross-examination. - When a party is called by his opponent as an adverse witness, the party's attorney may not, on cross-examination, introduce new matters, unrelated to the direct examination, which constitute his own case or defense. *Jojola v. Baldrige Lumber Co.*, 96 N.M. 761, 635 P.2d 316 (Ct. App. 1981).

Cross-examination not unreasonably restricted. - Contention that appellant was unreasonably restricted in his cross-examination of the witness is unfounded when each of the questions in issue was elicited and obtained during the course of other interrogation and appellant had the opportunity to cross-examine the witness and did so at length. *State v. Holly*, 79 N.M. 516, 445 P.2d 393 (Ct. App. 1968) (decided before enactment of this rule).

Formerly, permissible extent of cross-examination within trial court's discretion. - Prior to enactment of rules of evidence, the permissible extent of this cross-examination was within the discretion of the trial court. *State v. Apodaca*, 81 N.M. 580, 469 P.2d 729 (Ct. App. 1970) (decided under former law).

And generally limited to subject matter of direct examination. - Prior to enactment of New Mexico rules of evidence, the right to cross-examine generally was limited to the subject matter of the direct examination. However, the scope or extent of cross-examination rested largely in the sound discretion of the trial court. *State v. Sanchez*, 79 N.M. 701, 448 P.2d 807 (Ct. App. 1968).

But discretionary judgment only disturbed on appeal if discretion abused. - The limits of cross-examination are within the discretion of the trial court and will be disturbed on appeal only if that discretion is abused. *State v. Wesson*, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972).

Question concerning defendant's silence on certain facts at arrest admissible. - Questioning defendant on cross-examination, after he testified that he had found certain stolen property in an abandoned house, about why he had not told the police the same thing when he was arrested was not an improper comment on his silence at the time of arrest. When arrested the defendant did not remain silent, not only stating that he did not know anything, but also offering an explanation which tended to deny his possession; the question was proper cross-examination under this rule and was admissible for the purpose of impeaching defendant's credibility by showing prior inconsistent statements. *State v. Olguin*, 88 N.M. 511, 542 P.2d 1201 (Ct. App. 1975).

Extrinsic evidence of motive of witness to testify falsely is admissible and a witness may be cross-examined as to such a motive. *State v. Lovato*, 91 N.M. 712, 580 P.2d 138 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

But attack on credibility governed by Rule 11-608. - If asserted motive evidence is, in fact, no more than evidence of character and conduct attacking the credibility of a witness, its admissibility would be governed by Rule 11-608. *State v. Lovato*, 91 N.M. 712, 580 P.2d 138 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Civil action by victim is proper subject of inquiry. - Bias of a witness is always relevant. Therefore, pendency of a civil action by a prosecuting witness seeking damages for an assault being tried in a criminal action is a proper subject of inquiry; however, the trial court did not err in prohibiting defendant in an aggravated battery prosecution from questioning of a witness (the victim) concerning an unidentified civil suit where counsel gave the court no information about the suit, made no tender of evidence and never informed the court that the witness himself had anything to do with the suit. *State v. Santillanes*, 86 N.M. 627, 526 P.2d 424 (Ct. App. 1974).

Prejudicial error not allowing defendant opportunity to develop polygraph scoring responses. - Where the defendant was not allowed by the trial judge to develop any relationship between a polygraph chart, which recorded the examinee's responses to questions asked by the examiner, and the examiner's scoring of the responses so recorded, while at the same time it was recognized that further cross-examination might be of assistance to defendant, this was an abuse of discretion and prejudicial error. *State v. Urioste*, 94 N.M. 767, 617 P.2d 156 (Ct. App. 1980).

Evidence of defendant's wife's residence with drug rehabilitation organization held irrelevant in his prosecution for aggravated battery. *State v. Mills*, 94 N.M. 17, 606 P.2d 1111 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

11-612. Writing used to refresh memory.

If a witness uses a writing to refresh his memory for the purpose of testifying, either (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in

the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the judge in his discretion determines that the interests of justice so require, declaring a mistrial.

Committee commentary. - This rule was changed to conform to federal rule, excluding a reference to a specific federal statute. The change allows inspection of a writing before the witness testifies, if the judge in his discretion determines that examination is necessary in the interests of justice.

COMPILER'S ANNOTATIONS

Cross-references. - As to recorded recollection not being included by hearsay rule, see Rule 11-803.

Compiler's notes. - This rule is similar to Rule 612 of the Federal Rules of Evidence.

Rules not applicable to pretrial suppression hearings. - There was no error in the trial court's refusal to permit the defendant to review the prosecutor's notes of an interview with an informant where the prosecutor had referred to the notes while testifying at a suppression hearing, since the Rules of Evidence do not apply to pretrial suppression hearings. *State v. Doran*, 105 N.M. 300, 731 P.2d 1344 (Ct. App. 1986).

Purpose of the phrase "for the purpose of testifying" is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Subject to court's discretion only when applied before testifying. - The phrase "if the court in its discretion determines it is necessary in the interests of justice" was added by the amendment in 1976 to conform to the federal version of this rule; and the federal rule applies that discretionary language only to "(2) before testifying." *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Anything may be used to revive a memory. - A song, a scent, a photograph, all allusion, even a past statement known to be false; thus, a writing in this rule includes sound recordings and pictures of all kinds, and it does not matter whether a statement was written by the witness himself, was made contemporaneously with the event itself, or is

a copy rather than an original, but only whether in fact it is genuinely calculated to revive the witness's recollection. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Lacking effective present recollection is prerequisite to transcription use. - No means of arousing recollection may be used until the witness has satisfied the trial judge that he lacks effective present recollection. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Case law still governs majority of refreshing of recollection law. - This rule covers but a small portion of the law relating to the refreshing of recollections, most aspects of which will continue to be governed by case law. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1247 (1977).

Witness to testify as to present recollection and that memory refreshed. - When a witness is allowed to use a prior statement to refresh his memory, it becomes proper to have the witness say that his memory is refreshed and, independent of the exhibit, testify what his present recollection is. *State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979).

Before prior statement by witness can be used to refresh recollection, the time, place and person to whom the statement was given must be established. *State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979).

This rule does not permit the use of leading questions. *State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979).

Hypnotically refreshed witnesses permitted to testify. - Subject to the exercise of the trial court's sound discretion and judicial guidelines, the court may permit a witness whose testimony has been hypnotically refreshed to testify before the fact finder on matters that are relevant to the factual issues to be determined. *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981).

Adverse party entitled to record of hypnosis session before trial. - For purposes of cross examination, an adverse party is entitled to have the electronic tape or other proper record of a hypnosis session produced for inspection and copying in advance of trial, to cross-examine the witness thereon and to introduce into evidence those portions which relate to the testimony of the witness. *State v. Beachum*, 97 N.M. 682, 643 P.2d 246

(Ct. App. 1981).

Trial judge has considerable discretion at various points to reject testimony purporting to be present recollection revived either by holding that the witness is not lacking in memory, or that the writing does not refresh his memory, or as in the case of leading questions by declining to permit the use of the aid to memory, where he regards the danger of undue suggestion as outweighing the probable value. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Other side may use transcription to correct false impressions. - Defendant having attempted to leave with the jury an incorrect impression as to the contents of the transcription used by the witness to refresh his memory it was proper for the state on redirect to correct that impression by showing the true content of the transcription on the particular subject, and the state's reading of the two questions and answers on redirect was not error. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Defendant may impeach own doctor using his deposition as refresher. - See same catchline in notes to Rule 11-607.

Past recorded recollection's limiting rules inapplicable to present recollection revived. - One of the requirements for use of a recorded recollection as evidence is a showing that the record was correct when made; however, none of the limiting rules for past recorded recollection has any bearing on present recollection revived. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Witness may refer to transcription without showing transcription made correctly. - There was no error in allowing a witness to revive his memory by referring to a transcription without a showing that the transcription was correct when made. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

When applying rule of "present recollection revived." - The rule that a memorandum used to refresh the memory must be shown to have been correct when made does not apply to present recollection revived. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Memorandum may be read into evidence if recollection not revived. - After a witness consults the particular writing or object offered as a stimulus so that his testimony relates to a present recollection, if his recollection is not revived, a memorandum may

be read into evidence and admitted if it meets the test of recorded recollection set forth in Rule 11-803. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

But writing's reliability must be established. - When a witness speaks from a memory that has been revived, the testimony is what the witness says and not the writing; however, when memory is not revived, the witness relies upon a writing, and in this situation the reliability of the writing must be established. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For note, "Evidence - The Admissibility of Hypnotically Refreshed Testimony in New Mexico: *State v. Beachum*," see 13 N.M.L. Rev. 541 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence § 876; 81 Am. Jur. 2d Witnesses §§ 459 to 462.

Admissibility of hypnotic evidence at criminal trial, 92 A.L.R.3d 442.

Fact that witness undergoes hypnotic examination as affecting admissibility of testimony in civil case, 31 A.L.R.4th 1239.

Use of writing to refresh witness' memory, as governed by Rule 612 of Federal Rules of Evidence, 73 A.L.R. Fed. 423.

98 C.J.S. Witnesses §§ 357, 358, 360, 362, 363.

11-613. Prior statements of witnesses.

A.

Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown or its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

B.

Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Subparagraph 2 of Paragraph D of Rule 11-801.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Extrinsic Evidence of Prior Statement.
 - A. In General.
 - B. Laying Foundation.

I. General Consideration.

Cross-references. - As to contents of writings, recordings and photographs, see Rules 11-1001 to 11-1008.

Compiler's notes. - This rule is similar to Rule 613 of the Federal Rules of Evidence.

Most of the following cases were decided pursuant to 20-2-1 and 20-2-2, 1953 Comp. (repealed by Laws 1973, ch. 223, § 2), which were similar to this rule.

Rule's scope limited by balancing probativeness against prejudice. - This rule provides for the admissibility of extrinsic evidence of a prior inconsistent statement by a witness for impeachment purposes; the scope of this rule is limited by the necessary balancing of probativeness against prejudice, and the extrinsic evidence contemplated by the rule must be material and relevant. *State v. Ross*, 88 N.M. 1, 536 P.2d 265 (Ct. App. 1975).

A written or oral statement of a witness as to material matters inconsistent with his trial testimony is admissible at trial for impeachment purposes. However, it is equally clear that such admission is limited by the necessary balancing of probativeness against prejudice. *State v. Davis*, 97 N.M. 130, 637 P.2d 561 (1981).

Method and extent of cross-examination depends upon discretion of trial judge. *State v. Roybal*, 33 N.M. 540, 273 P. 919 (1928).

Matter of cross-examination to test credibility of witness is largely within the discretion of the trial court. *State v. Roybal*, 33 N.M. 540, 273 P. 919 (1928); *State v. Burkett*, 33 N.M. 159, 262 P. 532 (1927).

Admission or exclusion of inconsistent statement rests within sound discretion of trial court under the particular facts in a case and will not be reversed absent an abuse of that discretion. *State v. Davis*, 97 N.M. 130, 637 P.2d 561 (1981).

When witness admits dislike for party no details on cross-examination. - Court did not abuse its discretion in refusing to permit counsel for appellant to show on cross-examination of an adversary's witness, that there were family disagreements between father and mother of defendant, and that the witness had taken sides with one of the members of the family, and the defendant with the other, and that out of such disagreement had grown a feeling of hostility between the parties, where the record showed that the witness said in answer to direct questions that his relations with the defendant were unfriendly. *State v. Roybal*, 33 N.M. 540, 273 P. 919 (1928).

When state witness proves adverse, state may prove former inconsistent statements, if the circumstances are stated to him and he is asked whether or not he did make such statement. *State v. Hite*, 24 N.M. 23, 172 P. 419 (1918).

State could impeach own key witness by using contradictory affidavits. - Allowing district attorney to impeach key state's witness on redirect, by questioning him about affidavits directly contradictory to his testimony on cross-examination and then admitting such affidavits in evidence over objection was not error where his testimony on direct examination made out a strong case for the state and he did a "right-about face" on cross-examination by giving testimony which, if believed, fully exonerated accused. *State v. Garcia*, 57 N.M. 166, 256 P.2d 532 (1953).

Contradictory pretrial statement used to impeach witness as adverse witness. - A witness who testified at trial that he did not see a fight and that he had seen defendants "crossing the highway," when he had said before trial that he had witnessed a fight between defendant and deceased, could be impeached as an adverse witness. *State v. Lopez*, 46 N.M. 463, 131 P.2d 273 (1942).

Defendant's introduction of evidence of inconsistency in witness' testimony. - Once a witness testifies she does not remember an alleged inconsistent answer, the defendant can introduce evidence of an inconsistency. *State v. Martinez*, 98 N.M. 27, 644 P.2d 541 (Ct. App. 1982).

Unfavorable statement by motorist following collision admissible as res gestae. - Testimony by a police officer may be admitted under the res gestae doctrine as to a statement made to him by a motorist following a collision that as the motorist approached an intersection, and being unable to stop he accelerated his vehicle to cross, and that at the time the motorist appeared nervous, excited and upset. *Otero v. Physicians & Surgeons Ambulance Serv., Inc.*, 65 N.M. 319, 336 P.2d 1070 (1959).

Proper time to make demand for grand jury testimony during trial is when the grand jury witness testifies at trial and the defendant wants to cross-examine. *Valles v. State*, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Disclosure of attorney's notes. - Having used an attorney's notes concerning a witness' statement in an effort to impeach the witness, these are no longer shielded by the work-product doctrine. In this circumstance, the trial court may properly require the disclosure of the notes under Paragraph A. *State v. Turner*, 97 N.M. 575, 642 P.2d 178 (Ct. App. 1981).

Law reviews. - For article, "Impeachment of Witnesses in New Mexico by Proof of Prior Inconsistent Statements," see 2 Nat. Resources J. 562 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31A Am. Jur. 2d Expert and Opinion Evidence § 88.

Admissibility of advertisements, brochures, catalogs and the like as containing admissions by a litigant contrary to a position taken by him, 44 A.L.R.2d 1027.

Right of counsel representing party at trial, but employed by his liability insurer, to cross-examine or impeach him for asserted contradictory statements, 48 A.L.R.2d 1239.

Admissibility, for purpose of supporting impeached witness, of prior statements by him consistent with his testimony, 75 A.L.R.2d 909.

Propriety and prejudicial effect of showing, in criminal case, withdrawn guilty plea, 86 A.L.R.2d 326.

Impeachment of accused as witness by use of involuntary or not properly qualified confession, 89 A.L.R.2d 478.

Denial of recollection as inconsistent with prior statement so as to render statement admissible, 99 A.L.R.3d 934.

Admissibility of affidavit to impeach witness, 14 A.L.R.4th 828.

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case - modern state cases, 30 A.L.R.4th 414.

Use of prior inconsistent statements for impeachment of testimony of witnesses under Rule 613, Federal Rules of Evidence, 40 A.L.R. Fed. 629.

Propriety, in federal court action, of attack on witness' credibility by rebuttal evidence pertaining to cross-examination testimony on collateral matters, 60 A.L.R. Fed. 8.

98 C.J.S. Witnesses §§ 573 to 628.

II. Extrinsic Evidence of Prior Statement.

A. In General.

When extrinsic evidence reaches collateral matters, it is not admissible under this rule, but rather, a cross-examiner is bound and limited by whatever answers he elicits from the witness. *State v. Ross*, 88 N.M. 1, 536 P.2d 265 (Ct. App. 1975).

Object of the requirement of 20-2-2, 1953 Comp. (now repealed) is to afford witness an opportunity to deny the statement if he did not make it, or to admit it if he did make it with such explanation of the apparent contradiction as he may have to make. *State v. Carabajal*, 26 N.M. 384, 193 P. 406 (1920).

Witness has opportunity to deny or explain apparent contradiction. - If an objection was directed to any questioning concerning a prior statement before the basis for such questioning is shown to be in the form of admissible evidence in the questioner's possession, it would be overruled because 20-2-2, 1953 Comp. (now repealed) imposes no such requirement. The questions could be asked even though there was no foundation for admission of the notes, because the object of 20-2-2, 1953 Comp. (now repealed) was to give the witness an opportunity to deny or explain the apparent contradiction. *State v. Carlton*, 82 N.M. 537, 484 P.2d 757 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754 (1971).

Witness allowed to distinguish prior testimony but jury may consider interest. - Where defendants contend that it is useless to go to trial since a certain witness is going to testify according to his affidavit and distinguish his deposition testimony, and, even assuming he will so testify, he is an employee of one of the defendants and can be considered an interested witness, the jury may choose to believe that his prior statement, made before the case arose, was accurate and his subsequent affidavit

colored by employee loyalty. *Rodriguez v. State*, 86 N.M. 535, 525 P.2d 895 (Ct. App. 1974).

May prove statement made if denied. - If the witness on cross-examination as to former statement made by him relative to subject matter of cause and inconsistent with his present testimony does not distinctly admit that he made such statement, proof may be given that he did make it after proper predicate for its admission has been laid. *State v. Rodriguez*, 23 N.M. 156, 167 P. 426 (1917).

Witness's prior written statement must be produced. - When a witness has made a prior written statement about that which he is called to testify, the accused is entitled to an order directing the prosecutor to produce the statement for inspection of the defendant. Any other result denies the defendant the right to confront the witnesses against him. *State v. Herrera*, 84 N.M. 365, 503 P.2d 648 (Ct. App. 1972).

To admit prior confession voluntariness must be shown. - Admission of evidence of prior confession to impeach a defendant represents a denial of due process where voluntariness of such confession has not been shown and defendant denies or claims inability to recall the statement. *State v. Turnbow*, 67 N.M. 241, 354 P.2d 533 (1960).

Prior statement's voluntariness not issue when testimony inconsistent. - A prior written statement or one reduced to writing may be used on cross-examination without a hearing to determine voluntariness and cautionary hearing when a witness testifies inconsistent with such statement. *State v. Paul*, 83 N.M. 619, 495 P.2d 797 (Ct. App. 1972).

Question concerning defendant's silence on certain facts at arrest admissible. - See same catchline in notes to Rule 11-611.

B. Laying Foundation.

Cannot impeach witness without calling matter to his attention. - A party may not show for purposes of impeaching a witness that he has made contradictory statements, without having first called them to his attention. *Valencia v. Beaman*, 85 N.M. 82, 509 P.2d 274 (Ct. App. 1973).

Laying foundation calls attention of witness to impeaching evidence. - Where it is desired to contradict a witness by letters written by him, a proper foundation must be

laid for their admission, calling attention of witness to those parts of letters which are to be used for that purpose. *Kirchner v. Laughlin*, 6 N.M. 300, 28 P. 505 (1892).

Foundation laid by either showing or reading impeaching writing. - Where the offer of defendant shows that testimony given on former trial was in writing, the foundation for its introduction as impeaching testimony could only be laid either by showing the written testimony to the witness or by reading it to him at the time he was interrogated. *United States v. Fuller*, 5 N.M. 80, 20 P. 175 (1889).

Prior testimony should be read to witness at time of interrogation. - Under 20-2-1, 1953 Comp. (now repealed), an attempted impeachment of a witness, by reading to him his testimony in writing, given at a formal trial, should be read to the witness at the time of his interrogation as a foundation for his impeachment, and not afterwards. *Lopez v. Atchinson, T. & S.F. Ry.*, 60 N.M. 134, 288 P.2d 678 (1955).

Witness must be made aware of evidence of contradictory statement. - Before a witness may be impeached by proof of former contradictory statements, his attention must first be directed to what may be brought forward for that purpose. And this must be done with particularity as to time, place and circumstances, so that he can deny it, or make any explanation intending to reconcile what he formerly said with what he is now testifying. *State v. Fletcher*, 36 N.M. 47, 7 P.2d 936 (1932); *State v. Thompson*, 68 N.M. 219, 360 P.2d 637 (1961).

Where it is sought to impeach witness by showing omission to make an important disclosure on a prior occasion presently related at the trial, the cross-examiner, before putting the impeaching question, must make a prima facie showing as to time, place and circumstance sufficient to warrant the inference that on such former occasion the opportunity and duty to make such disclosure existed. *State v. Fletcher*, 36 N.M. 47, 7 P.2d 936 (1932).

Cross-examination on witness's statements without laying foundation sometimes permissible. - The right to inquire of a witness as to a statement made by him is not dependent upon a further right to show the falsity of the answer, and cross-examination as to its contents was permissible, although foundation had not been laid for its reception as a confession. *State v. Butler*, 38 N.M. 453, 34 P.2d 1100 (1934), overruled, *State v. Turnbow*, 67 N.M. 241, 354 P.2d 533 (1960).

But such cross-examination of defendant strictly limited. - Absent a proper showing to the satisfaction of the court that the confession is voluntary in point of law, the state may initially cross-examine a defendant as to whether he has made a statement contrary to

his testimony but, upon his denial thereof or his claimed inability to recall, may proceed no further. *State v. Turnbow*, 67 N.M. 241, 354 P.2d 533 (1960).

Laying of foundation rule protects witness and not party. - The rule that in order to impeach a witness for prior inconsistent statements there must first be a foundation laid of the time, place and details of the statement in the examination of the witness being impeached is intended as a protection to the witness and not the parties. *Nichols v. Sefcik*, 66 N.M. 449, 349 P.2d 678 (1960).

And rule cannot be waived because witness unavailable. - The impossibility of laying a foundation because the witness was unavailable at the trial should not waive the rule requiring it because the rule was intended as a protection to the witness and not the parties. *Brown v. General Ins. Co. of Am.*, 70 N.M. 46, 369 P.2d 968 (1962).

11-614. Calling and interrogation of witnesses by judge.

A.

Calling by judge. The judge may, on his own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

B.

Interrogation by judge. The judge may interrogate witnesses, whether called by himself or a party; provided, however, that in trials before a jury, the judge's questioning must be cautiously guarded so as not to constitute an implied comment.

C.

Objections. Objections to the calling of witnesses by the judge or to interrogation by him may be made at the time or at the next available opportunity when the jury is not present.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 614 of the Federal Rules of Evidence.

Judge should ordinarily refrain from intruding upon functions of counsel, thus shielding the court's position of impartiality from any contrary suggestion to the jury. *State v.*

Caputo, 94 N.M. 190, 608 P.2d 166 (Ct. App. 1980).

Judge must be careful not to add to party's burden of proof. - Because of his power and influence, and because of the tendency of the jury to place great emphasis upon what he says and does, the trial judge must be most careful not to say or do anything which would add to a party's burdens of proof, or detract from the presumptions to which a person charged with crime is entitled. State v. Caputo, 94 N.M. 190, 608 P.2d 166 (Ct. App. 1980).

Trial court may properly call witness in civil proceeding as the court's own witness in order to arrive at the truth, and witnesses called by the court as the court's witnesses are subject to cross-examination by the parties to the suit. Sanchez v. Sanchez, 84 N.M. 498, 505 P.2d 443 (1973).

And parties must be allowed to cross-examine. - It is error to deny plaintiff the right to cross-examine a witness called by the court since the trial court obviously did receive and consider a written report from this witness in deciding the issues and this report may possibly have had an effect upon the court's decision on the other principal issues litigated. Sanchez v. Sanchez, 84 N.M. 498, 505 P.2d 443 (1973).

But discretionary power must be exercised cautiously. - The discretionary power of the court to call a witness is one that should be exercised cautiously and is fraught with great danger which might improperly influence a jury if it were present. City of Portales v. Bell, 72 N.M. 80, 380 P.2d 826 (1963).

Proper exercise of judicial discretion demonstrated. - The trial court did not abuse its discretion where the questions asked by the court prior to the defendant's objection tended to clarify what had preceded, after the objection the trial court asked very carefully guarded questions, and the jury was instructed with respect to the court's questions. State v. Stallings, 104 N.M. 660, 725 P.2d 1228 (Ct. App. 1986).

Questioning defendant in criminal case. - Paragraph B of this rule authorizes the trial court to question a witness, and there is no express exception as to a defendant in a criminal case; however, in all cases, the questions asked must be guarded, so as not to constitute an implied comment. State v. Stallings, 104 N.M. 660, 725 P.2d 1228 (Ct. App. 1986).

Court should only rarely call witnesses in criminal proceeding. - The trial judge has a wide discretion in the conduct of a trial, and it is a permitted practice for the trial judge,

in a civil proceeding, to call a witness where necessary, in order to arrive at the truth of the matter. However, in a criminal proceeding, such a practice should rarely be followed, as the court must be extremely careful to preserve an attitude of impartiality. *City of Portales v. Bell*, 72 N.M. 80, 380 P.2d 826 (1936).

Trial judge is more than mere umpire or moderator, and he may properly propound questions to the witnesses, so long as he keeps the same within the bounds demanded of him by his position as trial judge, and so long as he displays no bias against or favor for either of the litigants. *State v. Sedillo*, 76 N.M. 273, 414 P.2d 500 (1966) (decided prior to the adoption of this rule).

Trial judge may properly propound questions to witnesses, so long as he keeps the same within the bounds demanded of him by his position as trial judge, and so long as he displays no bias against or favor for either of the litigants. *State v. Clark*, 83 N.M. 484, 493 P.2d 969 (Ct. App. 1971), cert. denied, 83 N.M. 473, 493 P.2d 958 (1972).

Trial judge may question a witness, but the questioning must not intimate any bias for or against either party. *Crownover v. National Farmers Union Property & Cas. Co.*, 100 N.M. 568, 673 P.2d 1301 (1983).

Leading questions by judge is not error, unless abuse of discretion is shown. *State v. Crump*, 97 N.M. 177, 637 P.2d 1232 (1981).

Asking witness whether she was defendant's wife not undue participation. - Mistrial was properly denied where the witness had previously testified that she had never seen the defendant prior to the time the offenses were committed and the trial judge did not unduly participate in questioning the witness, by asking her whether she was or had been married to the defendant, the question did not display bias for or against defendant. *State v. Padilla*, 86 N.M. 282, 523 P.2d 17 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974).

Timely objection to court's questioning satisfactory. - Where an objection to the court's questioning of defendant was made at the instructions conference held after the noon recess, called immediately after the court concluded its questioning of defendant, the timeliness requirement of Paragraph C was satisfied. *State v. Caputo*, 94 N.M. 190, 608 P.2d 166 (Ct. App. 1980).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence § 267.

Court's witnesses (other than expert) in state criminal prosecution, 16 A.L.R.4th 352.

Calling and interrogation of witnesses by court under Rule 614 of the Federal Rules of Evidence, 53 A.L.R. Fed. 498.

98 C.J.S. Witnesses §§ 348, 351.

11-615. Exclusion of witnesses.

At the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and he may make the order of his own motion. This rule does not authorize exclusion of

A. a party who is a natural person, or

B. an officer or employee of a party which is not a natural person designated as its representative by its attorney, or

C. a person whose presence is shown by a party to be essential to the presentation of his cause.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 615 of the Federal Rules of Evidence.

Purpose of rule excluding witnesses is to give adverse party an opportunity to expose inconsistencies in their testimony and to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial. *State v. Ortiz*, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Exclusion of witnesses from courtroom is matter within discretion of the trial court and permitting a witness to testify who has remained in the courtroom in violation of the exclusion rule is also within the court's discretion. *State v. Kijowski*, 85 N.M. 549, 514 P.2d 306 (Ct. App. 1973).

As is permitting testimony of witness who violated "discussion" instructions. - Permitting a witness to testify who has violated the court's instruction not to discuss the case with other than the attorneys is within the trial court's discretion. *State v. Kijowski*, 85 N.M. 549, 514 P.2d 306 (Ct. App. 1973).

Permitting witness who has violated this rule to testify is within the discretion of the trial court. *State v. Simonson*, 100 N.M. 297, 669 P.2d 1092 (1983).

Broad discretion in trial court. - Decisions in this state interpret this rule to give the trial court broad discretion in its application. *State ex rel. State Hwy. Dep't v. First Nat'l Bank*, 91 N.M. 240, 572 P.2d 1248 (1977).

Limiting testimony of witness inadvertently present. - Where a defense witness was inadvertently present in the courtroom during the testimony of another defense witness and had heard the cross-examination and rehabilitation of the other defense witness, the trial court properly exercised its discretion in limiting the testimony of that witness to defendant's character and reputation. *State v. Hovey*, 106 N.M. 300, 742 P.2d 512 (1987).

Judge should determine whether counsel condoned violation of exclusion order. - The suggestion made in *State v. Barboa*, 84 N.M. 675, 506 P.2d 1222 (Ct. App. 1973), that it would be advisable for the trial judge to determine whether the counsel condoned the witness's violation of the exclusionary rule was substantially complied with by the trial judge's questioning of the prosecutor and the judge's questioning of the prosecutor and the judge's subsequent statement that the prosecutor was unaware that he would be calling the witness. *State v. Ortiz*, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Rule excluding witnesses takes effect upon request of any party and the decision as to what remedy is appropriate in the event the rule is violated is in the discretion of the trial judge with the controlling consideration being prejudice to the complaining party. *State v. Ortiz*, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Request to strike evidence violative of rule must be in record. - The appellate court could not consider whether the trial court improperly denied the defendant's alleged request to strike a witness' testimony because of the alleged attempt of that witness and another witness to manipulate their testimony in violation of the court's admonition not to discuss the case with each other, since the record of the trial court proceedings did not disclose any such request by the defendant. *State v. Coates*, 103 N.M. 353, 707 P.2d 1163 (1985).

No abuse of discretion in allowing prosecutrix to remain. - The exculsion of witnesses from the courtroom is a matter resting within the sound discretion of the trial court and there was nothing to indicate an abuse of discretion on the part of the trial court in permitting the prosecutrix to remain in the courtroom, or to be further called as a witness for the purpose of identifying evidence. *State v. Carrillo*, 82 N.M. 257, 479 P.2d 537 (Ct. App. 1970).

Witness's testimony permissible where no danger of conforming to others. - Where a rebuttal witness for the state was present in the courtroom while two other witnesses testified about an alleged argument between defendant and victim, one of whom denying it had occurred and the other relating no details, there was no danger that he had conformed his elaborate story to one or the other's testimony, and therefore, because in this particular situation the reasons for the exclusionary rule were not involved, it was not an abuse of the trial judge's discretion to allow the witness to testify. *State v. Ortiz*, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Mistrial following discussion among witnesses denied where relation to subsequent testimony not shown. - Where the defendants contend that witnesses discussed the case with each other, in violation of the trial court's admonition prohibiting such discussion, the trial court does not abuse its discretion in denying the defendants' mistrial motion where the defendants make no effort to show what the witnesses discussed or whether the discussions related in any way to the substance of the subsequent testimony of one of the witnesses. *Martinez v. Teague*, 96 N.M. 446, 631 P.2d 1314 (Ct. App. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial §§ 61, 62.

Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case, 32 A.L.R.2d 358.

Exclusion from courtroom of expert witnesses during taking of testimony in civil case, 85 A.L.R.2d 478.

Effect of witness' violation of order of exclusion, 14 A.L.R.3d 16.

Counsel's reference, in presence of sequestered witness in state criminal trial, to testimony of another witness as ground for mistrial or reversal, 24 A.L.R.4th 488.

Exclusion of witnesses under Rule 615 of Federal Rules of Evidence, 48 A.L.R. Fed. 484.

23A C.J.S. Criminal Law § 1195 et seq.; 88 C.J.S. Trial § 65.

Article 7

Opinions and Expert Testimony

11-701. Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are

- A. rationally based on the perception of the witness and
- B. helpful to a clear understanding of his testimony or the determination of a fact in issue.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Specific Applications.

- I. General Consideration.

Compiler's notes. - This rule is similar to Rule 701 of the Federal Rules of Evidence.

Opinions rationally based on own perceptions are admissible. - Plaintiff farmer's opinion that the chemical which admittedly caused damage to two fields of corn was also the cause of the damage to the third, founded on his observation of the fields and the characteristics of the damage was rationally based on his own perceptions, was helpful to the determination of the causation issue and was admissible. *Jesko v. Stauffer Chem. Co.*, 89 N.M. 786, 558 P.2d 55 (Ct. App. 1976).

Foundation required for admitting opinion testimony of layman is a showing of first-hand knowledge on the part of the witness and a rational connection between the observations made and the opinion formed. If these two requirements are present and the witness' opinion might be helpful in the determination of the facts in issue, the opinion is admissible. The requirement of a rational basis is satisfied if the opinion or reference is one which a normal person would form on the basis of the observed facts. *State v. Luna*, 92 N.M. 680, 594 P.2d 340 (Ct. App. 1979).

Personal observation is key factor in allowing lay opinion evidence. *Estrada v. Cuaron*, 93 N.M. 283, 599 P.2d 1080 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979); *Hansen v. Skate Ranch, Inc.*, 97 N.M. 486, 641 P.2d 517 (Ct. App. 1982).

Ruling on admissibility of lay opinion is within discretion of trial court. *State v. Luna*, 92 N.M. 680, 594 P.2d 340 (Ct. App. 1979).

The admissibility of lay opinion testimony is within the discretion of the trial court and an appellate court will not overturn the decision of the trial court absent an abuse of any discretion. *Hansen v. Skate Ranch, Inc.*, 97 N.M. 486, 641 P.2d 517 (Ct. App. 1982).

Whether a witness is shown to be qualified as an expert is a matter addressed to the judicial discretion of the trial court. *Roberts v. Sparks*, 99 N.M. 152, 655 P.2d 539 (Ct. App. 1982).

No abuse of discretion to refuse to receive layman testimony. - There is no abuse of discretion on the part of the trial court in refusing to receive the opinion testimony of laymen when, based upon the evidence, the court could properly rule that the lay witnesses did not have a sufficient basis on which to form an opinion, or that their opinion would not have been helpful to a clear understanding of the issue. *State v. Luna*, 93 N.M. 773, 606 P.2d 183 (1980).

Nonexpert opinion evidence competent if necessary to reproduce witness's knowledge. - Prior to enactment of rules of evidence, where descriptive language was inadequate to convey the precise facts to the jury, or the bearing of the facts on the issue, the description of the witness would, of necessity, be allowed to be supplemented by his opinion, since all nonexpert opinion and impression evidence was competent if it was necessary or appropriate to reproduce the witness's knowledge of the pertinent facts. *Pavlos v. Albuquerque Nat'l Bank*, 82 N.M. 759, 487 P.2d 187 (Ct. App. 1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31A Am. Jur. 2d Expert and Opinion Evidence §§ 53, 54, 68 to 73, 90, 165 to 167, 344, 353, 356.

Admissibility in condemnation proceedings of opinion evidence as to probable profits derivable from land condemned if devoted to particular agricultural purposes, 16 A.L.R.2d 1113.

Admissibility of opinion evidence as to whether vehicle involved in collision was standing still or moving, 33 A.L.R.2d 1250.

Admissibility of opinion of nonexpert owner as to value of chattel, 37 A.L.R.2d 967.

Admissibility of opinion evidence as to the cause of an accident or occurrence, 38 A.L.R.2d 13.

Requisite foundation or predicate to permit nonexpert witness to give opinion, in a civil action, as to sanity, mental competency, or mental condition, 40 A.L.R.2d 15.

Admissibility of opinion or estimate by nonexpert witness in personal injury action of future hospital expenses, future hospitalization, or the like, 45 A.L.R.2d 1148.

Admissibility of opinion evidence of lay witnesses as to diseases and physical condition of animals, 49 A.L.R.2d 932.

Admissibility, in homicide prosecution, of opinion evidence that death was or was not self-inflicted, 56 A.L.R.2d 1447.

Admissibility of opinion evidence as to point of impact or collision in motor vehicle accident case, 66 A.L.R.2d 1048.

Admissibility of opinion evidence as to cause of death, disease, or injury, 66 A.L.R.2d 1082.

Expert and opinion evidence as to cause or origin of fire, 88 A.L.R.2d 230.

Admissibility and probative effect of testimony that motor vehicle was going "fast" or the like, 92 A.L.R.2d 1391.

Expert or opinion evidence as to speed based on appearance or condition of motor vehicle after accident, 93 A.L.R.2d 287.

Comment note: Ability to see, hear, smell, or otherwise sense, as proper subject of opinion by lay witness, 10 A.L.R.3d 258.

Competency of nonexpert's testimony, based on sound alone, as to speed of motor vehicle involved in accident, 33 A.L.R.3d 1405.

Admissibility of nonexpert opinion testimony as to weather conditions, 56 A.L.R.3d 575.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases, 89 A.L.R.3d 783.

Admissibility of expert or opinion testimony on battered wife or battered woman syndrome, 18 A.L.R.4th 1153.

Admissibility of expert or opinion testimony concerning identification of skeletal remains,

18 A.L.R.4th 1294.

Competency of nonexpert witness to testify, in criminal case, based upon personal observation, as to whether person was under the influence of drugs, 21 A.L.R.4th 905.

Construction and application of Rule 701 of Federal Rules of Evidence, providing for opinion testimony by lay witnesses under certain circumstances, 44 A.L.R. Fed. 919.

23 C.J.S. Criminal Law §§ 1050 to 1058; 32 C.J.S. Evidence §§ 438 to 453, 546; 32A C.J.S. Evidence §§ 959, 1007, 1015.

II. Specific Applications.

Opinion based on observations of witness not expert testimony. - Where a person has an opportunity to observe the movement of a vehicle, he may give an opinion as to its speed at the time and when the opinion is based on the observations of the witness, it is not expert testimony. *Dahl v. Turner*, 80 N.M. 564, 458 P.2d 816 (Ct. App.), cert. denied, 80 N.M. 608, 458 P.2d 860 (1969).

Expressing opinion as to speed is not giving expert testimony, but is permitted as a means of getting the picture before the jury, and is based upon a rule of expediency, where it is difficult or impossible to otherwise describe the occurrence in words. *State v. Deming*, 66 N.M. 175, 344 P.2d 481 (1959); *Bunton v. Hull*, 51 N.M. 5, 177 P.2d 168 (1947).

Lay-opinion evidence used to corroborate expert testimony. - The testimony of neighbors in the vicinity concerning the effects of the blasts on property near the plaintiff's merely served to corroborate the expert testimony showing a causal connection between the blasts and plaintiff's damage and is therefore admissible. *Jaramillo v. Anaconda Co.*, 71 N.M. 161, 376 P.2d 954 (1962).

Lay witness cannot opine on complexities of trial practice. - A lay witness does not have the experience, knowledge and wisdom to opine on the complexities of trial practice, including the verdict that a jury will render. *Sanders v. Smith*, 83 N.M. 706, 496 P.2d 1102 (Ct. App.), cert. denied, 83 N.M. 698, 496 P.2d 1094 (1972).

Where witness was fully qualified by his experience so as to warrant the acceptance of his qualifications by recognized specialists in the field, there was no abuse of discretion on the part of the trial court in allowing this witness's testimony to be presented to the jury. *State v. Rose*, 79 N.M. 277, 442 P.2d 589 (1968), cert. denied, 393 U.S. 1028, 89

S. Ct. 626, 21 L. Ed. 2d 571 (1969).

That technician-witness was not specialist goes to weight, not admissibility. - Although witness was neither a chemist nor a medical expert, he had been trained to operate the test machine in question and had performed several hundred similar tests with it, and that he was not a specialist does not go to the admissibility of the evidence elicited from him nor to its sufficiency to support a finding based thereon, but rather to the weight to be accorded it. *State v. Myers*, 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975).

Store manager may testify on whether burglary alarm activated. - In a prosecution for burglary the acting manager of the burglarized store was held qualified to give testimony that the store's burglar alarm system, with which he was familiar, was activated by something crossing a beam of light since his testimony concerned his own perceptions and was helpful in determining whether there had been an entry into the building. *State v. Tixier*, 89 N.M. 297, 551 P.2d 987 (Ct. App. 1976).

There was sufficient foundation to justify admission of testimony by 18-year-old witness with driver's training, who had driven a car for about a year and a half, had observed traffic on the street in question daily, had fine eyesight, had estimated the speed of vehicles in the past and was 100 to 200 feet from the intersection on a clear night, concerning the speed of defendant's car. *State v. Richerson*, 87 N.M. 437, 535 P.2d 644 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Jury may assess weight of minor's unchallenged testimony identifying controlled substance. - Where a drug user, who is a minor, testifies as to the identification of a controlled substance and is not challenged on cross-examination, the court does not abuse its discretion in allowing the jury to assess the weight of the minor's testimony. *State v. Cortez*, 99 N.M. 727, 663 P.2d 703 (Ct. App. 1982), rev'd on other grounds, 100 N.M. 158, 667 P.2d 963, cert. denied, 464 U.S. 964, 104 S. Ct. 402, 78 L. Ed. 2d 343 (1983).

No error in permitting wife, in divorce and alimony action, to testify as to her present medical condition. *Russell v. Russell*, 101 N.M. 648, 687 P.2d 83 (1984).

Owner of chattel may testify as to its value. - It is a general rule that an owner of chattel property is competent to testify as to the value of his property. This rule is applicable in both civil and criminal trials. *State v. Zarafonetis*, 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

As may owner of real property. - An owner of real property is presumed to have special knowledge as to its value by reason of ownership and is therefore competent to testify to value. *City of Albuquerque v. Ackerman*, 82 N.M. 360, 482 P.2d 63 (1971).

Motel manager's testimony on value of used televisions was competent. - Motel manager's testimony that he was familiar with the value of the television sets that are sold to motels and testified that a used set like the one involved was worth between \$150 and \$200 was competent and meets the substantial evidence test. *State v. Williams*, 83 N.M. 477, 493 P.2d 962 (Ct. App. 1972).

Opinion testimony of lay witnesses is admissible on question of insanity. *State v. Gutierrez*, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975); *State v. Luna*, 93 N.M. 773, 606 P.2d 183 (1980).

Opinion testimony of layman may be received on question of insanity, and it is the duty of the trial court to pass upon the qualifications and opportunity of the lay witness to form such an opinion. *State v. Lujan*, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

But expert should be allowed to comment thereon. - Though the trial judge should probably have allowed defendant's expert to testify regarding the validity of lay opinion of defendant's mental condition, defendant was denied no substantial right, nor was he substantially harmed such that he was denied a fair trial, furthermore, the record clearly showed that the expert witness had an opportunity after the disallowed question to state the difficulty a lay person would have in forming a valid opinion as to defendant's mental condition. *State v. Lujan*, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Witness's speculative testimony as to starting of fight. - The trial court properly instructed the jury to disregard witness's opinion as to who started a fight where the trial court could properly conclude that witness's testimony was speculative, that the witness was not stating the totality of his actual observations but rather his own version of "but for" causation, and that this evidence was neither rationally based upon his perceptions nor helpful to the jury. *Baum v. Orosco*, 106 N.M. 265, 742 P.2d 1 (Ct. App. 1987).

Opinion may be based upon voice and movements of person. - The opinion of the witness need not be based upon a recognition of face and features; it may be based upon the voice, size, gait and movements of the person whose identity is in question. *State v. Quintana*, 69 N.M. 51, 364 P.2d 120 (1961); *State v. Fore*, 37 N.M. 143, 19

P.2d 749 (1933).

No indication victim knowledgeably could answer questions concerning defendant's rationality. - Where questions directed to the victim, all of which go beyond the victim's explanation, during direct examination, as to why defendant "seemed rational," ask her to state whether specific acts taken during the commission of the crimes of which defendant has been convicted were rational, absent something indicating knowledge by the victim of what would be rational conduct of a person committing the crimes involved, there is nothing indicating the victim has a knowledgeable basis for answering these questions. State v. Day, 94 N.M. 753, 617 P.2d 142, cert. denied, 449 U.S. 860, 101 S. Ct. 163, 66 L. Ed. 2d 77 (1980).

Admission of juvenile probation officer's rebuttal testimony regarding opinion of defendant's reputation for truthfulness is impermissibly prejudicial. State v. Guess, 98 N.M. 438, 649 P.2d 506 (Ct. App. 1982).

11-702. Testimony by experts.

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Qualifications.
- III. Admissibility.
- IV. Medical Experts.

- I. General Consideration.

Compiler's notes. - This rule is similar to Rule 702 of the Federal Rules of Evidence.

Purpose of expert's opinion is to aid trier of facts in making a determination or decision on the issue upon which the opinion is given, or toward which it is directed, and such an opinion does not preclude the trier of the facts from considering nonexpert evidence on

the issue. An expert opinion is not intended to conclude the trier of the facts in determining or deciding the issue. *State v. Smith*, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969).

Nothing compels trier of facts to disregard nonexpert testimony and to accept the opinions of defendant's medical experts as to his probable state of mind and incapacity to control his will at the time of committing a criminal act. The jury is not required to accept these expert opinions and disregard all other evidence bearing on the question of his mental and emotional state, nor is the trial court bound to accept these expert opinions and dismiss the charges of first and second-degree murder. *State v. Smith*, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969).

Thus jury may accept nonexpert over expert testimony. - In New Mexico a jury is not required to accept expert opinion and to reject contradictory nonexpert opinion. *State v. James*, 85 N.M. 230, 511 P.2d 556 (Ct. App.), cert. denied, 85 N.M. 228, 511 P.2d 554 (1973).

Conclusions of expert are as much evidence as are his observations. *State ex rel. State Hwy. Comm'n v. Steinkraus*, 76 N.M. 617, 417 P.2d 431 (1966).

Opinion of expert, although uncontradicted, is not conclusive of fact in issue. The fact finder may reject expert opinion evidence in whole or in part. *Van Orman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967).

Trier of fact to weigh expert's testimony. - The weight to be given the testimony of an expert on handwriting is for the trier of fact. *Price v. Foster*, 102 N.M. 707, 699 P.2d 638 (Ct. App. 1985).

Expert testimony in claims of legal malpractice means testimony of lawyers. *Sanders v. Smith*, 83 N.M. 706, 496 P.2d 1102 (Ct. App.), cert. denied, 83 N.M. 698, 496 P.2d 1094 (1972).

That doctor stated he was not an expert did not deprive his testimony of its value as expert testimony. *Williams v. Skousen Constr. Co.*, 73 N.M. 271, 387 P.2d 590 (1963).

Expert may testify based on evidence already before jury. - Expert testimony as to speed of automobile based on evidence already before the jury was not an invasion of the province of the jury and did not constitute prejudicial error. *Alford v. Drum*, 68 N.M.

298, 361 P.2d 451 (1961).

And court may require all other testimony before expert testifies. - Court did not err in refusing to permit the testimony of expert witnesses until all evidence forming a basis for formation of such expert opinion had been introduced by the petitioner, since the order of proof in a case is addressed to the sound discretion of the trial court. State ex rel. State Hwy. Dep't v. Fox Trailer Court, 83 N.M. 178, 489 P.2d 1176 (1971).

Conflicting expert testimony not case for physical fact doctrine application. - Conflicting expert testimony based upon physical facts as well as the application of knowledge of scientific principles in the possession and control of the experts is not a case for application of the physical facts doctrine. Jaramillo v. Anaconda Co., 71 N.M. 161, 376 P.2d 954 (1962).

Expert may show rifle safe if other expert contends otherwise. - It was proper for appellee to show that the poundage pressure required to move the safety lever on a rifle from "safe" to "fire" measured two and one-half pounds, and also to show the poundage pressure required in rifles with identical safety devices, where appellant's expert had contended that the rifle was unsafe, thus giving rise to the issue of the pressure required to move the safety lever. Lopez v. Heesen, 69 N.M. 206, 365 P.2d 448 (1961).

Expert's failure to remember making statement not ground for striking. - It was not abuse of discretion by trial court to refuse to strike expert testimony from record where witness did not deny that he gave testimony appearing in record, but claimed only to not remember making statement. State v. Chavez, 84 N.M. 247, 501 P.2d 691 (Ct. App. 1972).

Affidavit expert opinion evidence not competent. - 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).

Court may refuse expert's testimony if only cumulative. - Refusal of the court to permit the commission to call an expert employed but not used by the landowner is not error when the tendered testimony would only be cumulative. State ex rel. State Hwy. Comm'n v. Steinkraus, 76 N.M. 617, 417 P.2d 431 (1966).

Registered engineer's testimony not barred because not licensed private investigator. - Testimony by a registered professional engineer under the Engineering Practice Act (61-23-4 to 61-23-29 NMSA 1978), whether "as an engineer" or as a traffic expert concerning the accident and arriving at his opinion as to the speed of the defendant's car was not controlled by the Private Investigators Act (61-27-1 to 61-27-49 NMSA 1978) and therefore the expert's testimony was not barred by the fact that he was not a licensed private investigator. *Dahl v. Turner*, 80 N.M. 564, 458 P.2d 816 (Ct. App.), cert. denied, 80 N.M. 608, 458 P.2d 860 (1969).

Medical nonspecialist can testify as to standards of care owed by defendant medical specialist, if nonspecialist is qualified and competent to do so. *Sewell v. Wilson*, 97 N.M. 523, 641 P.2d 1070 (Ct. App. 1982).

Time to determine expert's competency at trial and not before. - The trial court erred in ruling on a pretrial motion that a well-qualified general surgeon was not competent to establish the standard of care for a general practitioner in a small community hospital emergency room because of his lack of knowledge of the routines, procedures, etc., obtaining in such hospitals at the time of depositions, since by the time of trial the surgeon could have filled in his knowledge merely by making inquiry; thus the time to determine his competency as an expert witness was at the time of trial, and not before. *Griego v. Grieco*, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977).

Having waived any proof of qualifications, defendant should not be heard to complain that the witness was not qualified to testify concerning disability for civilian activities. *Sturgeon v. Clark*, 69 N.M. 132, 364 P.2d 757 (1961).

Inadmissibility of polygraph tests without stipulation violates due process. - The rule that polygraph test results are inadmissible except when, inter alia, the tests are stipulated to by both parties to the case and no objection is offered at trial is (1) mechanistic in nature; (2) inconsistent with the concept of due process; (3) repugnant to the announced purpose and construction of the Rules of Evidence; and (4) particularly incompatible with the purposes and scope of Rules 401, 402, 702 and 703 (now 11-401, 11-402, 11-702 and 11-703). *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975).

Supreme court has held that polygraph test results may be admitted when: (1) the tests were stipulated to by both parties to the case; (2) no objection is offered at trial; (3) the court has evidence of the qualifications of the polygraph operator to establish his expertise; (4) there is testimony to establish the reliability of the testing procedure employed as approved by the authorities in the field; and (5) there is evidence to show the validity of the tests made on the subject. However, because the supreme court at the time of its holding did not consider the effect of the Rules of Evidence or due

process claim, where tendered polygraph results were relevant under Rule 11-402 and crucial to the defense in order to establish intent and provocation, they would be admitted despite the failure of the district attorney to stipulate to them and despite his objection to their admission. *State v. Dorsey*, 87 N.M. 323, 532 P.2d 912 (Ct. App.), aff'd, 88 N.M. 184, 539 P.2d 204 (1975).

Law reviews. - For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For note, "Lie Detector Evidence - New Mexico Court of Appeals Holds Voice-Stress Lie Detector Evidence Conditionally Admissible: *Simon Neustadt Family Center, Inc. v. Bludworth*," see 13 N.M.L. Rev. 703 (1983).

For case note, "WORKERS' COMPENSATION LAW: A Clinical Psychologist Is Qualified to Give Expert Medical Testimony Regarding Causation: *Madrid v. University of California, d/b/a Los Alamos National Laboratory*," see 18 N.M.L. Rev. 637 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 5 Am. Jur. 2d Appeal and Error §§ 808, 843, 884; 31A Am. Jur. 2d Expert and Opinion Evidence § 1 et seq.

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.

Expert evidence to identify gun from which bullet or cartridge was fired, 26 A.L.R.2d 892.

Necessity of expert testimony to show causal connection between medical treatment necessitated by injury for which defendant is liable and allegedly harmful effects of such treatment, 27 A.L.R.2d 1263.

Cross-examination of expert witness as to fees, compensation, and the like, 33 A.L.R.2d 1170.

Admissibility of opinion of medical expert as affected by his having heard the person in question give the history of his case, 51 A.L.R.2d 1051.

Chiropractor's competency as expert in personal injury action as to injured person's condition, medical requirements, nature and extent of injury, and the like, 52 A.L.R.2d 1384.

Party litigant in civil personal injury or death case as bound by conflicting testimony of

his own medical witnesses, 53 A.L.R.2d 1229.

Admissibility, in homicide prosecution, of opinion evidence that death was or was not self-inflicted, 56 A.L.R.2d 1447.

Right of physician, notwithstanding physician-patient privilege, to give expert testimony based on hypothetical question, 64 A.L.R.2d 1056.

Admissibility of opinion evidence as to point of impact or collision in motor vehicle accident case, 66 A.L.R.2d 1048.

Admissibility of opinion evidence as to cause of death, disease, or injury, 66 A.L.R.2d 1082.

Qualification as expert to testify as to findings or results of scientific test to determine alcoholic content of blood, 77 A.L.R.2d 971.

Compelling expert to testify, 77 A.L.R.2d 1182.

Qualification of nonmedical psychologist to testify as to mental condition or competency, 78 A.L.R.2d 919.

Expert and opinion evidence as to cause or origin of fire, 88 A.L.R.2d 230.

Right to elicit expert testimony from adverse party called as witness, 88 A.L.R.2d 1186.

Expert or opinion evidence as to speed based on appearance or condition of motor vehicle after accident, 93 A.L.R.2d 287.

Admissibility, in civil case, of expert or opinion evidence as to proposed witness' inability to testify, 11 A.L.R.3d 1360.

Necessity and admissibility of expert testimony as to credibility of witness, 20 A.L.R.3d 684.

Opinion testimony as to speed of motor vehicle based on skid marks and other facts, 29 A.L.R.3d 248.

Locality rule as governing hospital's standard of care to patient and expert's competency to testify thereto, 36 A.L.R.3d 440.

Malpractice testimony: competency of physician or surgeon from one locality to testify, in malpractice case, as to standard of care required of defendant practicing in another locality, 37 A.L.R.3d 420.

Necessity of expert evidence to support action against hospital for injury to or death of

patient, 40 A.L.R.3d 515.

Necessity and sufficiency of expert evidence to establish existence and extent of physician's duty to inform patient of risks of proposed treatment, 52 A.L.R.3d 1084.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases, 89 A.L.R.3d 783.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

Admissibility and weight of voiceprint evidence, 97 A.L.R.3d 294.

Admissibility of expert medical testimony on battered child syndrome, 98 A.L.R.3d 306.

Admissibility of social worker's expert testimony on child custody issues, 1 A.L.R.4th 837.

Admissibility, in criminal case, of results of residue detection test to determine whether accused or victim handled or fired gun, 1 A.L.R.4th 1072.

Necessity of expert testimony to show malpractice of architect, 3 A.L.R.4th 1023.

Products liability: admissibility of expert or opinion evidence that product is or is not defective, dangerous, or unreasonably dangerous, 4 A.L.R.4th 651.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney, 14 A.L.R.4th 170.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction, 16 A.L.R.4th 666.

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney, 17 A.L.R.4th 170.

Admissibility of expert or opinion testimony on battered wife or battered woman syndrome, 18 A.L.R.4th 1153.

Admissibility of expert or opinion testimony concerning identification of skeletal remains, 18 A.L.R.4th 1294.

Admissibility and weight, in criminal case, of expert or scientific evidence respecting characteristics and identification of human hair, 23 A.L.R.4th 1199.

Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification, 29 A.L.R.4th 104.

Admissibility of testimony that bullet could or might have come from particular gun, 31 A.L.R.4th 486.

Admissibility of expert testimony as to modus operandi of crime - modern cases, 31 A.L.R.4th 798.

Propriety of cross-examining expert witness regarding his status as "professional witness," 39 A.L.R.4th 742.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 A.L.R.4th 1203.

Admissibility of bare footprint evidence, 45 A.L.R.4th 1178.

Admissibility, at criminal prosecution, of expert testimony on reliability of eyewitness testimony, 46 A.L.R.4th 1047.

Admissibility of expert testimony as to appropriate punishment for convicted defendant, 47 A.L.R.4th 1069.

Admissibility of voice stress evaluation test results or of statements made during test, 47 A.L.R.4th 1202.

Right of independent expert to refuse to testify as to expert opinion, 50 A.L.R.4th 680.

Necessity of expert testimony to show standard of care in negligence action against insurance agent or broker, 52 A.L.R.4th 1232.

Thermographic tests: admissibility of test results in personal injury suits, 56 A.L.R.4th 1105.

Compelling testimony of opponent's expert in state court, 66 A.L.R.4th 213.

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains, 66 A.L.R.4th 588.

Admissibility of expert testimony that item of clothing or footgear belonged to, or was worn by, particular individual, 71 A.L.R.4th 1148.

Necessity and admissibility, in federal trial, of expert or opinion testimony regarding use or reliability of hypnotically refreshed recollections, 50 A.L.R. Fed. 602.

When will expert testimony "assist trier of fact" so as to be admissible at federal trial under Rule 702 of Federal Rules of Evidence, 75 A.L.R. Fed. 461.

23 C.J.S. Criminal Law § 1050 et seq.; 32 C.J.S. Evidence §§ 446, 546.

II. Qualifications.

Whether expert qualified within court's discretion. - Whether an expert has the necessary qualifications to testify on any given proposition is within the discretion of the trial court and the court's ruling will not be disturbed unless that discretion has been abused. *Sturgeon v. Clark*, 69 N.M. 132, 364 P.2d 757 (1961); *Transwestern Pipe Line Co. v. Yandell*, 69 N.M. 448, 367 P.2d 938 (1961).

Whether witness is shown to be qualified to testify as an expert is a matter addressed to the judicial discretion of the trial court. *Alford v. Drum*, 68 N.M. 298, 361 P.2d 451 (1961); *Madrid v. University of Cal.*, 105 N.M. 715, 737 P.2d 74 (1987).

Trial court has wide discretion in determining whether one offered as an expert witness is competent and qualified to give an opinion on any given subject or proposition, and the court's determination of this question will not be disturbed on appeal, unless there has been an abuse of this discretion. *Jaramillo v. Anaconda Co.*, 71 N.M. 161, 376 P.2d 954 (1962); *Wood v. Citizens Std. Life Ins. Co.*, 82 N.M. 271, 480 P.2d 161 (1971).

The determination of whether an expert has the necessary qualifications to testify upon a given proposition is in the discretion of the trial judge and will not be overturned unless an abuse of such discretion is shown. *State ex rel. State Hwy. Dep't v. Fox Trailer Court*, 83 N.M. 178, 489 P.2d 1176 (1971).

The admission or exclusion of expert testimony is peculiarly within the discretion of the court and its decision will not be reviewed unless the exercise of that discretion has been abused. *State Farm Fire & Cas. Co. v. Miller Metal Co.*, 83 N.M. 516, 494 P.2d 178 (Ct. App. 1971), writ quashed, 83 N.M. 740, 497 P.2d 742 (1972).

In not allowing testimony of plaintiff "expert" witness owing to his lack of qualifications, the trial court exercised its discretion which when neither an abuse of discretion nor manifestly wrong will be sustained on appeal. *Hill v. Burnworth*, 85 N.M. 615, 514 P.2d 1312 (Ct. App. 1973).

It is the trial judge's responsibility to determine whether an offered expert is sufficiently qualified to testify in a cause, and he should exercise discretion in allowing or denying

the testimony to be introduced, which discretion will be interfered with by the appellate court only when it has been abused, and it was held that a state police narcotics agent who had conducted 200 to 300 similar tests, 80 of which had been used in various nonfelony cases, preliminary hearings and children's cases not involving felonies was sufficiently expert to qualify for the purposes of delinquency petitions which involved a marijuana offense which would have been a misdemeanor if committed by an adult. *Doe v. State*, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Whether a witness qualifies as an expert is a decision for the trial court, and its determination will not be overturned absent a showing of abuse of discretion. *Duran v. Lovato*, 99 N.M. 242, 656 P.2d 905 (Ct. App. 1982).

And upheld unless manifestly wrong or court applied wrong legal standards. - The trial court's determination that a witness is qualified to testify as an expert will not be disturbed unless the ruling is manifestly wrong or the trial court has applied wrong legal standards in the determination. *Dahl v. Turner*, 80 N.M. 564, 458 P.2d 816 (Ct. App.), cert. denied, 80 N.M. 608, 458 P.2d 860 (1969).

No rule is possible as to extent of knowledge required. - While it must appear that the witnesses have acquired sufficient knowledge or experience to testify, no rule can be laid down as to the extent of such knowledge. *Dahl v. Turner*, 80 N.M. 564, 458 P.2d 816 (Ct. App.), cert. denied, 80 N.M. 608, 458 P.2d 860 (1969).

Court may allow testimony where expert's qualifications accepted in his field. - Where the witness was fully qualified by his experience so as to warrant the acceptance of his qualifications by recognized specialists in the field, there was no abuse of discretion on the part of the trial court in allowing this witness's testimony to be presented to the jury. *State v. Rose*, 79 N.M. 277, 442 P.2d 589 (1968), cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969).

Licensure not sole qualifying criterion. - The use of the disjunctive "or" in this rule indisputably recognizes that an expert witness may be qualified on foundations other than licensure. *Madrid v. University of Cal.*, 105 N.M. 715, 737 P.2d 74 (1987).

To give scientific or specialized opinion testimony, an expert witness must be qualified to do so by knowledge, skill, training or education. *Sewell v. Wilson*, 97 N.M. 523, 641 P.2d 1070 (Ct. App. 1982).

It is clear that qualified psychologist can testify as expert witness in New Mexico. *State v. Tafoya*, 94 N.M. 762, 617 P.2d 151 (1980).

Policeman may be expert. - A police officer who relies on a diagram and his notes to render an opinion regarding the area of impact and whether speed was a contributing factor in an automobile accident may be an expert witness. *Duran v. Lovato*, 99 N.M. 242, 656 P.2d 905 (Ct. App. 1982).

Witness without sufficient educational qualifications or experience cannot testify. - Where a witness in a criminal case did not have a PhD degree and also lacked the required postgraduate training in clinical psychology and the necessary experience in an approved mental institution, the admission of his testimony relative to defendant's mental state was error. *State v. Padilla*, 66 N.M. 289, 347 P.2d 312 (1959).

III. Admissibility.

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. 55, 417 P.2d 46 (1966) (decided prior to the adoption of this rule).

Expert needs facts to make reasonably accurate conclusion. - Expert testimony may be received if, and only if, the expert possesses such facts as would enable him to express a reasonably accurate conclusion, as distinguished from mere conjecture. *Leon, Ltd. v. Carver*, 104 N.M. 29, 715 P.2d 1080 (1986).

Court determines whether sufficiently qualified and exercises discretion on admissibility. - It is the trial judge's responsibility to determine whether an offered expert is sufficiently qualified to testify in a cause, and he should exercise discretion in allowing or denying the testimony to be introduced. *State v. Garcia*, 76 N.M. 171, 413 P.2d 210 (1966) (decided prior to the adoption of this rule).

Admission or exclusion of expert testimony is peculiarly within discretion of the court and its decision will not be reviewed unless the exercise of that discretion has been abused. *Cantrell v. Dendahl*, 83 N.M. 583, 494 P.2d 1400 (Ct. App. 1972) (decided prior to the adoption of this rule).

Expert testimony admissible if it assists jury in determining issue. - Testimony by a properly qualified expert, on sufficient foundational facts, is presently admissible if the

testimony would assist the jury in determining an issue. *State v. Elliott*, 96 N.M. 798, 635 P.2d 1001 (Ct. App. 1981).

Offerable by defense or prosecution. - Relevant evidence and expert testimony are admissible, regardless of whether offered by the defendant or the prosecution. *State v. Gallegos*, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

And court cannot prevent defendant from calling expert because of nonexperts' testimony. - The trial court cannot properly prevent a defendant from calling experts in support of the defense on the basis that nonexperts have testified about the same issue. *State v. Elliott*, 96 N.M. 798, 635 P.2d 1001 (Ct. App. 1981).

Determination of probative value and other relevant considerations relating to the admission of expert witness testimony left to the sound discretion of the trial judge. *State v. Tafoya*, 94 N.M. 762, 617 P.2d 151 (1980).

No error in refusing expert testimony where probative value slight. - The trial court does not err in refusing to admit the testimony of an expert as to the credibility of the victims of a sexual offense where the probative value of the testimony was slight, based upon the lack of personal observation by the expert. *State v. Tafoya*, 94 N.M. 762, 617 P.2d 151 (1980).

Court may take whole panorama into consideration and reject experts. - Although supreme court has held, in a case involving medical testimony, that uncontradicted evidence is conclusive upon the court as a trier of the facts, it was determined, considering the facts in case involving alleged deviation from architectural style provided for in restrictive covenant as to the evidence presented by the expert witnesses and the aesthetic nature of the issues, that the trier of the facts could take the whole panorama into consideration, including his own knowledge of the area. Consequently, in that cause the fact finder could reject expert opinion evidence. *Gaskin v. Harris*, 82 N.M. 336, 481 P.2d 698 (1971).

Court should allow expert to comment on lay opinion's validity. - Though the trial judge should probably have allowed defendant's expert to testify regarding the validity of lay opinion on defendant's mental condition, defendant was denied no substantial right, nor was he substantially harmed such that he was denied a fair trial, furthermore, the record clearly showed that the expert witness had an opportunity after the disallowed question to state the difficulty a lay person would have in forming a valid opinion as to defendant's mental condition. *State v. Lujan*, 87 N.M. 400, 534 P.2d 1112, cert. denied,

423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

This rule does not restrict expert opinion testimony to "perceptions of the witness." *State v. Ellis*, 89 N.M. 194, 548 P.2d 1212 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

"Never heard of it happening" testimony by expert is admissible. - The testimony of one witness, an official of the state of New Mexico with 20 years' experience in plumbing and gas installations, that he had never heard of a fire starting because of hot duct work igniting framework was found to be neither inadmissible or prejudicial by the appellate court. *State Farm Fire & Cas. Co. v. Miller Metal Co.*, 83 N.M. 516, 494 P.2d 178 (Ct. App. 1971), writ quashed, 83 N.M. 740, 497 P.2d 742 (1972).

Properly qualified expert may testify as to defendant's intent. *State v. Ellis*, 89 N.M. 194, 548 P.2d 1212 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

An accident reconstructionist shown to be possessed of the education and experience necessary to form an opinion on the movement of bodies within a vehicle may properly be admitted to testify. *State v. Vigil*, 103 N.M. 643, 711 P.2d 920 (1985).

Testimony of duly qualified expert as to speed, based on skid marks, is admissible. *Alford v. Drum*, 68 N.M. 298, 361 P.2d 451 (1961).

Qualified person may testify as to a summary based upon his examination of complicated books of accounts and records. *State v. Schrader*, 64 N.M. 100, 324 P.2d 1025 (1958).

Medical expert's testimony held inadmissible for lack of foundation. - Where there was no foundation for the testimony that defendant had taken medication and alcohol on the night of the crime, a medical expert could not testify as to the particular effect of that combination on defendant as there was no evidence or fact in issue upon which the expert could offer an opinion. *State v. Guzman*, 100 N.M. 756, 676 P.2d 1321, cert. denied, 467 U.S. 1256, 104 S. Ct. 3548, 82 L. Ed. 2d 851 (1984).

Expert's opinion on witness' prior drug addiction excluded. - Trial court did not abuse its discretion in excluding testimony of defendant's expert witness about prior heroin addiction of state's witness where trial court found that the expert had not applied any particular psychological test with regard to state's witness, that the testimony would be

highly prejudicial while having little probative value due to lack of clear connection between witness' prior addiction and her present ability to recall, and that evidence would not be helpful to jury. *State v. Blea*, 101 N.M. 323, 681 P.2d 1100 (1984).

Physician's affidavit held not covered by physician-patient privilege. - Affidavit of physician who had previously treated plaintiff submitted in support of defendant's motion for partial summary judgment was properly obtained and submitted since testimony was not covered by physician-patient privilege. *Trujillo v. Puro*, 101 N.M. 408, 683 P.2d 963 (Ct. App. 1984).

Testimony regarding voluminous records permitted without records being in court. - A qualified person may testify in regard to a summary of voluminous records which that person has examined without the necessity of requiring the records themselves to be in court. *State v. Schrader*, 64 N.M. 100, 324 P.2d 1025 (1958).

Auditor's testimony as an expert witness was admissible evidence, and the jury was at liberty to believe or disbelieve this testimony under the instructions of the court. *State v. Peke*, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962).

Evidence in a products liability case that plaintiff's car was defective based on experts' examination of the defective mechanism, together with a showing that plaintiffs' use was not improper, that the car went out of control, and that a broken axle caused the lack of control, exceeded the requisite standard of proof and presented sufficient evidence of a defect. *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).

"Battered wife syndrome" term admissible. - Trial court should not have excluded, during a psychologist's testimony at defendant's trial for killing her ex-husband, use of the term "battered wife syndrome". *State v. Gallegos*, 104 N.M. 247, 719 P.2d 1268 (Ct. App. 1986).

IV. Medical Experts.

Medical testimony, like other expert evidence, is intended to aid but not to conclude the trier of the facts in determining the extent of disability. *Lucero v. Los Alamos Constructors, Inc.*, 79 N.M. 789, 450 P.2d 198 (Ct. App. 1969).

Weight given medical expert's testimony for trier of facts. - Once a medical witness has qualified to give an expert medical opinion upon a particular issue, the weight, if any, to be given his opinion on this issue, and the resolution of conflicts between his opinion and the opinions of other medical experts on the issue, are for the trier of the facts. Wood v. Citizens Std. Life Ins. Co., 82 N.M. 271, 480 P.2d 161 (1971).

Trier of facts resolving conflicts even between medical expert's opinions. - It was for the trial court, as the trier of the facts, and not for the supreme court, to determine the credibility of the witnesses, the weight to be given their respective testimonies, and wherein the truth lay, and that the witnesses upon whose credibility the trial court was required to pass were medical experts, and that the differences and conflicts to be resolved arose out of their medical opinions as to the causes and nature of plaintiff's disabling condition, does not alter the rule. Wood v. Citizens Std. Life Ins. Co., 82 N.M. 271, 480 P.2d 161 (1971).

Fact that doctor not specialist goes to weigh, not admissibility. - Testimony from a general practitioner although not a specialist does not go to the admissibility of the evidence elicited from him nor to its sufficiency to support a finding based thereon, but rather to the weight to be accorded it. Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964).

Expert testimony establishes liability and causal connection in malpractice case. - Facts to establish liability in a malpractice case must generally be established by expert testimony. Likewise, expert testimony is generally required to establish causal connection. Sanders v. Smith, 83 N.M. 706, 496 P.2d 1102 (Ct. App.), cert. denied, 83 N.M. 698, 496 P.2d 1094 (1972).

Experts must determine whether doctor's performance within recognized medical standards. - Expert testimony is generally necessary to prove whether or not the doctor's handling of the case was within recognized standards of medical practice in the community. Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967).

Since specific medical knowledge required. - Question of whether or not doctor's treatment was within an accepted medical standard was a factual question requiring special scientific knowledge that could best be answered by the expert witnesses and did not constitute a request for an opinion on the ultimate issue. Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967).

Fundamental techniques more determinative than local practices. - It would make no difference whether a surgeon had personal knowledge concerning local practice if

fundamental techniques, applicable no matter where the doctor practices, would apply to the locality involved in the lawsuit. *Griego v. Grieco*, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977).

Testimony as to widespread fundamental procedures indicates local practices considered. - Testimony of several doctors that the diagnosis of abdominal injuries was taught in medical schools for many, many years, and was of long standing, that the method of diagnosis did not vary from town to town in New Mexico, and that diagnostic tests and examinations would be the same in any community in New Mexico shows that the doctors gave due consideration to the locality involved, and they were qualified to testify whether defendant followed the standard of care and skill required of physicians in examining, diagnosing and treating a patient suffering from blunt trauma to the abdomen to determine whether an intraabdominal injury was present. *Griego v. Grieco*, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977).

Expert's opinion fails to raise issue if method not generally known. - 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).

Purpose of medical opinion as to percentage of disability is to assist the trier of the facts in arriving at a correct determination of the extent of claimant's disability, and a percentage opinion may be disregarded if there is other competent evidence to support the award. *Lucero v. Los Alamos Constructors, Inc.*, 79 N.M. 789, 450 P.2d 198 (Ct. App. 1969).

Only medical expert can testify on physical condition's cause and effect. - The cause and effect of a physical condition lies in a field of knowledge in which only a medical expert can give a competent opinion. *Woods v. Brumlop*, 71 N.M. 221, 377 P.2d 520 (1962).

Psychiatrist testifies on mental state and not specific facts. - Prior to enactment of rules of evidence, defendant's contention of inadmissibility of psychiatrist's testimony

concerning the veracity of the defendant in claiming a loss of memory was without merit where psychiatrist testified as to the mental state of the defendant as it concerned his alleged loss of memory, not as to specifics related to him by the defendant concerning the alleged circumstances. *State v. Vaughn*, 82 N.M. 310, 481 P.2d 98, cert. denied, 403 U.S. 933, 91 S. Ct. 2262, 29 L. Ed. 2d 712 (1971).

Expert medical opinion partly based upon out-of-court statements inadmissible. - The opinion of a medical expert as to the sanity of a defendant in a criminal proceeding based partly upon the statements of third persons out of court is generally considered inadmissible. *State v. Chambers*, 84 N.M. 309, 502 P.2d 999 (1972).

11-703. Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 703 of the Federal Rules of Evidence.

Expert must give satisfactory explanation as to how opinion reached. - An expert witness must, of course, be able to give a satisfactory explanation as to how he arrives at his opinion. If his opinion is based on erroneous factors, it is subject to being stricken. *Dahl v. Turner*, 80 N.M. 564, 458 P.2d 816 (Ct. App.), cert. denied, 80 N.M. 608, 458 P.2d 860 (1969); *Smith v. Klebanoff*, 84 N.M. 50, 499 P.2d 368 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

Otherwise testimony is not competent. - An expert witness must be able to give a satisfactory explanation as to how he arrives at his opinion, and without such an explanation the opinion is not competent evidence. *Galvan v. City of Albuquerque*, 85 N.M. 42, 508 P.2d 1339 (Ct. App. 1973).

Testing basis of expert's opinion. - An expert is not to be sheltered from a testing of the basis of his opinion; rather, such a testing is expressly authorized. *Jaramillo v. Fisher Controls Co.*, 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985).

Expert may rely upon hearsay information. - In forming an expert opinion it may be necessary to rely upon information - hearsay though it be - which in part is derived from persons charged with the supervision of the one whose conduct is involved. The information is winnowed through the mental processes of the expert, and is by him either accepted or rejected. If information is accepted as useable by the expert-doctor it is not so liable to be untrustworthy as to require the court to rule that his opinion is unworthy of consideration by the jury. *State v. Chambers*, 84 N.M. 309, 502 P.2d 999 (1972).

Because basis of expert opinion is required to be made known before the expert opinion is admissible, this court is unwilling to exclude from consideration that information upon which the expert himself relies and will allow an expert to rely on hearsay evidence. *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).

But hearsay itself still not admissible. - Even if physicians relied on hearsay in forming their opinions, that would not make the hearsay itself admissible. *Wilson v. Leonard Tire Co.*, 90 N.M. 74, 559 P.2d 1201 (Ct. App. 1976), cert. denied, 90 N.M. 9, 558 P.2d 621 (1977).

While experts may rely on hearsay under this rule, the hearsay itself is not admissible. *Coulter v. Stewart*, 97 N.M. 616, 642 P.2d 602 (1982).

Cannot have admitted in evidence opinions of absent doctors. - In personal injury case, where plaintiff, in cross-examination of defendant's doctors, got admitted in evidence the medical opinions of two absent doctors, and there was no evidence that defendant's doctors had relied on those opinions, and the argument that the opinions were admissible because they could bring out the fact that defendant's doctors had rejected the opinions was without merit and was considered a back door ruse to introduce inadmissible testimony. *Wilson v. Leonard Tire Co.*, 90 N.M. 74, 559 P.2d 1201 (Ct. App. 1976), cert. denied, 90 N.M. 9, 558 P.2d 621 (1977).

Admission in evidence of hearsay medical opinion of nontestifying physician is prejudicial error. *O'Kelly v. State*, 94 N.M. 74, 607 P.2d 612 (1980).

But reliance upon other doctor's reports not in evidence permissible. - When a doctor appears to have relied on medical reports prepared by other doctors, the objection that these reports were an impermissible basis for his opinion because they were not in evidence, is not a sufficient objection. There was no objection that these reports were not of the sort reasonably relied on by such experts. *Higgins v. Hermes*, 89 N.M. 379,

552 P.2d 1227 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

Where expert did not adopt hearsay evidence as necessarily true statement of what occurred, the court did not agree that reversible error was committed by admitting the hearsay evidence of factory procedures and the expert's recital of his basis for refusing to make a conclusion which he did not feel was justified. *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).

Expert testimony concerning tests done at accident site is admissible and competent. *Harrison v. ICX, Illinois-California Express, Inc.*, 98 N.M. 247, 647 P.2d 880 (Ct. App. 1982).

Testimony of duly qualified expert as to speed, based on skid marks, is admissible. *Alford v. Drum*, 68 N.M. 298, 361 P.2d 451 (1961).

New Mexico law sanctions expert testimony regarding vehicle speed when such testimony is based on an interpretation of skid marks. *Roberts v. Sparks*, 99 N.M. 152, 655 P.2d 539 (Ct. App. 1982).

Mathematical odds are not admissible as evidence to identify defendant in a criminal proceeding so long as the odds are based on estimates, the validity of which have not been demonstrated. *State v. Sneed*, 76 N.M. 349, 414 P.2d 858 (1966).

Medical opinion letter should not have been admitted to show basis of expert's opinion where expert testified, not that he relied on the letter, but that he had already formed his opinion before he read the letter. *Sewell v. Wilson*, 101 N.M. 486, 684 P.2d 1151 (Ct. App. 1984).

Inadmissibility of polygraph tests without stipulation violates due process. - The rule that polygraph test results are inadmissible except when, inter alia, the tests are stipulated to by both parties to the case and no objection is offered at trial is: (1) mechanistic in nature; (2) inconsistent with the concept to due process; (3) repugnant to the announced purpose and construction of the Rules of Evidence; and (4) particularly incompatible with the purposes and scope of Rules 11-401, 11-402, 11-702 and 11-703. *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975).

Law reviews. - For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31A Am. Jur. 2d Expert and Opinion Evidence § 1 et seq.

Admissibility of X-ray report made by physician taking or interpreting X-ray pictures, 6 A.L.R.2d 406.

Admissibility of hearsay evidence as to comparable sales of other land as basis for expert's opinion as to land value, 12 A.L.R.3d 1064.

Air pollution: evidence as to Ringelmann chart observations, 51 A.L.R.3d 1026.

Admissibility on issue of sanity of expert opinion based partly on medical, psychological, or hospital reports, 55 A.L.R.3d 551.

Admissibility and weight of voiceprint evidence, 97 A.L.R.3d 294.

Admissibility, in criminal case, of results of residue detection test to determine whether accused or victim handled or fired gun, 1 A.L.R.4th 1072.

Necessity of expert testimony to show malpractice of architect, 3 A.L.R.4th 1023.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 A.L.R.4th 1203.

What information is of type "reasonably relied upon by experts" within Rule 703, Federal Rules of Evidence, permitting expert opinion based on information not admissible in evidence, 49 A.L.R. Fed. 363.

Necessity and admissibility, in federal trial, of expert or opinion testimony regarding use or reliability of hypnotically refreshed recollection, 50 A.L.R. Fed. 602.

23 C.J.S. Criminal Law § 1050 et seq.; 32 C.J.S. Evidence §§ 446, 546.

11-704. Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 704 of the Federal Rules of Evidence.

Fact that expert opinion invades province of jury is not grounds for excluding the testimony. *State v. Ellis*, 89 N.M. 194, 548 P.2d 1212 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Evidence not inadmissible simply because it invades fact finder's province. - If the matter in dispute and to be decided involves causes and effects which are not within the knowledge or comprehension of the lay trier, expert testimony is admissible as an aid to the decisional process, and it is not rendered inadmissible simply because it invades the province of the trier of the critical issue. *State v. Lopez*, 84 N.M. 805, 508 P.2d 1292 (1973).

Not ground for exclusion if witness usurps jury's functions. - This rule is identical with Federal Rule 704 and therefore, though a witness may usurp the functions of the jury, or invade the jury's province, such is not necessarily a ground for excluding the witness's testimony. *State v. Lopez*, 84 N.M. 805, 508 P.2d 1292 (1973).

Ultimate fact opinions do not usurp because jury may disregard. - The testimony of witnesses, experts in their field, was upon the ultimate issue of fact of whether the safety device on the rifle was dangerous and defective or unsafe, and was properly the subject of expert testimony. Opinion evidence on an ultimate issue of fact does not attempt or have the power to usurp the functions of the jury, and therefore, this evidence could not usurp the jury's function because the jury may still reject these opinions and accept some other view. *Lopez v. Heesen*, 69 N.M. 206, 365 P.2d 448 (1961).

Admissible if within expertise even if concerns legal conclusion. - Where questions put to expert witness concerned subject matter which was within the expertise of the witness, his testimony was not inadmissible because it also concerned a legal conclusion. *Herrera v. Fluor Utah, Inc.*, 89 N.M. 245, 550 P.2d 144 (Ct. App.), cert. denied, 89 N.M. 321, 551 P.2d 1368 (1976).

Whether doctor's treatment proper not request for ultimate issue opinion. - Question of whether or not doctor's treatment was within an accepted medical standard was a factual question requiring special scientific knowledge that could best be answered by the expert witnesses and did not constitute a request for an opinion on the ultimate

issue. *Crouch v. Most*, 78 N.M. 406, 432 P.2d 250 (1967).

Opinion evidence is admissible on basis that it will aid the jury to understand the problem and lead them to the truth on the ultimate facts, and opinions may be disregarded by the jury in whole or in part. *Lopez v. Heesen*, 69 N.M. 206, 365 P.2d 448 (1961).

Experts may testify as to facts and opinions respecting facts. - Witnesses possessing requisite training, skill or knowledge, denominated "experts," may testify, not only to the facts, but to their opinions respecting the facts, so far as necessary to enlighten the jury and to enable it to come to a right verdict. *Lopez v. Heesen*, 69 N.M. 206, 365 P.2d 448 (1961).

Court cannot prevent defendant from calling expert because of nonexperts' testimony. - The trial court cannot properly prevent a defendant from calling experts in support of the defense on the basis that nonexperts have testified about the same issue. *State v. Elliott*, 96 N.M. 798, 635 P.2d 1001 (Ct. App. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31A Am. Jur. 2d Expert and Opinion Evidence § 1 et seq.

Admissibility of opinion evidence as to the cause of an accident or occurrence, 38 A.L.R.2d 13.

Safety of condition, place, or appliance as proper subject of expert or opinion evidence in tort actions, 62 A.L.R.2d 1426.

Admissibility of opinion evidence as to cause of death, disease, or injury, 66 A.L.R.2d 1082.

Necessity of expert testimony to show malpractice of architect, 3 A.L.R.4th 1023.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 A.L.R.4th 1203.

Necessity and admissibility, in federal trial, of expert or opinion testimony regarding use or reliability of hypnotically refreshed recollections, 50 A.L.R. Fed. 602.

23 C.J.S. Criminal Law § 1050 et seq.; 32 C.J.S. Evidence §§ 438, 444, 446.

11-705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 705 of the Federal Rules of Evidence.

Outside opinions inadmissible when expert does not rely thereon. - In personal injury case, where plaintiff, in cross-examination of defendant's doctors, got admitted in evidence the medical opinions of two absent doctors, there was no evidence that defendant's doctors had relied on the opinions, and the argument that the opinions were admissible because they could bring out that defendant's doctors had rejected the opinions was without merit and was considered a back door ruse to introduce inadmissible testimony. *Wilson v. Leonard Tire Co.*, 90 N.M. 74, 559 P.2d 1201 (Ct. App. 1976), cert. denied, 90 N.M. 9, 558 P.2d 621 (1977).

Experts must satisfactorily explain steps followed in reaching conclusion; without such an explanation the opinion is not competent evidence. *Four Hills Country Club v. Bernalillo County Property Tax Protest Bd.*, 94 N.M. 709, 616 P.2d 422 (Ct. App. 1979).

An expert is not incompetent and impermissibly speculative as lacking a factual basis where the expert gives a satisfactory explanation as to how he arrived at his opinion. *Harrison v. ICX, Illinois-California Express, Inc.*, 98 N.M. 247, 647 P.2d 880 (Ct. App. 1982).

Testing basis of expert's opinion. - An expert is not to be sheltered from a testing of the basis of his opinion; rather, such a testing is expressly authorized. *Jaramillo v. Fisher Controls Co.*, 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985).

Expert's failures of consideration destroys weight of opinions. - An expert appraiser's blanket acceptance of hearsay information and his failure to consider influencing facts in so-called "comparable sales" all but destroys any weight that might be given to his opinions. *Four Hills Country Club v. Bernalillo County Property Tax Protest Bd.*, 94 N.M. 709, 616 P.2d 422 (Ct. App. 1979).

Could ask experts whether they used collateral offenses in evaluation. - Prior to enactment of rules of evidence, it was not error to allow prosecution to ask experts who administered certain deception tests (polygraph, hypnosis, sodium amytol) whether they had been informed of certain collateral offenses committed by defendant and how they had evaluated such information in reaching their conclusions concerning defendant's guilt or innocence. *State v. Turner*, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

Permitting hypothetical question, and admitting answer, within court's discretion. - Permitting a hypothetical question to an expert witness and admitting the answer, pursuant to this rule, is within the discretion of the trial court. *State v. Johnson*, 99 N.M. 682, 662 P.2d 1349 (1983).

Physician's testimony that future medical treatment "fairly likely" admissible as to damages. - Where physician testified that future medical treatment was "fairly likely," his testimony was properly admitted on damages issue and would support, when taken as a whole, a finding that such treatment was medically probable. *Regenold v. Rutherford*, 101 N.M. 165, 679 P.2d 833 (Ct. App. 1984).

Law reviews. - For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31A Am. Jur. 2d Expert and Opinion Evidence § 1 et seq.

Presumption and burden of proof of accuracy of scientific and mechanical instruments for measuring speed, temperature, time, and the like, 21 A.L.R.2d 1200.

Modern status of rules regarding use of hypothetical questions in eliciting opinion of expert witness, 56 A.L.R.3d 300.

Necessity of expert testimony to show malpractice of architect, 3 A.L.R.4th 1023.

Products liability: admissibility of expert or opinion evidence that product is or is not defective, dangerous, or unreasonably dangerous, 4 A.L.R.4th 651.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 A.L.R.4th 1203.

Right of independent expert to refuse to testify as to expert opinion, 50 A.L.R.4th 680.

Necessity and admissibility, in federal trial, of expert or opinion testimony regarding use or reliability of hypnotically refreshed recollections, 50 A.L.R. Fed. 602.

23 C.J.S. Criminal Law § 1050 et seq.; 32 C.J.S. Evidence §§ 546, 552.

11-706. Court-appointed experts.

A.

Appointment. The judge may on his own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The judge may appoint one or more expert witnesses of his own selection to give evidence in the action except that, if the parties agree as to the experts to be appointed, he shall appoint only those designated in the agreement. An expert witness shall not be appointed by the judge unless he consents to act. A witness so appointed shall be informed of his duties by the judge in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the judge or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

B.

Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the judge may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment to the United States Constitution and Article II, Section 2 of the New Mexico Constitution. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the judge directs, and thereafter charged in like manner as other costs.

C.

Disclosure of appointment. In the exercise of his discretion, the judge may authorize disclosure to the jury of the fact that the court appointed the expert witness.

D.

Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Committee commentary. - The amendment of Paragraph B follows the federal rule in substituting the phrase "civil actions and proceedings" for "civil cases" and also adds a reference to the just compensation provision of the New Mexico Constitution.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 706 of the Federal Rules of Evidence.

Statutory authority. - Section 32-1-32B NMSA 1978 is not the only authority for a mental examination of a child, as the court may also appoint experts under this rule. *State v. Doe*, 97 N.M. 598, 642 P.2d 201 (Ct. App. 1982).

Appointment of independent expert authorized. - This rule authorizes the trial court to appoint an independent expert unaligned with either party to assist the court in determining significant issues in the proceeding. *Sanders v. New Mexico Health & Env't Dep't*, 108 N.M. 434, 773 P.2d 1241 (Ct. App. 1989).

Defendant can subpoena expert although trial court refuses. - Although the trial court refused to subpoena a psychologist as requested by defendant after trial had begun, the defendant himself could have subpoenaed the doctor 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).

Costs of a clinical psychologist appointed to assist a petitioner seeking revocation of his treatment guardianship were payable from the funds of the district court, not the health and environment department, where, although the court did not follow the procedures provided in this rule in making the appointment, the department did not object to the procedure followed. *Sanders v. New Mexico Health & Env't Dep't*, 108 N.M. 434, 773 P.2d 1241 (Ct. App. 1989).

Law reviews. - For article, "The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence," see 6 N.M.L. Rev. 187 (1976).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Right of independent expert to refuse to testify as to expert opinion, 50 A.L.R.4th 680.

Right of indigent defendant in state criminal case to assistance of ballistics experts, 71 A.L.R.4th 638.

Right of indigent defendant in state criminal case to assistance of fingerprint expert, 72 A.L.R.4th 874.

11-707. Polygraph examinations.

A.

Definitions. As used in this rule:

(1) "charts" means the record of bodily reactions by a polygraph instrument that is attached to the human body during a series of questions;

(2) "polygraph examination" means a test using a polygraph instrument which at a minimum simultaneously graphically records on a chart the physiological changes in human respiration, cardiovascular activity, galvanic skin resistance or reflex for the purpose of lie detection;

(3) "polygraph examiner" means any person who is qualified to administer or interpret a polygraph examination; and

(4) "relevant question" means a clear and concise question which refers to specific objective facts directly related to the purpose of the examination and does not allow rationalization in the answer.

B.

Minimum qualifications of polygraph examiner. To be qualified as an expert witness on the truthfulness of a witness, a polygraph examiner must have at least the following minimum qualifications:

(1) at least five (5) years' experience in administration or interpretation of polygraph examinations or equivalent academic training;

(2) conducted or reviewed the examination in accordance with the provisions of this rule; and

(3) successfully completed at least twenty (20) hours of continuing education in the field of polygraph examinations during the twelve (12) month period immediately prior to the date of the examination.

C.

Admissibility of results. Subject to the provisions of this rule, the opinion of a polygraph examiner may in the discretion of the trial judge be admitted as evidence as to the truthfulness of any person called as a witness if the examination was performed by a person who is qualified as an expert polygraph examiner pursuant to the provisions of this rule and if:

- (1) the polygraph examination was conducted in accordance with the provisions of this rule;
- (2) the polygraph examination was quantitatively scored in a manner that is generally accepted as reliable by polygraph experts;
- (3) prior to conducting the polygraph examination the polygraph examiner was informed as to the examinee's background, health, education and other relevant information;
- (4) at least two (2) relevant questions were asked during the examination; and
- (5) at least three (3) charts were taken of the examinee.

D.

Notice of examination. Any party who intends to use polygraph evidence at trial shall, not less than ten (10) days before trial or such other time as the district court may direct, serve upon the opposing party a notice in writing of his intention to use such evidence. The following reports shall be served with the notice:

- (1) a copy of the polygraph examiner's report, if any;
- (2) a copy of each chart;
- (3) a copy of the audio or video recording of the pretest interview, actual testing and posttest interview; and
- (4) a list of any prior polygraph examinations taken by the examinee in the matter under question, including the names of all persons administering such examinations, the dates and the results of the examinations.

E.

Recording of tests. The pretest interview and actual testing shall be recorded in full on an audio or video recording device.

F.

Determination of admissibility. The court shall make any determination as to the admissibility of a polygraph examination outside the presence of the jury.

G.

Compelled polygraph examinations. No witness shall be compelled to take a polygraph examination over objection. However, for good cause shown, the court may compel the taking of a polygraph examination by a witness who has previously voluntarily taken an examination and has been given notice pursuant to Paragraph D that the party intends to use the polygraph examination. If a witness refuses to take a polygraph examination ordered by the court under this paragraph, opinions of other polygraph examiners as to the truthfulness of the witness shall be inadmissible as evidence.

COMPILER'S ANNOTATIONS

Expert opinions must be based on reasonable probability. - In ruling on the admissibility of expert testimony, the court must determine whether the scientific procedure which supports the testimony is based on a well-recognized scientific principle or discovery and whether it is capable of supporting opinions based on a reasonable probability rather than conjecture. *State v. Martin*, 101 N.M. 595, 686 P.2d 937 (1984).

Examiner's testimony allowed on weight of evidence issue. - Trial court did not abuse its discretion in allowing the testimony of a polygraph examiner into evidence notwithstanding an objection that not all of the pretest interview had been recorded, where the reliability of the examiner's testimony related to the weight to be given the evidence, not to the question of its admissibility. *B & W Constr. Co. v. N.C. Ribble Co.*, 105 N.M. 448, 734 P.2d 226 (1987).

Determinations to be made by court. - Contested factual issues on the admissibility of scientific evidence, and of polygraph examinations in particular, are factual determinations to be made by the trial court. *Baum v. Orosco*, 106 N.M. 265, 742 P.2d 1 (Ct. App. 1987).

The argument that since there were conflicting opinions regarding the reliability of polygraph evidence, the trial court abused its discretion in excluding the evidence was clearly specious. It is the role of the trial court to resolve such conflicts, and it is the very essence of discretion to make such a resolution and determination. *Baum v. Orosco*, 106 N.M. 265, 742 P.2d 1 (Ct. App. 1987).

Discoverability dependent on intent to use at trial. - Polygraph test results are not discoverable by the state absent notice by defendant of an intent to use such evidence at trial. Tafoya v. Baca, 103 N.M. 56, 702 P.2d 1001 (1985).

Polygraph examiner's opinion held inadmissible. - Where defendant suffered from painful eye irritation during polygraph examination and examiner lacked qualifications to properly evaluate the effect of such condition, examiner's opinion was inadmissible. State v. Anthony, 100 N.M. 735, 676 P.2d 262 (Ct. App. 1983).

Law reviews. - For article, "Survey of New Mexico Law, 1982-83: Evidence," see 14 N.M.L. Rev. 161 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence § 831; 31A Am. Jur. 2d Expert and Opinion Evidence §§ 13 to 18.

Power of court which appoints or employs expert witnesses to tax their fees as costs, 39 A.L.R.2d 1376.

Trial court's appointment, in civil case, of expert witness, 95 A.L.R.2d 390.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

Necessity of expert testimony to show malpractice of architect, 3 A.L.R.4th 1023.

97 C.J.S. Witnesses §§ 3, 14.

Article 8

Hearsay

11-801. Definitions.

The following definitions apply under this article:

A.

Statement. A "statement" is

(1) an oral or written assertion or

(2) nonverbal conduct of a person, if it is intended by him as an assertion.

B.

Declarant. A "declarant" is a person who makes a statement.

C.

Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

D.

Statements which are not hearsay. A statement is not hearsay if:

(1)

Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(a) inconsistent with his testimony, or

(b) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

(c) one of identification of a person made after perceiving him; or

(2)

Admission by party-opponent. The statement is offered against a party and is

(a) his own statement, in either his individual or a representative capacity or

(b) a statement of which he has manifested his adoption or belief in its truth, or

(c) a statement by a person authorized by him to make a statement concerning the subject, or

(d) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or

(e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Hearsay.
- III. Prior Statement By Witness.
- IV. Admission by Party-Opponent.

I. General Consideration.

Compiler's notes. - This rule is similar to Rule 801 of the Federal Rules of Evidence.

Hearsay evidence may be used to establish probable cause. *Zamora v. Creamland Dairies, Inc.*, 106 N.M. 628, 747 P.2d 923 (Ct. App. 1987).

Hearsay statements in document admitted by stipulation are competent. - Where documentary evidence is admitted by stipulation, hearsay statements contained therein become competent evidence. *Caranta v. Pioneer Home Imps., Inc.*, 81 N.M. 393, 467 P.2d 719 (1970) (decided prior to the adoption of this rule).

Objection to hearsay must direct court's attention to defect. - Even if the question is objectionable as calling for hearsay evidence, a ruling by the court in allowing the testimony will be sustained where the objection is not properly stated and the court's attention not directed to the defect relied upon. *Sturgeon v. Clark*, 69 N.M. 132, 364 P.2d 757 (1961).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For annual survey of New Mexico law relating to Evidence, see 12 N.M.L. Rev. 379 (1982).

For annual survey of New Mexico law relating to evidence, see 13 N.M.L. Rev. 407 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 493, 496, 497, 500, 597 to 707, 738.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence, 4 A.L.R.3d 671.

Admissibility as evidence in civil cases of admissions by infants, 12 A.L.R.3d 1051.

Party's right to use, as evidence in civil trial, its own testimony given upon interrogatories or depositions taken by opponent, 13 A.L.R.3d 1312.

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.

Witness' refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions, 43 A.L.R.3d 1413.

Comment note: necessity and sufficiency of independent evidence of conspiracy to allow admission of extrajudicial statements of coconspirators, 46 A.L.R.3d 1148.

Admissibility of defense communications made in connection with plea bargaining, 59 A.L.R.3d 441.

Nonverbal reaction to accusation, other than silence alone, as constituting adoptive admission under hearsay rule, 87 A.L.R.3d 706.

Denial of recollection as inconsistent with prior statement so as to render statement admissible, 99 A.L.R.3d 934.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter, 12 A.L.R.4th 1016.

Admissibility of hearsay evidence in student disciplinary proceedings, 30 A.L.R.4th 935.

Admissibility of impeached witness' prior consistent statement - modern state criminal cases, 58 A.L.R.4th 1014.

What is "other proceeding" under Rule 801(d)(1)(A) of Federal Rules of Evidence, excepting from hearsay rule prior inconsistent statement given "at a trial, hearing, or other proceeding," 37 A.L.R. Fed. 855.

Admissibility of statement by coconspirator under Rule 801(d)(2)(E) of Federal Rules of Evidence, 44 A.L.R. Fed. 627.

Effect of Rule 801(d)(1)(B) of the Federal Rules of Evidence upon the admissibility of a witness' prior consistent statement, 47 A.L.R. Fed. 639.

Admissibility of statement under Rule 801(d)(2)(B) of Federal Rules of Evidence,

providing that statement is not hearsay if party-opponent has manifested his adoption or belief in its truth, 48 A.L.R. Fed. 721.

Admissibility of party's own statement under Rule 801(d)(2)(A) of the Federal Rules of Evidence, 48 A.L.R. Fed. 922.

23 C.J.S. Criminal Law § 856 et seq.; 31A C.J.S. Evidence § 192.

II. Hearsay.

Out-of-court statement offered in evidence only to prove the truth of the matter asserted was hearsay. *State v. Self*, 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975).

Rule operates when extrajudicial statements offered to prove matter's truth. - The exclusionary effect of the hearsay rule is applicable only when the extrajudicial statements or writings are offered to prove the truth of the matter therein stated. *State v. Alberts*, 80 N.M. 472, 457 P.2d 991 (Ct. App. 1969).

Extrajudicial statements excluded when offered to prove asserted matter's truth. - The prohibition of the hearsay rule does not apply to all out-of-court utterances or writings as such. Such extrajudicial statements or writings are subject to the exclusionary impact of the hearsay rule only when they are offered to prove the truth of the matter asserted therein. *McCord v. Ashbaugh*, 67 N.M. 61, 352 P.2d 641 (1960).

Rule inapplicable to probation revocation proceedings. - The Rules of Evidence do not apply to proceedings to revoke probation and, for the proper usage of hearsay in such proceedings, a court looks to the law not involving these rules. *State v. Vigil*, 97 N.M. 749, 643 P.2d 618 (Ct. App. 1982).

Facts possibly constituting basis for expert's opinions not hearsay. - Where information sought by the prosecutor's questions was the facts before polygraph examiner which the examiner could have considered in arriving at his opinion, such information was not elicited for its truth, and was not hearsay. *State v. Hogervorst*, 90 N.M. 580, 566 P.2d 828 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Statement not hearsay where not dependent on credibility of another. - Testimony of defendant-doctor in a malpractice suit as to the number of patients treated at two area hospitals for a certain complaint during the five years, as gleaned from his perusal of the hospital records was not hearsay because the doctor's statements were not dependent,

in whole or in part, on the competency and credibility of some person other than himself. *Sundberg v. Hurley*, 89 N.M. 511, 554 P.2d 673 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

Not hearsay when witness recognized defendant's voice on telephone. - Defendant's objection at trial that the testimony was hearsay because of witness' lack of positive identification of the defendant was without merit, as witness testified unequivocally that he recognized the defendant's voice over the telephone. *State v. Wesson*, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972).

Verbal conduct to which law attaches duties and liabilities. - Oral utterances by parties in a contract suit constituting offer and acceptance are not evidence of assertions offered testimonially, but rather of verbal conduct to which the law attaches duties and liabilities. Such utterances are not "hearsay" and are admissible to prove an oral contract. *Catanach v. Gunn*, 107 N.M. 574, 761 P.2d 452 (Ct. App. 1988).

Statements which are mere directions. - Words which are meant to be directions as to how to do something, and which are not assertions that would either be true or false, are not hearsay. *Jim v. Budd*, 107 N.M. 489, 760 P.2d 782 (Ct. App. 1987).

Unvouched for third party written appraisals inadmissible as hearsay. - Written appraisals prepared for use in condemnation proceedings by third parties whom the city's urban renewal agency did not supervise, the accuracy of which the agency would not vouch for, and one of which was based on an erroneous assumption about the age of the building, presented none of the circumstantial guarantees of trustworthiness which are normally required to justify an exception to the hearsay rule and were inadmissible as hearsay. *Owen v. Burn Constr. Co.*, 90 N.M. 297, 563 P.2d 91 (1977).

Recitals in deed not competent evidence. - Recitals that the parties to a deed are heirs of a record owner are, in the absence of statute, not competent evidence either of his death, or of their heirship. *Caranta v. Pioneer Home Imps., Inc.*, 81 N.M. 393, 467 P.2d 719 (1970).

Heirship recitals in deed are mere hearsay. - Although there is no New Mexico authority pertaining to the evidentiary value of heirship recitals in a deed, the general rule is that such recitals are mere hearsay and are not competent evidence of the truth of the recitations against anyone other than the parties to the deed and persons in privity with them. *Caranta v. Pioneer Home Imps., Inc.*, 81 N.M. 393, 467 P.2d 719 (1970). See also Rule 11-803.

Except admissible when deed ancient and accompanied by possession. - Although the general rule is that recitals in a deed are mere hearsay and are inadmissible in evidence as against a third person who claims by a paramount title, there is an exception to this rule in the case of an ancient deed accompanied by possession and such a deed is admissible, even as against third persons, as prima facie evidence of the facts recited in it. *Caranta v. Pioneer Home Imps., Inc.*, 81 N.M. 393, 467 P.2d 719 (1970). See also Rule 11-803.

And become competent evidence when admitted by stipulation. - Recitals of heirship in a deed, although hearsay and incompetent evidence, can become competent evidence to prove the truth of the facts recited when admitted in evidence by stipulation or without objection. *Caranta v. Pioneer Home Imps., Inc.*, 81 N.M. 393, 467 P.2d 719 (1970).

Public record is admissible after authentication and proof of admissibility under hearsay exceptions. *State v. Ellis*, 95 N.M. 427, 622 P.2d 1047 (Ct. App. 1980).

Wife's statement not spontaneous exclamation. - In a proceeding in which the defendant was accused of possession of marijuana, a statement by the defendant's wife to a police officer that she had been very concerned about the defendant's growing marijuana could best be described as a narrative of a past occurrence rather than a spontaneous exclamation produced by the stress of the moment; therefore, the trial court erred in allowing the officer to testify about this statement, which was inadmissible as hearsay. *State v. Cozzens*, 93 N.M. 559, 603 P.2d 298 (Ct. App. 1979).

Testimony not hearsay notwithstanding witness' testimony before officer. - Where at hearing on a motion to quash the indictment, witness (a friend of defendant) testified that a police officer told her at the scene of the accident that "(t)hey (the victims) came over in her (defendant's) lane and hit her," witness stated that she attempted to testify to this before the grand jury but that the assistant district attorney would not let her testify to this statement because it was hearsay, the statement was not hearsay notwithstanding the fact that the witness testified before the officer. *State v. Lampman*, 95 N.M. 279, 620 P.2d 1304 (Ct. App. 1980).

III. Prior Statement By Witness.

Evidence amounting to hearsay available to rebut. - If the mere fact that statements were made on a particular date is relevant, then they are not hearsay, and, where testimony was relevant to show that defendant's blackmail defense was not of recent fabrication, and that true or not, it was asserted prior to any knowledge of charges being brought, the fact that it may have been inadmissible to establish the truth thereof did not

render it inadmissible to rebut the implied charge of recent fabrication. *State v. Foster*, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

Only portion of statement used to impeach admissible. - Where a statement is made available to the defendant for impeachment, the state, generally, may then introduce into evidence only that portion of the statement used to impeach the witness or which explains and clarifies the same subject. *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979).

There are two basic reasons for giving substantive effect to prior inconsistent statements: (1) since juries may consider these statements for purposes of impeachment it is realistic to assume that, despite limiting instructions, the jury will decide which statement is true instead of concluding solely that the witness' credibility is impaired, and (2) statements made closer in time to the event in question and before the exertion of external pressures may be more trustworthy than testimony at trial and should not be excluded. *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

For purpose of impeachment, evidence is not barred because it is hearsay. A prior statement by a witness is not hearsay when the statement is inconsistent with his testimony. *Weiland v. Vigil*, 90 N.M. 148, 560 P.2d 939 (Ct. App.), cert. denied, 90 N.M. 255, 561 P.2d 1348 (1977).

Impeachment testimony must be relevant to an issue in case. *Weiland v. Vigil*, 90 N.M. 148, 560 P.2d 939 (Ct. App.), cert. denied, 90 N.M. 255, 561 P.2d 1348 (1977).

When prior inconsistent statement not hearsay. - Where the victim was the declarant, and her testimony at trial was inconsistent with prior statements made to her sister-in-law and mother, testimony of her sister-in-law and mother at the trial as to those statements was not hearsay under Subparagraph (1)(a) of Paragraph D. *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

Where a substantial portion of defendant's cross-examination of a witness implied that the witness' trial testimony was a recent fabrication, the admission of the witness' prior written statement, consistent with her trial testimony, was proper under Subparagraph (1)(b) of Paragraph D. *State v. Lovato*, 91 N.M. 712, 580 P.2d 138 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Pretrial statements admissible to show consistency. - Admission of the complete pretrial statements of two witnesses to show the high degree of consistency those statements

had with the witness' trial testimony was not an abuse of discretion where there was an express or implied charge of recent fabrication or improper influence. *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979).

Prior consistent statements admissible where victim's credibility to be attacked. - In a prosecution for criminal sexual contact with a minor, the court may allow the victim's prior consistent statements to be presented prior to the defendant's testimony, but after the trial court has been alerted, by way of opening statements, that the victim's credibility will be attacked. *State v. Vigil*, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985).

Out-of-court identifications. - The proviso that a declarant be subject to cross-examination is the fundamental safeguard in admitting evidence of out-of-court identifications under Subparagraph (1)(c) of Paragraph D. *State v. Barela*, 97 N.M. 723, 643 P.2d 287 (Ct. App. 1982).

Prior consistent statement admissible to rebut improper influence charge. - Where defendant on cross-examination declared that the victim had been "coached" in her oral testimony and implied that she was testifying from memory of the written statement, a prior consistent statement was properly admitted to rebut this implicit charge of improper influence. *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977).

IV. Admission by Party-Opponent.

Trial court did not err in admitting into evidence written confession of the defendant. Defendant, before giving the confession, was twice advised of his right to make no statement and his right to consult with counsel, by two different officers, and at the suppression hearing the trial court made full inquiry into the voluntariness of the confession and determined that the defendant had knowingly and intelligently waived his right to remain silent. *State v. Baros*, 87 N.M. 49, 529 P.2d 275 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

Transcript admissible as admission against interest. - Where the transcript of a prior trial was admittedly correct and complete, it was fully proper, and, if admissible for no other reason, it was certainly admissible as an admission by a party against his interest and therefore competent evidence. *In re Nelson*, 79 N.M. 779, 450 P.2d 188 (1969).

Admissions in docketing statement are not hearsay. *State v. Lynn C.*, 106 N.M. 681, 748 P.2d 978 (Ct. App. 1987).

Proof of loss claim from later accident admission against interest. - Evidence that plaintiffs in a personal injury case had filed a proof of loss with an insurer resulting from a later accident was admissible as an admission against interest, since the proof of loss, if inconsistent with the plaintiffs' claims at trial, might cast doubts upon plaintiffs' claims of damages. *Selgado v. Commercial Whse. Co.*, 86 N.M. 633, 526 P.2d 430 (Ct. App. 1974).

Testimony by witness mentioning defendant's references to prior armed robbery, made in conversations shortly after the shooting, was admissible as an admission by the defendant that he had just participated in an armed robbery, an offense relevant to the murder and aggravated battery charges or as a statement of the defendant's then existing mental condition which was relevant to the defendant's state of mind at the time of the shooting a short time before the conversations; however, it would have been improper for the state to have introduced separately evidence of this prior armed robbery. *State v. Ortiz*, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Single sentence properly excluded when entire writing not offered. - The trial court properly excluded admission of one sentence out of one paragraph of a two-page written statement dictated by defendant-doctor in a malpractice suit since plaintiff did not offer into evidence all relevant parts of the written statement, nor did she offer the written statement in evidence. *Sundberg v. Hurley*, 89 N.M. 511, 554 P.2d 673 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

Because sum total of writing required to present whole effect. - When part of a statement in any written form is offered against a party, it must be accompanied by all other relevant parts, and all parts possibly tending to qualify the admissions or to present the whole effect of what was said or written on that point must be given to the jury for it is to the sum total that the speaker has committed himself. *Sundberg v. Hurley*, 89 N.M. 511, 554 P.2d 673 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

Mere failure to contest assertion not enough. - The requirements of this rule have not been met if the party does no more than fail to contest an assertion. The evidence rule requires more; something not obscure, but obvious. *State v. Doe*, 91 N.M. 92, 570 P.2d 923 (Ct. App. 1977).

Failure to contest is acquiescence only if objection natural. - An accused would be more likely than not to dispute an untrue accusation. Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question. *State v. Doe*, 91 N.M. 92, 570 P.2d

923 (Ct. App. 1977).

Improperly obtained statements ineffective in satisfying manifestation requirement. - Where the statements of the defendant, a child, were inadmissible under 32-1-5 NMSA 1978, because made after being taken into custody and without the advice of an attorney, any testimony under Subparagraph (2)(b) of Paragraph D of this rule which relies on it as the manifestation requirement was inadmissible. State v. Doe, 91 N.M. 92, 570 P.2d 923 (Ct. App. 1977).

Silence combined with admitting large part of statement manifests adoption thereof. - Father's statement that his sons, at the time of apprehending the defendant, said that "they caught him trying to rip off the CB in the truck" was not hearsay and was admitted where the defendant at the same time admitted that they had caught him and that he had been in the truck. This was not an admission by silence, but was a manifestation of defendant's adoption of the statement or his belief in the statement of the sons. State v. Doe, 91 N.M. 92, 570 P.2d 923 (Ct. App. 1977).

Admission of party-opponent's deceased agent not hearsay. - An oral statement of a declarant, now deceased, concerning disability payments was not hearsay where it was an admission of the agent of a party-opponent under Subparagraph (2)(d) of Paragraph D. Segura v. Molycorp, Inc., 97 N.M. 13, 636 P.2d 284 (1981).

Declarations of coconspirators admissible once sufficient foundation laid. - When a sufficient foundation is laid by the evidence to establish the existence of a conspiracy, the acts and declarations of coconspirators in pursuance of the common purpose are admissible, whether conspiracy is directly charged or not. State v. Farris, 81 N.M. 589, 470 P.2d 561 (Ct. App. 1970).

Prima facie case must be shown. - Out-of-court statements made by a coconspirator about matters relating to the conspiracy are not admissible unless and until a prima facie case of conspiracy is shown by other independent evidence. State v. Harge, 94 N.M. 11, 606 P.2d 1105 (Ct. App. 1979); State v. Sheets, 96 N.M. 75, 628 P.2d 320 (Ct. App. 1981).

In a prosecution for conspiracy and attempt to commit murder, items which are statements are not admissible unless there is prima facie proof of the conspiracy independent of the items. State v. Sheets, 96 N.M. 75, 628 P.2d 320 (Ct. App. 1981).

Coconspirator's statement allowable before prima facie case shown. - Under New Mexico law there must be prima facie proof of the conspiracy independent of testimony before out-of-court statements made by a coconspirator about matters relating to the conspiracy are admissible under the coconspirator rule, but the trial court has wide discretion regarding the order of proof, and the coconspirator statement may be admitted prior to the submission of prima facie proof of conspiracy. *Trujillo v. Sullivan*, 815 F.2d 597 (10th Cir.), cert. denied, 484 U.S. 929, 108 S. Ct. 296, 98 L. Ed. 2d 256 (1987).

Coconspiracy statements must occur during conspiracy's existence. - The acts and declarations of a conspirator to be admissible against his coconspirator must occur during the existence of the conspiracy. The problem arising from this rule is one involving the duration of the conspiracy, and the determination of its beginning and end. As for the inception of a conspiracy, the question arises as to when the persons as a matter of fact began to act in pursuance of the common design. This is ordinarily not the subject of direct proof, and circumstances must be relied on to establish the fact. *State v. Farris*, 81 N.M. 589, 470 P.2d 561 (Ct. App. 1970).

Otherwise not binding or given in evidence. - While the acts and declarations of one conspirator during the existence of a conspiracy are competent evidence against his coconspirators, no act or declaration made before the inception of the conspiracy may be binding, or given in evidence against the coconspirator on trial. *State v. Farris*, 81 N.M. 589, 470 P.2d 561 (Ct. App. 1970).

Unavailability of nontestifying co-conspirator need not be shown. - There is no requirement under the confrontation clause for the prosecution to show that a nontestifying co-conspirator is unavailable to testify when his out-of-court statement is offered into evidence against the defendant - co-conspirator. *State v. Zinn*, 106 N.M. 544, 746 P.2d 650 (1987).

Nonverbal conduct intended as assertion within definition of "statement" by coconspirator. - Where the acts of furnishing photographs and a payroll stub were nonverbal conduct, intended to show the identity of the defendant's wife and the existence of insurance, and, thus, were intended as assertions, these acts came within the definition of "statement" and were subject to Subparagraph (2)(e) of Paragraph D. *State v. Sheets*, 96 N.M. 75, 628 P.2d 320 (Ct. App. 1981).

Hearsay evidence of a coconspirator's or codefendant's guilty plea may not be admitted when the witness himself does not testify, nor when that evidence is offered solely to prove the defendant's guilt. *State v. Gilbert*, 98 N.M. 77, 644 P.2d 1066 (Ct. App. 1982).

Evidence sufficient to prove conspiracy so that statements were admissible. - See *State v. Martinez*, 102 N.M. 94, 691 P.2d 887 (Ct. App. 1984); *Trujillo v. Sullivan*, 815 F.2d 597 (10th Cir.); *State v. Zinn*, 106 N.M. 544, 746 P.2d 650 (1987).

Circumstantial evidence must exclude every reasonable hypothesis other than guilt of the defendants. *State v. Malouff*, 81 N.M. 619, 471 P.2d 189 (Ct. App. 1970).

11-802. Hearsay rule.

Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Admissibility.
- III. Objections.

I. General Consideration.

Compiler's notes. - This rule is similar to Rule 802 of the Federal Rules of Evidence.

Rule not applicable to probation revocation proceedings. - The Rules of Evidence do not apply to proceedings to revoke probation and, for the proper usage of hearsay in such proceedings, a court looks to the law not involving these rules. *State v. Vigil*, 97 N.M. 749, 643 P.2d 618 (Ct. App. 1982).

That information was hearsay does not destroy its role in establishing probable cause. *State v. Deltenre*, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Law reviews. - For annual survey of New Mexico law relating to evidence, see 12 N.M.L. Rev. 379 (1982).

For annual survey of New Mexico law relating to evidence, see 13 N.M.L. Rev. 407

(1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 5 Am. Jur. 2d Appeal and Error § 737; 29 Am. Jur. 2d Evidence §§ 493 to 497, 1094.

Written recitals or statements as within rule excluding hearsay, 10 A.L.R.2d 1035.

Consideration, in determining facts, of inadmissible hearsay evidence introduced without objection, 79 A.L.R.2d 890.

Admissibility, as against hearsay objection, of report of tests or experiments carried out by independent third party, 19 A.L.R.3d 1008.

Admissibility in evidence of sound recording as affected by hearsay and best evidence rules, 58 A.L.R.3d 598.

Admissibility of former testimony of nonparty witness, present in jurisdiction, who refuses to testify at subsequent trial without making claim of privilege, 92 A.L.R.3d 1138.

Admissibility, as against interest, in criminal case of declaration of commission of criminal act, 92 A.L.R.3d 1164.

Admissibility of memorandum of telephone conversation, 94 A.L.R.3d 975.

Admissibility of hearsay evidence in probation revocation hearings, 11 A.L.R.4th 999.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter, 12 A.L.R.4th 1016.

Construction and application of provision of Rule 803(8)(B), Federal Rules of Evidence, excluding from exception to hearsay rule in criminal cases matters observed by law enforcement officers, 37 A.L.R. Fed. 831.

Admissibility of hearsay evidence for court's determination, under Rule 104(a) of the Federal Rules of Evidence, of preliminary questions of fact, 39 A.L.R. Fed. 720.

23 C.J.S. Criminal Law § 856 et seq.; 31A C.J.S. Evidence § 192.

II. Admissibility.

Extrajudicial statements properly received when establishing knowledge of hearer. - Extrajudicial statements or writings may properly be received into evidence, not for the

truth of the assertions therein contained, or the veracity of the out-of-court declarant, but for such legitimate purposes as that of establishing knowledge, belief, good faith, reasonableness, motive, effect on the hearer or reader and many others. *State v. Alberts*, 80 N.M. 472, 457 P.2d 991 (Ct. App. 1969).

Evidence was clearly hearsay and clearly prejudicial where its sole effect, insofar as defendant was concerned, was to have her branded as a known, or at least as a suspected, violator of the laws relating to marijuana. *State v. Alberts*, 80 N.M. 472, 457 P.2d 991 (Ct. App. 1969).

It was reversible error to admit hearsay testimony that narcotics agent had been told by local police more than a month prior to defendant's arrest that defendant was involved in the illegal traffic of marijuana. *State v. Alberts*, 80 N.M. 472, 457 P.2d 991 (Ct. App. 1969).

But admission of hearsay harmless when issue immaterial. - Admission of hearsay testimony concerning patient's failure to follow doctor's instructions was harmless error since the issue was immaterial. *Crouch v. Most*, 78 N.M. 406, 432 P.2d 250 (1967).

Testimony labeling defendants "trafficking" to show investigation's purpose inadmissible. - The naming of defendants as persons engaged in "illegal marijuana traffic," for the purpose of showing why policeman conducted an investigation, was not a legitimate reason for admitting this extremely prejudicial testimony. *State v. Alberts*, 80 N.M. 472, 457 P.2d 991 (Ct. App. 1969).

Statements of unidentified witness after accident are hearsay. - Where police officer testified that an unidentified witness at the scene of automobile collision told him that the car in which plaintiff was riding had passed him at an excessive rate of speed and just prior to the accident, this testimony was hearsay and did not fall within the exceptions to the hearsay rule. *Torres v. Sierra*, 89 N.M. 441, 553 P.2d 721 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

Deposition containing largely hearsay and irrelevant matter properly refused. - Where a deposition, and the portions thereof which were offered on rebuttal, included matters which were largely hearsay and matters which could not possibly relate to the question at issue, it was properly refused. *Glass v. Stratoflex, Inc.*, 76 N.M. 595, 417 P.2d 201 (1966).

Tendered deposition refused if includes inadmissible matters. - Assuming only for the sake of argument that there were some portions of the deposition which might have been properly admitted for the purpose of establishing either notice or knowledge on the part of the defendant, either as a part of plaintiffs' case in chief, or by way of rebuttal, the plaintiffs could be heard to complain of the court's refusal of their tenders, when the tenders included inadmissible matters. *Glass v. Stratoflex, Inc.*, 76 N.M. 595, 417 P.2d 201 (1966).

Testimony concerning declarant's out-of-court statements inadmissible when declarant did not testify. - Prior to enactment of rules of evidence, where spouse did not testify as to value of certain community property in divorce action, an accountant's deposition statements as to what were claimed to be the spouse's personal opinion as that value were improperly admitted, because even if those values were those of the defendant, the accountant's deposition testimony was hearsay, being the testimony of a witness as to out-of-court statements of a declarant who was not a witness as to that specific subject matter. *Lahr v. Lahr*, 82 N.M. 223, 478 P.2d 551 (1970).

Evidence of out-of-court utterance admissible to prove utterance made. - If the fact that a statement was made becomes relevant to an issue in the case, evidence of an out-of-court utterance of the statement is admissible, not for the purpose of proving the truth of the matter stated, but merely for the purpose of establishing the fact that the statement was made. *Glass v. Stratoflex, Inc.*, 76 N.M. 595, 417 P.2d 201 (1966).

However, this rule of evidence does not embrace telephone calls and other communications from unknown and unnamed persons concerning reputed ruptures in wire braid hoses which were not relevant to the issue of notice or knowledge by the defendant of inherent danger in its product. *Glass v. Stratoflex, Inc.*, 76 N.M. 595, 417 P.2d 201 (1966).

Another's utterance offered to show ensuing state of mind admissible. - An utterance by one person, which is offered only to evidence the state of mind which ensued in another person in consequence of the utterance, is admissible insofar as the hearsay rule is concerned. *Glass v. Stratoflex, Inc.*, 76 N.M. 595, 417 P.2d 201 (1966).

However, state of mind which ensued as a result of utterance must be relevant to an issue in the case. *Glass v. Stratoflex, Inc.*, 76 N.M. 595, 417 P.2d 201 (1966).

Public record is admissible after authentication and proof of admissibility under hearsay exceptions. *State v. Ellis*, 95 N.M. 427, 622 P.2d 1047 (Ct. App. 1980).

Public records to be authenticated before admitted. - Unless they fall within the narrow exception for self-authenticating documents, public records must be authenticated prior to admission into evidence. *State v. Ellis*, 95 N.M. 427, 622 P.2d 1047 (Ct. App. 1980).

III. Objections.

Hearsay admissible if no objection. - Testimony that defendant said, "I was going to do something but I was too scared," while hearsay, was admitted without objection and, therefore, was competent in robbery prosecution. *State v. Baca*, 83 N.M. 184, 489 P.2d 1182 (Ct. App. 1971).

Highly prejudicial hearsay admissible if no objection. - Although testimony was not only hearsay, but made at a time when defendant was not present and was highly prejudicial, this did not deny it admissibility, nor the jury a right to consider it, where there was no objection to its admissibility by defendant. *State v. Trujillo*, 60 N.M. 277, 291 P.2d 315 (1955).

Hearsay, admitted without objection, is to be considered along with other evidence in determining whether there is substantial evidence to sustain a verdict on appeal, and hearsay evidence may have sufficient probative worth to support a verdict, but this rule does not operate to make objectionable testimony conclusive proof of the matter asserted therein. The fact that it was hearsay does not prevent its use as proof so far as it has probative value, but this is limited to the extent of whatever rational persuasive power it may have. Mere rumor does not constitute substantial evidence. *State v. Romero*, 67 N.M. 82, 352 P.2d 781 (1960).

Objection must direct court's attention to defect relied upon. - Even if the question is objectionable as calling for hearsay evidence, a ruling by the court will be sustained where the objection is not properly stated and the court's attention not directed to the defect relied upon. *Sturgeon v. Clark*, 69 N.M. 132, 364 P.2d 757 (1961).

Not objecting to testimony at first trial precludes later attempts. - A failure to object to testimony given at one trial precludes the opponent at any subsequent trial from any further objection, for the reason and to the extent that a failure to object to the testimony before or at the first trial would have precluded him. *State v. White*, 61 N.M. 109, 295 P.2d 1019 (1956).

Objection not waived where cross-examination elicits same evidence. - Prior to enactment of Rules of Evidence, objection by plaintiff on hearsay grounds to the

admission of evidence was not waived where plaintiff, upon cross-examination, elicited the same evidence from the witness. Otherwise, the right of cross-examination would be infringed. *Sayner v. Sholer*, 77 N.M. 579, 425 P.2d 743 (1967).

Nor where plaintiff tries to rebut hearsay with prior inconsistency. - Prior to enactment of Rules of Evidence, where plaintiff properly objected on hearsay grounds to admission in evidence of a statement made by defendant's decedent to police officer some 24 hours after the accident, but where objection was overruled, plaintiff did not waive this objection when he later requested that statement made by defendant's decedent to the officer at the scene of the accident be admitted to show inconsistency. *Sayner v. Sholer*, 77 N.M. 579, 425 P.2d 743 (1967).

Mere fact hearsay corroborated does not render admission harmless. - If proper objection was made, the admission of hearsay testimony was prejudicial, was reasonably calculated to cause and may have caused the rendition of an improper verdict, and required reversal. The mere fact that other testimony corroborated, or was corroborated by, the hearsay testimony did not render the error harmless. *Sayner v. Sholer*, 77 N.M. 579, 425 P.2d 743 (1967).

11-803. Hearsay evidence; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

A.

Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

B.

Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

C.

Then existing mental, emotional or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will.

D.

Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

E.

Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

F.

Records of regularly conducted activity. A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit.

G.

Absence of entry in records kept in accordance with the provisions of Paragraph F. Evidence that a matter is not included in the memoranda, reports, records or data compilations, in any form, kept in accordance with the provisions of Paragraph F, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

H.

Public records and reports. Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth

(1) the activities of the office or agency,

(2) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or

(3) in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

I.

Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office pursuant to requirements of law.

J.

Absence of public record or entry. To prove the absence of a record, report, statement or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 11-902, or testimony, that diligent search failed to disclose the record, report, statement or data compilation, or entry.

K.

Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

L.

Marriage, baptismal and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

M.

Family records. Statements of fact concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts or tombstones, or the like.

N.

Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

O.

Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

P.

Statements in ancient documents. Statements in a document in existence twenty (20) years or more the authenticity of which is established.

Q.

Market reports, commercial publications. Market quotations, tabulations, lists, directories or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

R.

Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

S.

Reputation concerning personal or family history. Reputation among members of his family by blood, adoption or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of his personal or family history.

T.

Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

U.

Reputation as to character. Reputation of a person's character among his associates or in the community.

V.

Judgment of previous conviction. Evidence of a final judgment, entered upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one (1) year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused.

W.

Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

X.

Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that:

(1) the statement is offered as evidence of a material fact;

(2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Committee commentary. - Paragraph E was changed to conform to federal rule. The amendment makes the rule applicable to a memorandum adopted by the witness as well as one made by him.

Paragraph F was changed to conform to federal rule. The amendment identifies the regularly conducted activity as a "business" activity and also adds a very broad definition of "business".

Paragraph G was changed to conform to federal rule. The amendment makes it clear that Paragraph G dovetails with Paragraph F.

Paragraph H was changed to conform to federal rule. The rule as amended now excludes the use of police reports, etc., in criminal cases.

Paragraph P was changed to conform to federal rule. The change is grammatical, rather than substantive.

Unlike the federal rule, Paragraph V now provides that only evidence of a conviction based on a guilty plea is not excluded by the hearsay rule. The rule also now conforms to the federal rule, and to Rule 11-410, by excluding a plea of nolo contendere. The rule deviates from the federal rule by eliminating the reference to the pendency of an appeal.

Paragraph X was changed to conform to the federal rule. For a statement not specifically covered by the 23 specific exceptions of this rule but for which admission is sought as not excluded by the hearsay rule even though the declarant is available, the court must find that: (1) the statement has circumstantial guarantees of trustworthiness equivalent to statements admitted under 11-803A to W; (2) the statement is offered as evidence of a material fact (see Rules 11-401 and 11-402); (3) the statement must be more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; (4) admissibility accords with the general purposes of these rules and the interest of justice (see Rule 11-102); and (5) the proponent made known his intention to offer the statement sufficiently in advance of trial or hearing, including giving the particulars of the statement with the name and address of the declarant, thereby providing the opponent with a fair opportunity to challenge the proposed statement.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Present Sense Impression or Excited Utterance.
- III. Existing Emotional Or Physical Condition.
- IV. Recorded Recollection.
- V. Public and Regularly Conducted Activity Records.
 - A. In General.
 - B. Course of Business.
 - C. Public.

- VI. Interests In Land.
- VII. Market Reports, Commercial Publications.
- VIII. Judgment Of Previous Conviction.
- IX. Other Exceptions.

I. General Consideration.

Cross-references. - As to authentication and identification of documents, see Rules 11-901 to 11-903.

As to admissibility, explanation and contradiction of abstracts of title, see 38-7-3 NMSA 1978.

Compiler's notes. - This rule is similar to Rule 803 of the Federal Rules of Evidence.

Admissibility subject to trial court's discretion. - The determination of the admissibility of statements under the exceptions to the hearsay rule rest within the discretion of the trial court. *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978); *State v. Johnson*, 99 N.M. 682, 662 P.2d 1349 (1983).

Court's decision admitting evidence upheld where admissible under any theory. - Where evidence is admissible under any theory, the trial court's decision to admit it will be upheld. The same ruling will apply even more forcefully to evidence presented to the grand jury. *State v. Ballinger*, 99 N.M. 707, 663 P.2d 366 (Ct. App. 1983).

Defendant's right of confrontation may be violated by admissible evidence. - The fact that evidence may have qualified for admission under an exception to the hearsay rule does not necessarily mean that a defendant's constitutional right of confrontation was not violated. Whether there has been a sixth amendment violation depends upon the facts of each case. *State v. Martinez*, 99 N.M. 48, 653 P.2d 879 (Ct. App. 1982).

And burden is on state to establish unavailability of prosecution witness whose hearsay statements are sought to be admitted into evidence. Mere absence of a witness from the jurisdiction is not sufficient grounds for dispensing with the defendant's right of confrontation. *State v. Martinez*, 99 N.M. 48, 653 P.2d 879 (Ct. App. 1982).

But finding of violation of right does not automatically require reversal of the defendant's conviction and where other properly admitted evidence independently establishes guilt, the admission of the challenged hearsay evidence is harmless error. *State v. Martinez*,

99 N.M. 48, 653 P.2d 879 (Ct. App. 1982).

The Rules of Evidence do not apply to proceedings to revoke probation and, for the proper usage of hearsay in such proceedings, a court looks to the law not involving these rules. *State v. Vigil*, 97 N.M. 749, 643 P.2d 618 (Ct. App. 1982).

Parol evidence rule is fully applicable to written listing agreements, together with all the exceptions recognized in connection with any other writing. Parol evidence may not be received when its purpose and effect is to contradict, vary, modify or add to a written agreement, but is generally admissible to supply terms not in the written contract, to explain ambiguities in the written agreement, or to show fraud, misrepresentations or mistake. *Maine v. Garvin*, 76 N.M. 546, 417 P.2d 40 (1966).

Highly prejudicial hearsay admitted when no objection thereto. - Although testimony was not only hearsay, but made at a time when defendant was not present and was highly prejudicial, this did not deny it admissibility, nor the jury a right to consider it, if there was no objection to its admissibility by defendant and there was none. *State v. Trujillo*, 60 N.M. 277, 291 P.2d 315 (1955).

Or when objection fails to call court's attention to defect. - Even if the question is objectionable as calling for hearsay evidence, a ruling by the court will be sustained where the objection is not properly stated and the court's attention not directed to the defect relied upon. *Sturgeon v. Clark*, 69 N.M. 132, 364 P.2d 757 (1961).

Expert's opinion still valid even though partially based upon hearsay. - In forming an expert opinion it may be necessary to rely upon information-hearsay though it be - which in part is derived from persons charged with the supervision of the one whose conduct is involved. The information is winnowed through the mental processes of the expert, and is by him either accepted or rejected. If such information is accepted as useable by the doctor it is not so liable to be untrustworthy as to require the court to rule that his opinion is unworthy of consideration by the jury. *State v. Chambers*, 84 N.M. 309, 502 P.2d 999 (1972).

Records of vital statistics. - The statement of the cause of death is a factual finding, similar in nature to the factual findings of the identity of the deceased, the time and the date of death, and thus it is admissible under the vital statistics exception to the hearsay rule. *Corlett v. Smith*, 107 N.M. 707, 763 P.2d 1172 (Ct. App. 1988).

Law reviews. - For survey, "Evidence: Prior Crimes and Prior Bad Acts Evidence," see 6 N.M.L. Rev. 405 (1976).

For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For annual survey of New Mexico law relating to evidence, see 12 N.M.L. Rev. 379 (1982).

For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 334, 336 to 352, 391, 497, 503, 506 to 521, 648, 650, 655, 656, 683 to 686, 708 to 715, 737, 856, 872, 875, 877, 887 to 893, 910 to 912; 30 Am. Jur. 2d Evidence §§ 914, 927, 928, 934, 949 to 952, 959, 960, 962, 965, 978, 985, 991, 993, 995, 997 to 1010, 1012, 1175; 31A Am. Jur. 2d Expert and Opinion Evidence §§ 123 to 127, 228 et seq., 323.

Testimony of children as to grounds of divorce of their parents, 2 A.L.R.2d 1329.

Admissibility in divorce action for adultery of wife's statement that husband was not father of her child, 4 A.L.R.2d 567.

Inability of person making utterance to recollect and narrate facts to which it relates as affecting its admissibility as part of res gestae, 7 A.L.R.2d 1324.

Admissibility of declaration of persons other than members of family as to pedigree, 15 A.L.R.2d 1412.

What constitutes books of original entry within rule as to admissibility of books of account, 17 A.L.R.2d 235.

Verification and authentication of slips, tickets, bills, invoices, etc., made in regular course of business, under the Uniform Business Records as Evidence Act, or under similar "model acts," 21 A.L.R.2d 773.

Constitutionality, construction, and effect of legislation forbidding or limiting the use, as evidence, of statement secured from an injured person, 22 A.L.R.2d 1269.

Remarriage tables, 25 A.L.R.2d 1464.

Introduction of decedent's books of account by his personal representative as waiver of "dead man's statute," 26 A.L.R.2d 1009.

Insurance: coroner's verdict or report as evidence on issue of suicide, 28 A.L.R.2d 352.

Mutilations, alterations, and deletions as affecting admissibility in evidence of public record, 28 A.L.R.2d 1443.

Admissibility, on issue of child's legitimacy or parentage, of declarations of parents, relatives, or the child, deceased or unavailable, 31 A.L.R.2d 989.

Admissibility of declarations of grantor on issue of delivery of deed, 34 A.L.R.2d 588.

Reputation as to ownership or claim as admissible on question of adverse possession, 40 A.L.R.2d 770.

Admissibility of records or report of welfare department or agency relating to payment to or financial condition of particular person, 42 A.L.R.2d 752.

Admissibility, in Federal Employers' Liability Act action, of rules, practices, precautions, safety devices, etc., used by other railroads, 43 A.L.R.2d 618.

Admissibility of hospital record relating to cause or circumstances of accident or incident in which patient sustained injury, 44 A.L.R.2d 553.

Admissibility in evidence of ancient maps and the like, 46 A.L.R.2d 1318.

What are official records within purview of 28 U.S.C. § 1733, making such records or books admissible in evidence, 50 A.L.R.2d 1197.

Admissibility as res gestae of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 A.L.R.2d 1245.

Admissibility of hospital record relating to physician's opinion as to whether patient is malingering or feigning injury, 55 A.L.R.2d 1031.

Spontaneity of declaration sought to be admitted as part of res gestae as question for court or ultimately for jury, 56 A.L.R.2d 372.

Weather reports and records as evidence, 57 A.L.R.2d 713.

Admissibility of evidence of reputation or declaration as to matter of public interest, 58 A.L.R.2d 615.

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.

Admissibility of report of police or other public officer or employee, or portions of report, as to cause of or responsibility for accident, injury to person, or damage to property, 69 A.L.R.2d 1148.

Admissibility in criminal case, as part of the res gestae, of statements or utterances of bystanders made at time of arrest, 78 A.L.R.2d 300.

Admissibility under state law of hospital record relating to intoxication or sobriety of patient, 80 A.L.R.2d 456.

Refreshment of recollection by use of memoranda or other writings, 82 A.L.R.2d 473.

Declarant's age as affecting admissibility as res gestae, 83 A.L.R.2d 1368; 15 A.L.R.4th 1043.

Medical books or treatises as independent evidence, 84 A.L.R.2d 1338.

Admissibility, as part of res gestae, of accusatory utterances made by homicide victim after act, 4 A.L.R.3d 149.

Admissibility of party's book accounts to prove loans or payments by person by or for whom they are kept, 13 A.L.R.3d 284.

Admissibility, as res gestae, of statements relating to origin or cause of, or responsibility for, fire, 13 A.L.R.3d 1114.

Admissibility of physician's testimony as to patient's statements or declarations, other than res gestae, during medical examinations, 37 A.L.R.3d 778.

Admissibility, as part of res gestae of spontaneous utterances of unidentified bystander testified to by an interested party, 50 A.L.R.3d 716.

Admissibility of newspaper article as evidence of the truth of the facts stated therein, 55 A.L.R.3d 663.

Weather reports and records as evidence, 57 A.L.R.3d 713.

Admissibility in evidence, on issue of negligence, of codes or standards of safety issued or sponsored by governmental body or by voluntary association, 58 A.L.R.3d 148.

Admissibility, in action against notary public, of evidence as to usual business practice of notary public of identifying person seeking certificate of acknowledgment, 59 A.L.R.3d 1327.

Time element as affecting admissibility of statement or complaint made by victim of sex crime as res gestae, spontaneous exclamation or excited utterance, 89 A.L.R.3d 102.

Admissibility of former testimony of nonparty witness, present in jurisdiction, who refuses to testify at subsequent trial without making claim of privilege, 92 A.L.R.3d 1138.

Business records: authentication and verification of bills and invoices under Rule 803(6) of the Uniform Rules of Evidence, 1 A.L.R.4th 316.

Admissibility of computerized private business records, 7 A.L.R.4th 8.

Admissibility in evidence of professional directories, 7 A.L.R.4th 638.

Admissibility of hearsay evidence in probation revocation hearings, 11 A.L.R.4th 999.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter, 12 A.L.R.4th 1016.

Admissibility of testimony regarding spontaneous declarations made by one incompetent to testify at trial, 15 A.L.R.4th 1043.

Admissibility in state court proceedings of police reports under official record exception to hearsay rule, 31 A.L.R.4th 913.

Necessity, in criminal prosecution, of independent evidence of principal act to allow admission, under res gestae or excited utterance exception to hearsay rule, of statement made at time of, or subsequent to, principal act, 38 A.L.R.4th 1237.

Uniform evidence Rule 803(24): the residual hearsay exception, 51 A.L.R.4th 999.

Admissibility of school records under hearsay exceptions, 57 A.L.R.4th 1111.

Admissibility of hospital records under Federal Business Records Act (28 USC § 1732 (a)), 9 A.L.R. Fed. 457.

Construction and application of provision of Rule 803(8)(B), Federal Rules of Evidence, excluding from exception to hearsay rule in criminal cases matters observed by law enforcement officers, 37 A.L.R. Fed. 831.

Admissibility, under Rule 803(8)(C) of Federal Rules of Evidence, of "factual findings resulting from investigation made pursuant to authority granted by law," 47 A.L.R. Fed. 321.

When is hearsay statement an "excited utterance" admissible under Rule 803(2) of the Federal Rules of Evidence, 48 A.L.R. Fed. 451.

Admissibility of statements made for purposes of medical diagnosis or treatment as

hearsay exception under Rule 803(4) of the Federal Rules of Evidence, 55 A.L.R. Fed. 689.

Admissibility, over hearsay objection, of police observations and investigative findings offered by government in criminal prosecution, excluded from public records exception to hearsay rule under Rule 803(8)(B) or (C), Federal Rules of Evidence, 56 A.L.R. Fed. 168.

When is hearsay statement a "present sense impression" admissible under Rule 803(1) of the Federal Rules of Evidence, 60 A.L.R. Fed. 524.

Admissibility of records other than police reports, under Rule 803(6), Federal Rules of Evidence, providing for business records exception to hearsay rule, 61 A.L.R. Fed. 359.

Treatises, periodicals, or pamphlets as exception to hearsay rule under Rule 803(18) of the Federal Rules of Evidence, 64 A.L.R. Fed. 971.

Admissibility of evidence of absence of public record or entry under Rule 803(10) of Federal Rules of Evidence, 70 A.L.R. Fed. 198.

Exception to hearsay rule, under Rule 803(3) of Federal Rules of Evidence, with respect to statement of declarant's mental, emotional, or physical condition, 75 A.L.R. Fed. 170.

Exception to hearsay rule, under Rule 803(11) or 803(12) of Federal Rules of Evidence, with respect to information contained in records of religious organization, 78 A.L.R. Fed. 361.

23 C.J.S. Criminal Law § 856 et seq.; 31A C.J.S. Evidence §§ 193, 197, 422 to 437, 626, 632, 639, 642, 677, 718 to 727, 732, 743 to 752.

II. Present Sense Impression or Excited Utterance.

Doctrine of *res gestae* requires spontaneity of utterances. - Prior to enactment of rules of evidence the principle involved in the doctrine of *res gestae* was that an utterance made impulsively and under the immediate influence of a terrifying occurrence could be so inherently truthful that the ordinary sanctions and tests applied to assure verity could be dispensed with. Spontaneity was generally considered an essential factor governing the admissibility of utterances sought to be admitted in evidence as part of *res gestae*. *State v. Gunthorpe*, 81 N.M. 515, 469 P.2d 160 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309, 401 U.S. 941, 91 S. Ct. 943, 28 L. Ed. 2d 221 (1971).

Declarations which are spontaneously and instinctively made are considered by the courts as part of the *res gestae* and admissible under Paragraph A or B. *State v.*

Maestas, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

Excited utterance not result of deliberation. - If the tension resulting from the incident did not provoke the statement but, rather, the statement was the result of deliberation, then it is not admissible as part of the *res gestae*. *State v. Cozzens*, 93 N.M. 559, 603 P.2d 298 (Ct. App. 1979).

Assumption underlying the exception in Paragraph B is that a person under the sway of excitement, precipitated by an external startling event, will be bereft of the reflective capacity essential for fabrication, and that, consequently, any utterance he makes will be spontaneous and trustworthy. *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

The rationale for the excited utterance exception is that the exciting event induced the declarant's surprise, shock or nervous excitement which temporarily stills capacity for conscious fabrication and makes it unlikely that the speaker would relate other than the truth. *State v. Martinez*, 99 N.M. 48, 653 P.2d 879 (Ct. App. 1982).

Test for the admissibility of utterances under Paragraph B is: (1) there must be some shock, startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstances of the occurrence preceding it. *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

Spontaneity product of stress. - Spontaneity, stated to be the most influential factor in determining admissibility under the doctrine of *res gestae*, is a product of stress; absent stress, spontaneity is questioned. *State v. Cozzens*, 93 N.M. 559, 603 P.2d 298 (Ct. App. 1979).

Spontaneity, stated to be most influential factor in determining admissibility under the doctrine of *res gestae*, is a product of stress and absent stress an appellate court will question its "spontaneity" as the law uses that term and emphasize the self-serving nature of the statement. *Clinard v. Southern Pac. Co.*, 82 N.M. 55, 475 P.2d 321 (1970).

Under excited utterance doctrine, there is no definite or fixed time limit: admissibility depends more on circumstances than on time and each case must depend upon its own circumstances. *State v. Robinson*, 94 N.M. 693, 616 P.2d 406 (1980).

Under the "excited utterance" doctrine of Paragraph B, the time sequence continues as long as the witness is under the stress and strain of the excitement caused by an event. There is no definite or fixed limit of time. *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

Under this rule, the declaration should be spontaneous, made before there is time for fabrication, and made under the stress of the moment; however, no particular amount of time lapse will render a statement admissible or inadmissible, as long as the statement is produced by the stress of the moment, it is admissible. *State v. Martinez*, 102 N.M. 94, 691 P.2d 887 (Ct. App. 1984).

Fact that event occurred contemporaneously or shortly thereafter is factor to be considered in determining the trustworthiness of the statement. *State v. Perry*, 95 N.M. 179, 619 P.2d 855 (Ct. App. 1980).

While time alone may not be the sole test, where it is questionable that the claimed statement is so linked with the later accident in such continuity of action as to be a part of the accident or that the statement was made under circumstances of stress as would remove it from the doubtful character generally present in self-serving statements, then it may not be admissible. *Clinard v. Southern Pac. Co.*, 82 N.M. 55, 475 P.2d 321 (1970).

Trial court is allowed discretion determining whether declarant still under influence of the startling event when a statement is made. *State v. Robinson*, 94 N.M. 693, 616 P.2d 406 (1980).

The determination of the admissibility of statements as excited utterances is a matter within the sound discretion of the trial court and will not be overturned in the absence of clear abuse. *State v. Martinez*, 99 N.M. 48, 653 P.2d 879 (Ct. App. 1982).

Statement's self-serving character is factor bearing on spontaneous exclamation's trustworthiness. - That a statement may be self-serving is not controlling if the statement falls within the guidelines of *res gestae*; however, its self-serving character is a factor which bears on, and is to be considered in determining the trustworthiness attributed to spontaneous exclamations. *Clinard v. Southern Pac. Co.*, 82 N.M. 55, 475 P.2d 321 (1970).

Witness' accuracy considered in determining whether utterance is spontaneous exclamation. - Any reasonable doubt about the accuracy of the testimony of the witness, as to the words of such statement or declaration of another, other than a mere doubt as to the veracity of such witness, may also be considered by the trial judge in determining whether such statement or declaration should be admitted under the exception to the hearsay rule for spontaneous exclamations; and that, even though the reviewing court, if sitting as trial judges, would have held such statement or declaration admissible in evidence under the exception to the hearsay rule for spontaneous exclamations, a decision of the trial judge rejecting such statement or declaration will not ordinarily justify a reversal where such decision appears to have been a reasonable decision. *Garrett v. Howden*, 73 N.M. 307, 387 P.2d 874 (1963).

Paragraph A of this rule permits admission of remarks of an unidentified bystander. *State v. Perry*, 95 N.M. 179, 619 P.2d 855 (Ct. App. 1980).

Error to admit supervisor's statement made before leaving. - The admission of the testimony that supervisory employee told his two men to watch out for the train before his leaving as part of the *res gestae* was prejudicial error and in itself sufficient basis for granting a new trial. *Clinard v. Southern Pac. Co.*, 82 N.M. 55, 475 P.2d 321 (1970).

Statements by child made upon awakening after sexual assault admissible. - The evidence showed that upon awakening the child was crying and "looked scared" and that her statements were made while in this condition. Thus, the trial court could rule that the statements were contemporaneous with the shocked condition and were spontaneous. The fact that the statements were not contemporaneous with the actual assault did not bar testimony as to what the child said. *State v. Apodaca*, 80 N.M. 244, 453 P.2d 764 (Ct. App. 1969).

Wife's statement not spontaneous exclamation. - In a proceeding in which the defendant was accused of possession of marijuana, a statement by the defendant's wife to a police officer that she had been very concerned about the defendant's growing marijuana could best be described as a narrative of a past occurrence rather than spontaneous exclamation produced by the stress of the moment; therefore, the trial court erred in allowing the officer to testify about this statement, which was inadmissible as hearsay. *State v. Cozzens*, 93 N.M. 559, 603 P.2d 298 (Ct. App. 1979).

Error harmless where evidence merely cumulative. - Where the state failed to show due diligence, as required by the constitutional right to confrontation, in attempting to procure attendance of a witness whose statements were admitted under the excited utterances exception, the trial court's admission of the testimony was nonetheless sustained on the ground that the statements were merely cumulative of other evidence,

including admissions of the defendant himself. *State v. Martinez*, 99 N.M. 48, 653 P.2d 879 (Ct. App. 1982).

Statement properly admitted as present sense impression. See *State v. Zinn*, 106 N.M. 544, 746 P.2d 650 (1987).

Statement admissible under Paragraphs B and C. - See *State v. Martinez*, 102 N.M. 94, 691 P.2d 887 (Ct. App. 1984).

III. Existing Emotional Or Physical Condition.

State of mind exception in Paragraph C does not include a statement of memory or belief to prove the fact remembered or believed. *State v. Gallegos*, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Defendant's references to prior crime admissible to show mental condition. - Testimony by a witness mentioning defendant's references to a prior armed robbery, made in conversations shortly after the shooting, was admissible as an admission by the defendant that he had just participated in an armed robbery, an offense relevant to the murder and aggravated battery charges, or as a statement of the defendant's then existing mental condition which was relevant to the defendant's state of mind at the time of the shooting a short time before the conversations; however, it would have been improper for the state to have introduced separately evidence of this prior armed robbery. *State v. Ortiz*, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Defendant's written documents admissible to show motive. - Written documents found in trunk of defendant, which tended to show a wicked and depraved mind, directed toward son of prosecuting witness, if not the whole family, were admissible to show motive in prosecution for poisoning with intent to kill or injure under Laws 1854-1855, p. 94. *State v. Holden*, 45 N.M. 147, 113 P.2d 171 (1941).

Lawyer's statements on terms of will expressly admissible. - A lawyer's statements of memory or belief relating to terms of a decedent's will are expressly admissible. *Spencer v. Gutierrez*, 99 N.M. 712, 663 P.2d 371 (Ct. App. 1983).

Self-serving declarations of intent or motive. - Statements made which were self-serving declarations relating to questions of intent or motive were properly excluded from

evidence under rule excluding self-serving declarations. *State v. Snow*, 84 N.M. 399, 503 P.2d 1177 (Ct. App.), cert. denied, 84 N.M. 390, 503 P.2d 1168 (1972).

IV. Recorded Recollection.

No means of arousing recollection may be used until witness has satisfied the trial judge that he lacks effective present recollection. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Memorandum read into evidence if recollection not revived. - After a witness consults the particular writing or object offered as a stimulus so that his testimony relates to a present recollection, if his recollection is not revived, a memorandum may be read into evidence and admitted if it meets the test of recorded recollection set forth in Subparagraph E of this rule. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

V. Public and Regularly Conducted Activity Records.

A. In General.

Court still best judge of trustworthiness of records. - The trial court is still the best judge whether evidence tendered as a public record or compiled in regular course meets the standard of trustworthiness and reliability which will entitle the record to stand as evidence of issuable facts. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

Paragraph H of this rule appears to overlap rather than to diminish Paragraph F of this rule, and thus the discretion embodied in the concept of trustworthiness which the courts have read into Paragraph F is the same requirement of trustworthiness called for in Subparagraph (3) of Paragraph H. But these subdivisions are not completely coextensive, since Paragraph F has a clearly stated foundation requirement that the document be shown by the testimony of the custodian or other qualified witness whereas Paragraph H does not have such a requirement. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

Records admissible when information sources and preparation method indicate trustworthiness. - The rationale of the doctrine behind this rule is that records should be admissible despite the hearsay rule where the sources of information and the method of preparation indicate trustworthiness. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct.

App. 1976).

Computer data as business records. - Computer data compilations may be construed as business records themselves, and they should be treated as any other record of regularly conducted activity. *State ex rel. Electric Supply Co. v. Kitchens Constr., Inc.*, 106 N.M. 753, 750 P.2d 114 (1988).

Admissibility of computer printout. - Although a computer printout ordinarily is made after completion of all regular dealings with a party, the printout is admissible if its contents were stored and compiled at the time of the underlying transactions. *State ex rel. Electric Supply Co. v. Kitchens Constr., Inc.*, 106 N.M. 753, 750 P.2d 114 (1988).

Appraisals inadmissible when no circumstantial guarantees of trustworthiness are present. - Written appraisals prepared for use in condemnation proceedings by third parties whom the city's urban renewal agency did not supervise, the accuracy of which the agency would not vouch for, and one of which was based on an erroneous assumption about the age of the building, presented none of the circumstantial guarantees of trustworthiness which are normally required to justify an exception to the hearsay rule and were inadmissible hearsay. *Owen v. Burn Constr. Co.*, 90 N.M. 297, 563 P.2d 91 (1977).

B. Course of Business.

Records inadmissible when not proved made in course of business. - Where there was a failure of proof that the hospital records were made in the regular course of business of the institution and that it was the regular course of business of the hospital to make such record, although it appeared the services rendered were reasonably required, the hospital bills were not admissible as business records. *Sapp v. Atlas Bldg. Prods. Co.*, 62 N.M. 239, 308 P.2d 213 (1957).

Custodian of records must identify and testify as to preparation. - Although modern rules have relaxed the common-law requirement of calling or accounting for all participants in the making of a record, so that for regularly conducted activities foundational testimony may be provided by any qualified witness, nevertheless, for admissibility under Paragraph F of this rule, the custodian of the records or some other qualified witness, not necessarily the original entrant, must appear in court, identify the records, and testify as to the mode of their preparation and their safekeeping. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

Qualified witness to authenticate records. - There is no violation of the confrontation clause by the admission of business records where a qualified witness other than the maker is present at trial and where the record contains other indicia of reliability of the records. *State v. Wynne*, 108 N.M. 134, 767 P.2d 373 (Ct. App. 1988).

Store employee was qualified to authenticate receipts as records kept in the regular course of business. *State v. Wynne*, 108 N.M. 134, 767 P.2d 373 (Ct. App. 1988).

Witness is "qualified" under Paragraph F if able to testify to foundation requirements. *State v. Ruiz*, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

Payroll and time sheets recorded in regular course of business admissible. - In a workmen's compensation case, payroll and time sheets showing periods when decedent worked were not erroneously admitted, because 20-2-12, 1953 Comp. (since repealed), makes a record of an act admissible to establish the same upon showing that the record was made in the regular course of a business, and that it was the regular course of business to make the record at the time or within a reasonable time thereafter. *Callaway v. Mountain States Mut. Cas. Co.*, 70 N.M. 337, 373 P.2d 827 (1962).

As are records kept under direction and with knowledge. - Record containing bank deposits and expenditures, which was taken in part from the checkbook which was kept by the defendant and in part from the deposit slips which had been prepared by him was properly admitted into evidence, since, even though the books were not kept under the immediate supervision of the defendant, they were kept under his direction and with his knowledge and actual assent or cooperation. *State v. Peke*, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962).

Computer printout admissible. - If the entries in a computer printout were made in the regular course of business for business purposes, there is no need to produce the original files. As long as the custodian of the records or any other qualified person testifies about the foundational requirements, the records are admissible. *State ex rel. Electric Supply Co. v. Kitchens Constr., Inc.*, 106 N.M. 753, 750 P.2d 114 (1988).

Constitutional right of confrontation denied. - Defendant was denied her constitutional right of confrontation at her trial for embezzlement, where the only evidence of shortages attributable to her was obtained by an unexplained comparison of computer printouts with her own records and there was no evidence that the state's only witness understood how the printouts were prepared. *State v. Austin*, 104 N.M. 573, 725 P.2d 252 (Ct. App. 1985).

Business document admitted though not through business record exception. - A document prepared by a business which is relevant and material, the best evidence of its contents, and properly authenticated, may be admitted into evidence, notwithstanding it does not fall into the business record exception of this rule. *Sun Vineyards, Inc. v. Luna County Wine Dev. Corp.*, 107 N.M. 524, 760 P.2d 1290 (1988).

Traveler's check paraphernalia admissible. - A traveler's check purchase agreement, refund application, and refund processing form were admissible in a check forgery case as exceptions to the hearsay rule under Paragraph F. *State v. Young*, 103 N.M. 313, 706 P.2d 855 (Ct. App. 1985).

Seller's memo not admissible where buyer had no opportunity to confront writer. - Handwritten notation and typewritten memo by seller's credit manager of his conversations with defendant buyer were damaging to defendant and should not have been admitted into evidence where defendant did not have opportunity to confront and cross-examine credit manager regarding potential for misrepresenting defendant's statements. *Kirk Co. v. Ashcraft*, 101 N.M. 462, 684 P.2d 1127 (1984).

Sales manager qualified to testify on note made in regular course of sellers business. - Sales manager's inability to verify dates or identity of person who made handwritten notation on credit file exhibit was not fatal, and manager who testified that exhibits were kept as a regular business practice and that notations were made regularly in course of conducting business was a "qualified witness" whose testimony was admissible under Paragraph F. *Kirk Co. v. Ashcraft*, 101 N.M. 462, 684 P.2d 1127 (1984).

Trustworthiness of exhibit cannot be attacked by one who uses it for his benefit during the course of trial. *Kirk Co. v. Ashcraft*, 101 N.M. 462, 684 P.2d 1127 (1984).

Error in admitting nonbusiness communication held not harmful. - Defendant was not harmed by any error in admission of telex communications not made in the ordinary course of business but at request of prosecutor, even if the communications did not fall within business records exception. *State v. Griscom*, 101 N.M. 377, 683 P.2d 59 (Ct. App. 1984).

C. Public.

As for public records exception to hearsay, assumption is that a public official will perform his duty properly. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

Public record is admissible after authentication and proof of admissibility under hearsay exceptions. *State v. Ellis*, 95 N.M. 427, 622 P.2d 1047 (Ct. App. 1980).

Records must be authenticated unless self-authenticating. - Unless records fall within the narrow exception for self-authenticating documents, the records must be authenticated. Two letter reports from the state police crime laboratory could not be self-authenticating for two reasons, because they were not under seal, and they were not offered in their original form. The defendant had sought to introduce altered reports which eliminated references to a revolver which was suppressed as the fruit of an unlawful search, and because counsel declined the trial court's invitation to lay a foundation for them, the trial court was within its discretion in not allowing their introduction. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

Foundation requirements for Subparagraph H(3) exception have been relaxed to the point that in some cases they are omitted, but there is a requirement of trustworthiness, which means that it continues to be for the court to decide whether the record or report to be introduced is sufficiently trustworthy in and of itself, regardless of any testimony which the entrant might give, and furthermore, the record or report must be authenticated. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

Testimony of custodian of records not required. - Admissibility under Paragraph H does not require the testimony of the custodian or other qualified witness because of the assurance of accuracy for public records. *State v. Padilla*, 92 N.M. 19, 582 P.2d 396 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Nor foundation testimony. - Under Paragraph H, records can be admitted as proof of the facts which they relate without foundation testimony and the sole criteria is whether the record is that of a public body. *State v. Padilla*, 92 N.M. 19, 582 P.2d 396 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

But occasions may arise when public records have to meet foundation requirements. - Paragraph H considerably expands the type of record that may be admitted, and since the assurances of accuracy are usually even greater for public records than for regular entries, this paragraph omits foundation requirements, thereby making it more advantageous to qualify under it than under Paragraph F. However, there may be instances when questions will be raised about the manner in which the record was made or kept which must be satisfactorily explained by a custodian or other qualified witness, if the judge is not to exclude it for lack of trustworthiness. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

Identification records not hearsay. - Photographic and fingerprint identification records, properly authenticated by their custodian, are admissible under the hearsay rule and their admission does not violate a defendant's right to confront witnesses against him. *State v. Linam*, 93 N.M. 307, 600 P.2d 253, cert. denied, 444 U.S. 864, 100 S. Ct. 91, 62 L. Ed. 2d 59 (1979).

Evidence of "activity," as referred to in Subparagraph (1) of Paragraph H was necessarily implied from certifications by the warden and records manager stating that photographs and fingerprint cards are part of original records of a person committed to the penitentiary. *State v. Padilla*, 92 N.M. 19, 582 P.2d 396 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Evidence which showed fingerprint records were activities of penitentiary was admissible concerning foundation testimony for admission under this section. *State v. Gallegos*, 91 N.M. 107, 570 P.2d 938 (Ct. App. 1977).

Letter from an investigator for the state's department of insurance finding an insurance agency negligent and in violation of unfair claims settlement practices was not a trustworthy factual finding and constituted inadmissible hearsay. *Gallegos v. Citizens Ins. Agency*, 108 N.M. 722, 779 P.2d 99 (1989).

Irrelevant that signature of attestation not same as typed name on form. - Where a document bears the seal of a state agency and a signature of attestation, it is irrelevant that the signature does not match a typed name on the form. *State v. Stout*, 96 N.M. 29, 627 P.2d 871 (1981).

Exclusion of hospital records involves two questions of double hearsay: the first hearsay question goes to the records; the second hearsay question goes to the patient's statements contained in the records. *State v. Ruiz*, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

VI. Interests In Land.

Heirship recitals in deed are mere hearsay. - See same catchline in notes to Rule 11-801.

Except admissible when deed ancient and accompanied by possession. - See same catchline in notes to Rule 11-801.

And become competent evidence when admitted by stipulation. - See same catchline in notes to Rule 11-801.

VII. Market Reports, Commercial Publications.

Market reports and quotations admissible with proper foundation. - The introduction of market reports and quotations as contained in newspapers and trade journals is generally permitted under an exception to the hearsay rule. A foundation for introduction should be laid indicating that the publication is trustworthy "and is relied upon by the trade in general in dealings and negotiations." *Johnson v. Nickels*, 66 N.M. 181, 344 P.2d 697 (1959).

Where evidence of contents of a publication must be admitted if the relevant and material information contained therein is to be made available to the trier of the facts, and the publication is one which reasonable minds would agree is trustworthy, there appears to be no sound reason why such evidence should be excluded and the purpose of the hearsay rule is not offended by the introduction of such evidence. *State Farm Fire & Cas. Co. v. Miller Metal Co.*, 83 N.M. 516, 494 P.2d 178 (Ct. App. 1971), cert. quashed, 83 N.M. 740, 497 P.2d 742 (1972).

VIII. Judgment Of Previous Conviction.

Absent a plea of guilty, proof of conviction of criminal charges is inadmissible in the trial of a subsequent civil action for tort arising out of the same act. *Gray v. Grayson*, 76 N.M. 255, 414 P.2d 228 (1966).

Copies of verdicts and judgments admissible in habitual offender proceeding. - Copies of verdicts, copies of "judgment, sentence and commitment" in prior criminal cases involving defendant, where each document was authenticated under Rule 11-902(A) and (D), were admissible under this rule in an habitual offender proceeding. *State v. Gallegos*, 91 N.M. 107, 570 P.2d 938 (Ct. App. 1977).

Fact that co-defendant pled guilty to conspiracy to commit murder, presented to the jury in a case involving the defendant's conspiracy, does not come within Paragraph V of this rule and is hearsay; informing the jury of this guilty plea is error. *State v. Urioste*, 94 N.M. 767, 617 P.2d 156 (Ct. App. 1980).

IX. Other Exceptions.

Construction of "other exceptions" provision. - Paragraph X of this rule and Rule 11-804, cannot be read to mean that hearsay which almost, but not quite, fits another specific exception may be admitted under the "other exceptions" subdivision of either rule. *State v. Barela*, 97 N.M. 723, 643 P.2d 287 (Ct. App. 1982).

In criminal cases. - The "other" hearsay exceptions of Rules 11-803 and 11-804 must be far more stringently employed in criminal cases, particularly because of the confrontation clause of the sixth amendment, than in civil matters. *State v. Barela*, 97 N.M. 723, 643 P.2d 287 (Ct. App. 1982); *State v. Taylor*, 103 N.M. 189, 704 P.2d 443 (Ct. App. 1985).

Evidence admissible because probative of defendant's state of mind. - The trial court improperly excluded a taperecording of a phone conversation between the defendant in a securities' fraud case and a person who assured him that the defendant could indeed deliver on his representations of the ability to effect swaps between prospective condo buyers and the owners of condos in other areas. However, such error was not reversible because it was otherwise proven that the defendant's representations concerning the possibility of "condo-swaps" were true (even if without the consenting participation of exchange services) and were thus not misrepresentations. The tape was admissible because probative of defendant's state of mind, even though defendant had failed to comply with the pretrial procedures required by this rule. *State v. Shade*, 104 N.M. 710, 726 P.2d 864 (Ct. App. 1986).

Hearsay testimony of child-victim of criminal sexual contact properly admitted under Paragraph X. - See *State v. Doe*, 94 N.M. 637, 614 P.2d 1086 (Ct. App. 1980).

11-804. Hearsay exceptions; declarant unavailable.

A.

Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

- (1) is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or
- (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so; or
- (3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

B.

Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1)

Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

(2)

Statement of recent perception. A statement, not in response to the instigation of a person engaged in investigating, litigating or settling a claim, which narrates, describes or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

(3)

Statement under belief of impending death. A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(4)

Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly

indicate the trustworthiness of the statement.

(5)

Statement of personal or family history.

(a) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry or other similar fact of personal or family history even though declarant had no means of acquiring personal knowledge of the matter stated; or

(b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(6)

Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

(a) the statement is offered as evidence of a material fact;

(b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Committee commentary. - Subparagraph B(1) was changed to conform to the federal rule. The rule now narrows the exception for the use of former testimony in a criminal case by only admitting the testimony if the party against whom it is offered was a party in the prior proceeding.

Subparagraph B(4) was changed to conform to federal rule. However, the federal rule is codified as Subparagraph B(3) because congress deleted the exception for a statement of recent perception, included in New Mexico as Subparagraph B(2). The rule now eliminates the exception for statements that tend to make the declarant an object of hatred, ridicule or disgrace. The amendment also adds the requirement that a statement tending to expose the declarant to criminal liability, if offered to exculpate the accused, must have corroborating circumstances clearly indicating the trustworthiness of the

statement.

Subparagraph B(6) was changed to conform to federal rule. This rule is identical to amended Rule 11-803. See commentary to 11-803, *supra*.

COMPILER'S ANNOTATIONS

- I. General Consideration.
- II. Unavailability.
- III. Exceptions.
 - A. In General.
 - B. Former Testimony.
 - C. Statement of Recent Perception.
 - D. Statement Under Belief of Impending Death.
 - E. Statement Against Interest.
 - F. Other Exceptions.

I. General Consideration.

Cross-references. - As to privileges generally, see Rules 11-501 to 11-513 and 38-6-6 and 38-6-7 NMSA 1978.

Compiler's notes. - This rule is similar to Rule 804 of the Federal Rules of Evidence.

This rule is deemed to supersede, in part, former Rule 43(a), N.M.R. Civ. P. (now see Rule 1-043). Those cases decided pursuant to former Rule 43(a), N.M.R. Civ. P., but applicable to this rule, have been noted below.

This rule of evidence is applicable in civil cases as well as criminal cases. *Madrid v. Scholes*, 89 N.M. 15, 546 P.2d 863 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Court's decision admitting evidence upheld where admissible under any theory. - Where evidence is admissible under any theory, the trial court's decision to admit it will be upheld. The same ruling will apply even more forcefully to evidence presented to the grand jury. *State v. Ballinger*, 99 N.M. 707, 663 P.2d 366 (Ct. App. 1983), rev'd on other grounds, 100 N.M. 583, 673 P.2d 1316 (1984).

Rule not applicable to probation revocation proceedings. - The Rules of Evidence do not apply to proceedings to revoke probation and, for the proper usage of hearsay in such proceedings, a court looks to the law not involving these rules. *State v. Vigil*, 97 N.M. 749, 643 P.2d 618 (Ct. App. 1982).

Hearsay testimony that is trustworthy stands on equal footing with direct testimony even though the prior statements made were not under oath, were not subject to cross-examination and the jury was not present to observe the declarant's demeanor as the statements were made. *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

Law reviews. - For comment, "*McGuinness v. State: Limiting the Use of Depositions at Trial*," see 10 N.M.L. Rev. 207 (1979-80).

For article, "*Survey of New Mexico Law, 1979-80: Evidence*," see 11 N.M.L. Rev. 159 (1981).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For annual survey of New Mexico law relating to evidence, see 12 N.M.L. Rev. 379 (1982).

For article, "*Survey of New Mexico Law, 1982-83: Evidence*," see 14 N.M.L. Rev. 161 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 496, 500, 508 to 596, 615 to 620, 676, 677, 682, 716 to 721, 738 to 768; 30 Am. Jur. 2d Evidence § 915; 31A Am. Jur. 2d Expert and Opinion Evidence § 5 et seq.

Admissibility of declaration of persons other than members of family as to pedigree, 15 A.L.R.2d 1412.

Admissibility, on issue of child's legitimacy or parentage, of declarations of parents, relatives, or the child, deceased or unavailable, 31 A.L.R.2d 989.

Admissibility of advertisements, brochures, catalogs, and the like as containing admissions by a litigant contrary to a position taken by him, 44 A.L.R.2d 1027.

Claim of privilege by a witness as justifying the use in criminal case of his testimony

given on a former trial or preliminary examination, 45 A.L.R.2d 1354.

Admissibility of dying declaration in civil case, 47 A.L.R.2d 526.

Opinion of doctor or other attendant as to declarant's consciousness of imminent death so as to qualify his statement as dying declaration, 48 A.L.R.2d 733.

Admissibility in evidence of withdrawn, superseded, amended, or abandoned pleading as containing admissions against interest, 52 A.L.R.2d 516.

Admissibility and conclusiveness, as against insured, of statements in proof of loss, 58 A.L.R.2d 429.

Admissibility of pleading as evidence against pleader, on behalf of stranger to proceedings in which pleading was filed, 63 A.L.R.2d 412.

Admissibility, in action on employee fidelity bond or policy, of confessions or declarations of such employee no longer available as witness, 65 A.L.R.2d 631.

Identity of subject matter or of issues as condition of admissibility in civil case of testimony or deposition in former proceeding of witness not now available, 70 A.L.R.2d 494.

Admissibility of evidence of party's silence, as implied or tacit admission, when a statement is made by another in his presence regarding circumstances of an accident, 70 A.L.R.2d 1099.

Use in civil case of testimony given in criminal case by witness no longer accessible, 70 A.L.R.2d 1179.

Admissibility, on behalf of one of multiple defendants in accident case, of admission against interest made out of plaintiff's presence by another defendant to a fourth person, 73 A.L.R.2d 1180.

Binding effect, upon party litigant, of testimony of his witnesses at a former trial, 74 A.L.R.2d 521.

Propriety and prejudicial effect of showing, in criminal case, withdrawn guilty plea, 86 A.L.R.2d 326.

Admissibility in criminal trial of dying declarations involving an asserted opinion or conclusion, 86 A.L.R.2d 905.

Admissibility of homicide victim's statements exculpating the accused, 95 A.L.R.2d 637.

Admissibility of statements of coconspirators made after termination of conspiracy and

outside accused's presence, 4 A.L.R.3d 671.

Admissibility in evidence of deposition as against one not a party at time of its taking, 4 A.L.R.3d 1075.

Admissibility, in civil case, of expert or opinion evidence as to proposed witness' inability to testify, 11 A.L.R.3d 1360.

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.

Admissibility, in civil action, of confession or admission which could not be used against party in criminal prosecution because obtained by improper police methods, 43 A.L.R.3d 1375.

Witness' refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions, 43 A.L.R.3d 1413.

Comment note: statements of declarant as sufficiently showing consciousness of impending death to justify admission of dying declaration, 53 A.L.R.3d 785.

Comment note: sufficiency of showing of consciousness of impending death, by circumstances other than statements of declarant, to justify admission of dying declaration, 53 A.L.R.3d 1196.

Admissibility of former testimony of nonparty witness, present in jurisdiction, who refuses to testify at subsequent trial without making claim of privilege, 92 A.L.R.3d 1138.

Admissibility, as against interest, in criminal case of declaration of commission of criminal act, 92 A.L.R.3d 1164.

Denial of recollection as inconsistent with prior statement so as to render statement admissible, 99 A.L.R.3d 934.

Sufficiency of efforts to procure missing witness' attendance to justify admission of his former testimony - state cases, 3 A.L.R.4th 87.

Admissibility of evidence concerning words spoken while declarant was asleep or unconscious, 14 A.L.R.4th 802.

Admissibility of testimony regarding spontaneous declarations made by one incompetent to testify at trial, 15 A.L.R.4th 1043.

Admissibility or use in criminal trial of testimony given at preliminary proceeding by witness not available at trial, 38 A.L.R.4th 378.

Former testimony used at subsequent trial as subject to ordinary objections and exceptions, 40 A.L.R.4th 514.

Dead man's statutes as affected by Rule 601 of the Uniform Rules of Evidence and similar state rules, 50 A.L.R.4th 1238.

Admissibility of testimony before grand jury of unavailable witness under Rule 804(b)(5), Federal Rules of Evidence, providing for admission of hearsay statement not covered by any specific exception but having equivalent circumstantial guaranties of trustworthiness, 50 A.L.R. Fed. 848.

Construction and application of provision of Rule 803(8)(B), Federal Rules of Evidence, excluding from exception to hearsay rule in criminal cases matters observed by law enforcement officers, 37 A.L.R. Fed. 831.

Who is "predecessor in interest" for purposes of Rule 804(b)(1) of Federal Rules of Evidence, 47 A.L.R. Fed. 895.

Effect on federal criminal proceeding of unavailability to defendant of alien witness through deportation or other government action, 56 A.L.R. Fed 698.

Admissibility of statement made to government agent by unavailable witness, under Rule 804(b)(5) of Federal Rules of Evidence, providing for admissibility of hearsay statement not covered by any specific exception but having equivalent circumstantial guaranties of trustworthiness, 61 A.L.R. Fed. 915.

Admissibility of depositions under Federal Evidence Rule 804(b)(1), 84 A.L.R. Fed. 668.

23 C.J.S. Criminal Law §§ 867 et seq., 951, 960; 31A C.J.S. Evidence §§ 193, 205, 206, 384, 410 to 421.

II. Unavailability.

Unavailability of testimony deemed crucial factor. - The crucial factor in the employment of this rule is not the unavailability of a witness, but rather the unavailability of his testimony. *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

Whether witness' testimony is unavailable rests within discretion of trial court. *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

Witness exempted from testifying is unavailable. - Where the trial court has ruled that a witness is exempted from testifying concerning a statement made by him, then that person is unavailable within the meaning of Subparagraph A(1), concerning unavailability for purposes of hearsay exceptions. *State v. Self*, 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975).

Once witness is permitted to claim privilege against self-incrimination, he becomes unavailable as a witness under Subparagraph (1) of Paragraph A and his deposition would not be excluded at trial because of the hearsay rule; however, the fact that the deposition was not to be excluded as hearsay does not authorize its admission if it is excludable because of Rule 1-029. *McGuinness v. State*, 92 N.M. 441, 589 P.2d 1032 (1979).

Admission of deposition of uncooperative unavailable witness. - Defendant's sixth amendment right of confrontation was not violated by the admission of the deposition of uncooperative unavailable witness. *Ewing v. Winans*, 749 F.2d 607 (10th Cir. 1984).

Trial court did not abuse its discretion in admitting preliminary hearing testimony of absent state witness based on unavailability even though prosecutor did not use subpoena pursuant to uniform act to secure attendance of witnesses from without a state in criminal proceedings until witness had already become a fugitive, where witness had made three previous voluntary appearances. *State v. Martinez*, 102 N.M. 94, 691 P.2d 887 (Ct. App. 1984).

Inability to recall prior testimony deemed "inability to testify". - Where defendant was unable to recall much of the testimony that he gave at a hearing before a medical review commission panel, he was "unable to testify," as described in Subparagraph (4) of Paragraph A and the plaintiff could depose a panelist for the purpose of retrieving evidence lost as a result of the defendant's lapse of memory. *Salazare v. St. Vincent Hosp.*, 96 N.M. 409, 631 P.2d 315 (Ct. App.), *aff'd in part and rev'd in part*, 95 N.M. 147, 619 P.2d 823 (1980).

Unavailability because of mental illness and infirmity. - Where the victim persisted in a refusal to identify the person who beat her, suffered mental illness and infirmity, certain psychological blocks and some loss of memory that affected the quality of her testimony the trial court did not abuse its discretion in its determination that the victim was an "unavailable witness." *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

Unavailability because of advanced age. - Where a principal witness was unavailable because she was ill and infirm, it was not error for the trial judge to take the totality of

the circumstances of the case into consideration, including the witness' advanced age and the condition of her health, to admit her deposition at trial. *State v. Vialpando*, 93 N.M. 289, 599 P.2d 1086 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

Party must show that he was unable to procure attendance of the witness by process or other reasonable means. *Madrid v. Scholes*, 89 N.M. 15, 546 P.2d 863 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Attempt to procure attendance required. - Absent evidence of an attempt to procure the attendance of the witness before trial the court does not consider the witness unavailable and evidence of his testimony is inadmissible as hearsay. *Trujillo v. Chavez*, 93 N.M. 626, 603 P.2d 736 (Ct. App. 1979).

And burden is upon state to prove unavailability of its witness. *State v. Ewing*, 97 N.M. 235, 638 P.2d 1080 (1982).

And court may consider totality of circumstances. - In determining whether the state was diligent in attempting to produce a witness for trial, the trial court may take into consideration the totality of the circumstances. *State v. Ewing*, 97 N.M. 235, 638 P.2d 1080 (1982).

Effort required to secure attendance of witness. - Before he may use the preliminary hearing testimony of an unavailable witness the proponent of evidence must meet the good faith and due diligence standards in determining whether process or other reasonable means has been employed in securing the attendance of the witness. *State v. Waits*, 92 N.M. 275, 587 P.2d 53 (Ct. App. 1978).

And "process" means legal process. - Process, as used in Subparagraph (5) of Paragraph A must be defined as legal process; that is, it must not only be fair on its face but also valid. *State v. Waits*, 92 N.M. 275, 587 P.2d 53 (Ct. App. 1978).

Showing of "due diligence" to produce witness must be made. - A party seeking the admission of former testimony of a witness must make a showing of "due diligence" by some evidence that the witness cannot be produced in person to testify. *Madrid v. Scholes*, 89 N.M. 15, 546 P.2d 863 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Evidence of diligence in effort to obtain attendance of witness is sufficient to support court's discretion to receive former testimony. *State v. Trujillo*, 33 N.M. 370, 266 P. 922 (1928).

Proof witness outside state unnecessary since only diligence required. - When the state reads in evidence the testimony of an absent witness, taken at a previous trial, it does not have the burden of showing affirmatively that witness was outside the state and out of reach of process; it is only necessary to show diligent, but unsuccessful, search for him. *State v. Riddel*, 38 N.M. 550, 37 P.2d 802 (1934).

But unavailability of witness must be supported by factual elaboration. - The district attorney's statements that the state attempted to subpoena a material witness and that he was out of state were no more than bare recitals unsupported by factual elaboration. Since the record contained no evidence as to the circumstances of the state's alleged attempt and inability to subpoena the witness, the court of appeals refused to hold that the witness was unavailable for trial, and under this rule his preliminary hearing testimony was not admissible in evidence. *State v. Mann*, 87 N.M. 427, 535 P.2d 70 (Ct. App. 1975).

Former testimony excluded where insufficient showing of unavailability of witness. - Where a witness testified at the first trial and, pursuant to Subparagraph (1) of Paragraph B, defendant sought to introduce this first trial testimony at the second trial on the basis that the witness was "unavailable," the basis of the unavailability claim being, as prescribed in Subparagraph (5) of Paragraph A, that defendant had been unable to procure the attendance of this witness at the second trial by process or other reasonable means, there was no error in excluding the first trial testimony of this witness where the record showed that the witness was in the area, that defendant made no attempt to subpoena him and his efforts to secure the attendance of this witness were no more than two or three telephone calls during the three-day period prior to the second trial, with defendant never personally contacting the witness, as there was an insufficient showing of unavailability. *State v. Brown*, 91 N.M. 320, 573 P.2d 675 (1977), cert. quashed, 91 N.M. 349, 573 P.2d 1204, cert. denied, 436 U.S. 928, 98 S. Ct. 2826, 56 L. Ed. 2d 772 (1978).

In absence of immunity statute, state was unable to guarantee that witness would not be prosecuted; therefore, witness' claim of privilege was not due to the procurement of the proponent of his statement. *State v. Self*, 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975).

Appellate issue is abuse of discretion. - The trial court has discretion to determine whether the burden of showing unavailability of a witness has been met and the ruling

of the trial court will not be disturbed absent a showing of abuse of that discretion. *State v. Smith*, 92 N.M. 533, 591 P.2d 664 (1979).

III. Exceptions.

A. In General.

In order for statement to qualify as an exception to hearsay rule, there must be a nexus between the assertion relevant to the issues in the given case and the circumstances which qualify the assertion as an exception to the hearsay rule. *State v. Self*, 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975).

B. Former Testimony.

Preliminary examination testimony may be presented to grand jury. - The transcript of the testimony at preliminary examination of witnesses may be presented to the grand jury next convened and introduced in evidence against the accused at his trial in the state district court for the offense with which he is charged. *Pearce v. Cox*, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 16 L. Ed. 685 (1966) (decided pursuant to former Rule 43(a) N.M.R. Civ. P.).

Later use of preliminary hearing transcript constitutional. - Laws 1919, ch. 29, § 7 (§ 45-407, 1929 Comp.), which was merely declaratory of the common law, permitted the transcript of the testimony of a witness taken at a preliminary hearing to be read in the criminal prosecution; it did not contravene the constitutional right of accused to be confronted by witnesses. *State v. Moore*, 40 N.M. 344, 59 P.2d 902 (1936).

Motive, as used in Subparagraph (1) of Paragraph B, is used in its ordinary sense as something that prompts a person to act in a certain way. *State v. Massengill*, 99 N.M. 283, 657 P.2d 139 (Ct. App. 1983).

Where the issues involved at a preliminary hearing were whether a particular crime had been committed and whether the magistrate had probable cause to believe that the defendant had committed the crime, the defendant had a "similar motive" to cross-examine a witness at the preliminary hearing as he would have had to cross-examine such witness at trial; the fact that defendant did not choose to cross-examine the witness at the preliminary hearing did not go to motive but was a matter of tactics. Accordingly, the taped preliminary hearing testimony of the witness was properly

admitted at trial. *State v. Massengill*, 99 N.M. 283, 657 P.2d 139 (Ct. App. 1983).

Good-faith effort to obtain witness' presence required before preliminary hearing testimony admissible. - Where the defendant's counsel cross-examined a material witness at the preliminary hearing, the trial court's admission into evidence of the tape recording of the testimony of the witness taken at the preliminary hearing denied the defendant's right of confrontation of the witness unless there was a showing that the prosecution had made a good-faith effort to obtain the witness' presence at the trial; after the likelihood of the witness' nonappearance became known, a simple statement by the prosecutor that the state had issued a subpoena and bench warrant and "had been looking for the witness" was not enough. *Valenzuela v. Griffin*, 654 F.2d 707 (10th Cir. 1981).

Transcript of bail bond hearing admissible. - Where the trial court admitted a transcript of the prior testimony of a witness given at a bail bond hearing and the witness was dead at the time of the trial of the cause, the admission of such transcript was not hearsay and did not constitute a denial of defendant's right to confront the witness against him. *State v. Tijerina*, 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), opinion of Hernandez, J. adopted by supreme court, 86 N.M. 31, 519 P.2d 127 (1973), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974) (decided pursuant to Rule 1-043.).

Answers to interrogatories cannot be subsequently used by answering party. - 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) (decided pursuant to former Rule 43(a), N.M.R. Civ. P.).

Admission in another case's deposition revives debt barred by limitations. - Debt barred by the statute of limitations is revived by an admission that it is unpaid, made in writing and signed by the person to be charged, even though made in a deposition taken for use in another case. *Joyce-Pruit Co. v. Meadows*, 31 N.M. 336, 244 P. 889 (1925).

C. Statement of Recent Perception.

Subparagraph B(2) will operate sparingly in criminal cases because of the defendant's constitutional right to confront his accuser and his inability to test the reliability of the

declarant's statement by cross-examination. State v. Barela, 97 N.M. 723, 643 P.2d 287 (Ct. App. 1982).

Admissible statement of recent perception. - Where statements made by the victim to her sister and sister-in-law were that defendant beat her, hit her with a pipe and a fire log, kicked her and threw her outside the house, the assertions were made within 24 hours of the time the events occurred and the record established that the statements were made in good faith and while the victim's recollection was clear, the statements were admissible under Subparagraph (2) of Paragraph B. State v. Maestas, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

Statement made at instigation of officer. - Where an officer goes to a victim's hospital room for the purpose of obtaining a statement and an identification of her assailant, unmistakably, the identification is made at the instigation of the officer; the hearsay exception of Subparagraph (2) of Paragraph B is inapplicable. State v. Barela, 97 N.M. 723, 643 P.2d 287 (Ct. App. 1982).

Reliability, to support recent perception exception to hearsay rule, should obviate objection to admissibility of a statement so clothed with circumstances showing veracity. State v. Robinson, 94 N.M. 693, 616 P.2d 406 (1980).

D. Statement Under Belief of Impending Death.

Prerequisites for dying declaration. - When a dying declaration is made, the declarant must be conscious and the realization of approaching death must exist. State v. Quintana, 98 N.M. 17, 644 P.2d 531 (1982).

Fear or even the belief that the illness will end in death is not enough for a dying declaration. There must be a settled hopeless expectation that death is near, and what is said must have been spoken in the hush of impending death. State v. Quintana, 98 N.M. 17, 644 P.2d 531 (1982).

In determining "impending death," one is to look to the state of mind of the victim. State v. Quintana, 98 N.M. 17, 644 P.2d 531 (1982).

If it can reasonably be inferred from the state of the wound or the state of the illness that the dying person was aware of his danger, then the requirement of impending death is

met. State v. Quintana, 98 N.M. 17, 644 P.2d 531 (1982).

Dying declaration impeachable. - A dying declaration by no means implies absolute verity. It can be impeached. State v. Quintana, 98 N.M. 17, 644 P.2d 531 (1982).

E. Statement Against Interest.

Statements against penal interest admissible. - If the statements were assertedly against witness' penal interest in that they tended to subject him to criminal liability, then such statements would be admissible under Subparagraph B(4). State v. Self, 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975).

Foundation. - The foundation required for the admission of statements against penal interest is: (1) the declarant is unavailable as a witness; (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true; and (3) corroborating circumstances indicate the trustworthiness of the statement. State v. Huerta, 104 N.M. 340, 721 P.2d 408 (Ct. App. 1986).

Collateral portion of conversation being against interest insufficient. - In order to circumvent the usual requirement that testimony be given under oath and subject to cross-examination and the penalties of perjury, the precise matter offered for its truth ought to be against the interest of the declarant, and it is not enough that some collateral portion of the conversation is against the interest of the declarant; otherwise the circumstantial indicia of truthworthiness are not present to guarantee the reliability of the very matter being offered. State v. Self, 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975).

Exclusion of uncorroborated testimony of a defense witness who would have testified that a third party, prior to his death, told the witness that the heroin was his and that it was not defendant's was not plain error since the policy behind Subparagraph (4) of Paragraph B is to require corroboration in order to circumvent fabrication. State v. Anaya, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).

No error in finding no exception in statement not clearly against penal interest. - Where a witness' statements to his attorneys were not clearly against his penal interest and there was no corroborating evidence, it was not error for the court to find that the testimony did not fall within the exception to Subparagraph (4) of Paragraph B. State v. McGee, 95 N.M. 317, 621 P.2d 1129 (Ct. App. 1980).

F. Other Exceptions.

Construction of "other exceptions" provision. - Subparagraph (6) of Paragraph B of this rule, like Rule 11-803X, cannot be read to mean that hearsay which almost, but not quite, fits another specific exception may be admitted under the "other exceptions" subsection of either rule. *State v. Barela*, 97 N.M. 723, 643 P.2d 287 (Ct. App. 1982).

In criminal cases. - The "other" hearsay exceptions of Rules 11-803 and 11-804 must be far more stringently employed in criminal cases, particularly because of the confrontation clause of the sixth amendment, than in civil matters. *State v. Barela*, 97 N.M. 723, 643 P.2d 287 (Ct. App. 1982); *State v. Taylor*, 103 N.M. 189, 704 P.2d 443 (Ct. App. 1985).

Use of Subparagraph (6) of Paragraph B is an effective method of avoiding the exclusion of hearsay testimony that is clothed with special assurances or guarantees of trustworthiness. *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

11-805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 805 of the Federal Rules of Evidence.

For proper usage of hearsay in proceeding to revoke probation, a court looks to the law not involving these rules. *State v. Vigil*, 97 N.M. 749, 643 P.2d 618 (Ct. App. 1982).

Law reviews. - For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

11-806. Attacking and supporting credibility of declarant.

When a hearsay statement, or a statement defined in Subparagraphs (c), (d) or (e) of Subparagraph (2) of Paragraph D of Rule 11-801, has been admitted in evidence, the

credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Committee commentary. - This rule was changed to conform to federal rule. The rule now allows an attack on credibility of a declarant whose statement was admitted under Rule 11-801 since those statements, traditionally defined as exceptions to the hearsay rule, are now defined as "not hearsay."

COMPILER'S ANNOTATIONS

Cross-references. - As to impeaching generally, see Rules 11-607 to 11-609.

Compiler's notes. - This rule is similar to Rule 806 of the Federal Rules of Evidence.

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 493, 496.

98 C.J.S. Witnesses §§ 491, 538, 576, 629.

Article 9

Authentication and Identification

11-901. Requirement of authentication or identification.

A.

General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

B.

Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1)

Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2)

Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3)

Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4)

Distinctive characteristics and the like. Appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances.

(5)

Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6)

Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if

(a) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or

(b) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone;

(7)

Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report,

statement or data compilation, in any form, is from the public office where items of this nature are kept.

(8)

Ancient documents or data compilations. Evidence that a document or data compilation, in any form,

(a) is in such condition as to create no suspicion concerning its authenticity,

(b) was in a place where it, if authentic, would likely be, and

(c) has been in existence twenty years or more at the time it is offered;

(9)

Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10)

Methods provided by statute or rule. Any method of authentication or identification provided by statute or by other rules adopted by the supreme court.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 901 of the Federal Rules of Evidence.

General rule requiring authentication of records. - Unless records fall within the narrow exception for self-authenticating documents (set out in Rule 11-902), they must be authenticated. Thus, public records or reports admissible under Rule 11-803 (dealing with factual findings resulting from authorized investigations) must be authenticated. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

Methods of identifying real evidence. - In order to admit real or demonstrative evidence at trial, the item of evidence in question must be identified either visually or by establishing the custody of the object from the time it was seized to the time it is offered in evidence. For admission, it suffices if evidence establishes that it is more probable than not the object is the one connected with the case, and a preponderance of the evidence is sufficient to show this. *State v. Chavez*, 84 N.M. 760, 508 P.2d 30 (Ct. App. 1973).

Guidelines for the admission into evidence of items identified, either visually or by establishing custody of them, are: (1) the item must be identified from the time it was obtained to the time it was offered in evidence (it suffices if the evidence established is more probable than not that the item is one connected with the case; a preponderance of the evidence is sufficient); (2) factors to be considered include (a) the nature of the item; (b) the circumstances surrounding the preservation and custody of it; and (c) the likelihood of intermeddlers tampering with it, and (3) if the trial judge is satisfied within a reasonable probability that the item has not been changed in important respects, he may permit its introduction into evidence. *South v. Lucero*, 92 N.M. 798, 595 P.2d 768 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Foundation for admitting copy of letter. - Testimony by insured that he received carbon copy of letter sent by his attorney to insurer and that signature appeared to be his attorney's was adequate foundation for admitting carbon copy of letter. *State Farm Fire & Cas. Co. v. Price*, 101 N.M. 438, 684 P.2d 524 (Ct. App. 1984).

Prison files kept in course of business authenticated. - Where a handwriting expert testifies that the writing on two notes allegedly written by the defendant inmate is the same as the handwriting which appears on documents in the inmate's file, evidence that the files are kept in the regular course of penitentiary business provides proper authentication; therefore, the notes are admissible. *State v. Stephens*, 93 N.M. 368, 600 P.2d 820 (1979).

Public record is admissible after authentication and proof of admissibility under hearsay exceptions. *State v. Ellis*, 95 N.M. 427, 622 P.2d 1047 (Ct. App. 1980).

State's exhibit copy of document in penitentiary's central file properly authenticated. - Where custodian of inmate records at state penitentiary testified he maintains all inmate files and that the judgment and sentence was a document which routinely accompanies a prisoner when he is admitted to the facility, that state's exhibit was a copy of the document in the penitentiary's central file, that that document is also a copy and that he had no reason to question the document's authenticity, the document, under the facts of this case, was properly authenticated. *State v. Ellis*, 94 N.M. 427, 622 P.2d 1047 (Ct. App. 1980).

Chain of custody of tires established. - Where the record discloses that the defendant obtained tires from a wholesale and retail tire company by representing that he was a "tire broker," that the tires were picked up by the defendant's son on September 17, 1971, that defendant had orders from some customers who operated trading posts on the Navajo reservation, that on September 20, 1971, the defendant sold the tires, that the tires remained continuously in the purchaser's store until January 14, 1972, when he

turned them over to a police detective, and that the officer identified the tires by his initials and the date he had placed on each tire at the time he received them from proprietor and that the officer had then checked them into the evidence room of the police department where they had remained until he brought them to the courthouse, then the chain of custody was clearly established and the tires are admissible in evidence. *State v. Seifried*, 84 N.M. 581, 505 P.2d 1257 (Ct. App. 1973).

Conflicting testimony as to chain of custody does not render evidence inadmissible. *State v. Chavez*, 84 N.M. 760, 508 P.2d 30 (Ct. App. 1973).

Identical condition and absence of tampering need not be shown. - It is not necessary that article offered in evidence be identically the same as at time in controversy, and it is also unnecessary to show absence of tampering on part of every person through whose hands article has passed since as long as article can be identified it is immaterial in how many or in whose hands it has been. *State v. Chavez*, 84 N.M. 760, 508 P.2d 30 (Ct. App. 1973).

Facts which authenticate a reply letter are that letter discloses knowledge that only purported signer would be likely to have, that letter purports to be written by addressee of prior letter and purports to be a reply thereto (either refers to it or is responsive to its terms) and that letter has been received without unusual delay. *Ballard v. Miller*, 87 N.M. 86, 529 P.2d 752 (1974).

Authentication or verification of photographs prerequisite to their admission into evidence may be made by photographer or by any witness whose familiarity with subject matter represented qualifies him to testify as to correctness of representation of objects or scenes portrayed in photographs. *State ex rel. State Hwy. Dep't v. Kistler-Collister Co.*, 88 N.M. 221, 539 P.2d 611 (1975).

In an habitual offender proceeding where witness identified photograph of defendant showing defendant as he appeared when admitted to penitentiary in December of 1974, this was a sufficient basis for admission of photograph; fact that witness had not personally taken photograph nor seen photograph taken was not grounds for its exclusion. *State v. Gallegos*, 91 N.M. 107, 570 P.2d 938 (Ct. App. 1977).

Authentication by witness with knowledge. - Entries on a ledger copied from original invoices were admissible if person keeping books was present and testified as to their correctness. *Anderson, Clayton & Co. v. Swallows*, 84 N.M. 486, 505 P.2d 431 (1973).

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).

Where witness identified fingerprint records taken from penitentiary records of defendant and testified that he was custodian of said records and that processing upon admission of an inmate to penitentiary included obtaining identifying data including fingerprints and photographs, this evidence authenticated fingerprint records. *State v. Gallegos*, 91 N.M. 107, 570 P.2d 938 (Ct. App. 1977).

Proper foundation for admission of exhibits in form of plats or diagrams showing proposed redesign of parking spaces on property affected by condemnation proceedings was laid where, despite fact that they were not physically prepared by witness who identified them, exhibits were prepared at his request and he participated in their preparation and no question was raised as to accuracy of their representation or portrayal. *State ex rel. State Hwy. Dep't v. Kistler-Collister Co.*, 88 N.M. 221, 539 P.2d 611 (1975).

The New Mexico test for suppressing out-of-court identification does not rest entirely on whether the identification procedure was impermissibly suggestive. Rather, the totality of the circumstances leading to the reliability of the identification is to be weighed against the corrupting effect of the suggestive identification. *State v. Padilla*, 98 N.M. 349, 648 P.2d 807 (Ct. App. 1982).

Law reviews. - For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 367, 368, 374, 380 to 383, 385, 386, 471, 788, 800, 803, 806, 809, 810, 816, 817, 823, 824 to 833, 849, 856, 863; 30 Am. Jur. 2d Evidence §§ 947, 962, 963, 965, 966, 991, 993, 1011 to 1013; 31A Am. Jur. 2d Expert and Opinion Evidence §§ 144 et seq., 278 to 309.

Authentication or verification of photograph as basis for introduction in evidence, 9 A.L.R.2d 899; 41 A.L.R.4th 812; 41 A.L.R.4th 877.

Admissibility of evidence of fact of making or receiving telephone calls, 13 A.L.R.2d 1409.

Fingerprints, palm prints, or bare footprints as evidence, 28 A.L.R.2d 1115; 45 A.L.R.4th

1178.

Mode and degree of proof required to establish genuineness of handwriting offered as standard or exemplar for comparison with a disputed writing or signature, 41 A.L.R.2d 575.

Blood grouping tests, 46 A.L.R.2d 1000; 43 A.L.R.4th 579.

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.

Identification of accused by his voice, 70 A.L.R.2d 995.

Federal Civil Procedure Rule 44 and Federal Criminal Procedure Rule 27, relating to proof of official records, 70 A.L.R.2d 1227; 41 A.L.R. Fed. 784.

Admissibility of evidence as to extrajudicial or pretrial identification of accused, 71 A.L.R.2d 449; 29 A.L.R.4th 104.

Competency, as a standard of comparison to establish genuineness of handwriting, of writings made after controversy arose, 72 A.L.R.2d 1274.

Proof of authorship or identity of sender of telegram as prerequisite of its admission in evidence, 5 A.L.R.3d 1018.

Admissibility and weight of voiceprint evidence, 97 A.L.R.3d 294.

Business records: authentication and verification of bills and invoices under Rule 803(6) of the Uniform Rules of Evidence, 1 A.L.R.4th 316.

22A C.J.S. Criminal Law § 799 et seq.; 31A C.J.S. § 173; 32 C.J.S. Evidence §§ 546, 612 to 622, 643, 649 to 651, 706, 744.

11-902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

A.

Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory or insular possession thereof, or the Panama Canal Zone, or the trust territory of the Pacific islands, or of a political subdivision, department, officer or agency thereof, and a

signature purporting to be an attestation or execution;

B.

Domestic public documents not under seal. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in Paragraph A hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine;

C.

Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position

(1) of the executing or attesting person, or

(2) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the judge may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification;

D.

Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with Paragraph A, B or C of this rule or complying with any statute or rule adopted by the supreme court;

E.

Official publications. Books, pamphlets or other publications purporting to be issued by public authority;

F.

Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals;

G.

Trade inscriptions and the like. Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin;

H.

Acknowledged documents. Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements;

I.

Commercial paper and related documents. Commercial paper, signatures thereon and documents relating thereto to the extent provided by general commercial law;

J.

Presumptions under statutes. Any signature, document or other matter declared by statute to be presumptively or prima facie genuine or authentic.

Committee commentary. - Paragraph H was changed to conform to federal rule. The amendment eliminates the archaic language "under the hand and seal."

COMPILER'S ANNOTATIONS

Cross-references. - For admissibility of duplicates and other evidence of contents, see Rules 11-1001 to 11-1005.

As to admissibility of abstracts of title, see 38-7-3 and 38-7-4 NMSA 1978.

Compiler's notes. - This rule is similar to Rule 902 of the Federal Rules of Evidence.

This rule is deemed to have superseded those provisions in former Rule 44(a)(2), (3) and (5), N.M.R. Civ. P. (now see Rule 1-044), concerning authentication documents.

Self-authentication of official reports or records. - If writing purports to be an official report or record and is proved to have come from proper public office where such official papers are kept, it is generally agreed that this authenticates offered document as genuine. This result is founded on probability that officers in custody of such records will

carry out their public duty to receive or record only genuine official papers and reports. *State v. Miller*, 79 N.M. 117, 440 P.2d 792 (1968) (decided before enactment of this rule).

Authentication of penitentiary records. - Certification by the record manager of a penitentiary that photographs and fingerprint cards are true and correct copies of the original records of the defendant, certification by the warden that the records manager was in fact the records manager, had custody of the original records and that the signature of the records manager was genuine and the penitentiary seal accompanying the warden's signature, are sufficient to authenticate the documents under Paragraphs A and D. *State v. Padilla*, 92 N.M. 19, 582 P.2d 396 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Public record is admissible after authentication and proof of admissibility under hearsay exceptions. *State v. Ellis*, 95 N.M. 427, 622 P.2d 1047 (Ct. App. 1980).

Irrelevant that signature of attestation not same as typed name on form. - Where a document bears the seal of a state agency and a signature of attestation, it is irrelevant that the signature does not match a typed name on the form. *State v. Stout*, 96 N.M. 29, 627 P.2d 871 (1981).

Reports from state police crime laboratory could not be self-authenticating because they were not under seal and were not offered in their original form. Defendant had sought to introduce altered reports which eliminated references to revolver which was suppressed as fruit of an unlawful search, but because counsel declined trial court's invitation to lay a foundation for admission of altered reports, trial court was within its discretion in not allowing them. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

Sworn affidavit corroborating evidence. - Sworn affidavit prepared more than one year prior to decedent's death by attorney of recognized integrity and stating that each questioned transaction originated as a gift to defendant and that purpose of affidavit was to protect him against any assertion that such moneys were a loan instead of a gift constituted convincing corroborative evidence of defendant's claim, as required 20-2-5, 1953 Comp. (now repealed). *Goodwin v. Travis*, 58 N.M. 465, 272 P.2d 672 (1954) (decided before enactment of this rule).

Documents not properly admitted. - See *Levy v. Disharoon*, 106 N.M. 699, 749 P.2d 84 (1988).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For article, "Evidence," see 12 N.M.L. Rev. 379 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 853, 863, 885; 30 Am. Jur. 2d Evidence §§ 963, 966 to 972, 988, 990, 991, 996, 1006, 1010 to 1013, 1041; 32B Am. Jur. 2d Federal Rules of Evidence §§ 244, 250, 252, 276, 290 to 301, 311, 317.

Sufficiency, under Federal Civil Procedure Rule 44(a)(1), of authentication of copy of domestic official record, 2 A.L.R. Fed. 306.

1A C.J.S. Acknowledgments § 1 et seq., 32 C.J.S. Evidence §§ 626, 634, 643, 649 to 651, 653, 654, 675, 682, 726, 733, 735.

11-903. Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 903 of the Federal Rules of Evidence.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d §§ 850, 853.

32 C.J.S. Evidence §§ 739, 744.

Article 10

Contents of Writings, Recordings and Photographs

11-1001. Definitions.

For purposes of this article the following definitions are applicable.

A.

Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse mechanical or electronic recording or other form of data compilation.

B.

Photographs. "Photographs" include still photographs, X-ray films, videotapes and motion pictures.

C.

Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

D.

Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

Committee commentary. - Paragraph B was changed to conform to federal rule. The amendment adds "videotapes" to the definition of photograph.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 1001 of the Federal Rules of Evidence.

Use of photographic evidence. - When photographic evidence is sought to be admitted under the "silent witness" theory, the evidence must be properly authenticated and must be relevant, and its probative value must outweigh any unfair prejudice which may result. *State v. Henderson*, 100 N.M. 260, 669 P.2d 736 (Ct. App. 1983).

To clarify and illustrate evidence. - Photographs are relevant and admissible for the purpose of clarifying and illustrating testimony. *State v. Gilbert*, 100 N.M. 392, 671 P.2d 640, 465 U.S. 1073, 104 S. Ct. 1429, 79 L. Ed. 2d 753 (1984).

Cumulative photographs corroborating other evidence admissible. - Photographs are properly admitted if they serve to corroborate other evidence even though they may be cumulative. *State v. Hutchinson*, 99 N.M. 616, 661 P.2d 1315 (1983).

Although court determines whether photograph raises jury's passions and prejudices. - The issue of whether a photograph raises the passions and prejudices of the jury is largely one of discretion to be exercised by the trial court. *State v. Hutchinson*, 99 N.M. 616, 661 P.2d 1315 (1983).

Utilization of sound recordings as evidence is accepted by New Mexico Rules of Evidence. *State, Dep't of Motor Vehicles v. Gober*, 85 N.M. 457, 513 P.2d 391 (1973).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

11-1002. Requirement of original.

To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by statute.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 1002 of the Federal Rules of Evidence.

Best evidence required to prove content of document. - Best evidence rule applies to situations where document is proved for purpose of establishing content of document; under this rule the original of the document is required. *State v. Baca*, 86 N.M. 144, 520 P.2d 872 (Ct. App. 1974).

But rule inapplicable where documents used to support oral testimony. - Best evidence rule applies only in those situations where parties seek to prove a writing for the purpose of establishing its terms; in such instances the instrument itself is the best evidence. Where state did not attempt to prove the contents of any document or documents but used documents to support oral testimony, there was no basis for application of best evidence rule. *State v. Landlee*, 85 N.M. 726, 516 P.2d 697 (Ct. App. 1973).

Or to prove licensed status. - It is plaintiff's licensed status which must be proved and not the contents of a particular document; therefore, "best evidence rule" or this rule does not apply. *Kennedy v. Lynch*, 85 N.M. 479, 513 P.2d 1261 (1973).

Rule not violated by admission of copy of defendant's statement. - Introduction into evidence of copy of statement defendant gave to police did not violate best evidence rule. *State v. Darden*, 86 N.M. 198, 521 P.2d 1039 (Ct. App. 1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 5 Am. Jur. 2d Appeal and Error § 717; 29 Am. Jur. 2d Evidence §§ 448, 451.

Admissibility of X-ray report made by physician taking or interpreting X-ray pictures, 6 A.L.R.2d 406.

Authentication or verification of photograph as basis for introduction in evidence, 9 A.L.R.2d 899; 41 A.L.R.4th 812; 41 A.L.R.4th 877.

Admissibility in evidence of colored photographs, 53 A.L.R.2d 1102.

Admissibility of sound recordings in evidence, 58 A.L.R.2d 1024; 57 A.L.R.3d 746; 58 A.L.R.3d 598.

Use of motion pictures as evidence, 62 A.L.R.2d 686.

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.

Admissibility in evidence, in civil action, of tachograph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like, 73 A.L.R.2d 1025.

Admissibility, in wrongful death action, of photograph of decedent made in his lifetime, 74 A.L.R.2d 928.

Admissibility in evidence of sound recording as affected by hearsay and best evidence rules, 58 A.L.R.3d 598.

Admissibility of videotape film in evidence in criminal trial, 60 A.L.R.3d 333; 41 A.L.R.4th 812; 41 A.L.R.4th 877.

Applicability of best evidence rule to proof of ownership of allegedly stolen personal property in prosecution for theft, 94 A.L.R.3d 824.

Admissibility of memorandum of telephone conversation, 94 A.L.R.3d 975.

23 C.J.S. Criminal Law § 1025 et seq.; 32A C.J.S. Evidence §§ 785, 797, 798, 803, 805, 809, 810.

11-1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless

A. a genuine question is raised as to the authenticity of the original or

B. in the circumstances it would be unfair to admit the duplicate in lieu of the original.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 1003 of the Federal Rules of Evidence.

This rule is deemed to have superseded those provisions in former Rule 44(a)(1) to (4), N.M.R. Civ. P. (now see Rule 1-044), relating to the admissibility of copies of public documents.

Circumstances where copy not readily admitted. - Where there is deposition testimony that a deed was left in escrow, payment was made and deed was forwarded to vendee, court will not permit copy of deed to be admitted into evidence unless vendee proves he received original deed and made a reasonable search as to its present whereabouts. *Cross v. Ritch*, 61 N.M. 175, 297 P.2d 319 (1956) (decided before enactment of this rule).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 451, 452, 486 to 492.

Carbon copies of letters or other written instruments as evidence, 65 A.L.R.2d 342.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 A.L.R.2d 308.

Photographic representation or photostat of writing as primary or secondary evidence within best evidence rule, 76 A.L.R.2d 1356.

Admissibility of duplicates under Rules 1001(4) and 1003 of Federal Rules of Evidence, 72 A.L.R. Fed. 732.

23 C.J.S. Criminal Law § 1025; 32 C.J.S. Evidence §§ 634, 646, 647, 649; 32A C.J.S. Evidence §§ 753, 763.

11-1004. Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

A.

Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

B.

Original not obtainable. No original can be obtained by any available judicial process or procedure; or

C.

Original in possession of opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

D.

Collateral matters. The writing, recording or photograph is not closely related to a controlling issue.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 1004 of the Federal Rules of Evidence.

Purpose of this rule is a common sense approach to application of rules of evidence when a problem arises in construction of the rules. *Sundberg v. Hurley*, 89 N.M. 511, 554 P.2d 673 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

Instruments lost or destroyed. - It is up to trial court to determine if proof offered is sufficient to establish that instrument was lost so as to permit proof of its contents by secondary evidence. *Johnson v. Johnson*, 74 N.M. 567, 396 P.2d 181 (1964) (decided

before enactment of this rule).

The trial court did not err in permitting claimants to establish the contents of missing notations by oral testimony, since the original notations were either lost or destroyed. The requirement of a writing does not preclude proof of a lost document. *Catanach v. Gunn*, 107 N.M. 574, 761 P.2d 452 (Ct. App. 1988).

"Collateral" construed. - Whether a document is collateral is a question of whether it is important enough, under all the circumstances, to need production; judge presiding over trial is fittest to determine this question finally. *Sundberg v. Hurley*, 89 N.M. 511, 554 P.2d 673 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

Hospital records showing frequency of disorder collateral. - Where controlling issue in malpractice suit was negligence of defendant-doctor's failure to discover slipped or slipping capital femur epiphysis in its early stages during examination of plaintiff, information about hospital records (how many patients with such a complaint had been treated in last five years) was not a controlling issue in the case; thus records were only collaterally involved, parol evidence was admissible to establish number of cases of epiphysis in records and trial court did not abuse its discretion in allowing such parol evidence. *Sundberg v. Hurley*, 89 N.M. 511, 554 P.2d 673 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

Evidence of contents of warranty documents. - A home seller's affidavit containing his sworn statement that the stucco on the house was covered by a "fully transferable, one-year warranty" was admissible as to the contents of the warranty document, where the warranty agreement or card had been lost. *Marcilla v. Norris Realty, N.M.*, 734 P.2d 256 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 453 to 457, 463 to 469, 852.

Admissibility of memorandum of telephone conversation, 94 A.L.R.3d 975.

Federal rules of evidence: admissibility, pursuant to Rule 1004(1) of other evidence of contents of writing, recording, or photograph, where originals were allegedly lost or destroyed, 83 A.L.R. Fed. 554.

32A C.J.S. Evidence §§ 776 to 784.

11-1005. Public records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 11-902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

COMPILER'S ANNOTATIONS

Cross-references. - For admissibility of abstracts of title, see 38-7-3 and 38-7-4 NMSA 1978.

Compiler's notes. - This rule is similar to Rule 1005 of the Federal Rules of Evidence.

This rule is deemed to have superseded former Rule 44(a) and (c), N.M.R. Civ. P. (now see Rule 1-044), concerning proof of official record.

Certified photostatic copy admissible. - Photostatic copy of original mechanics' lien, certified by county clerk, rather than claimed "supplemental lien," was admissible under former Rule 44(a)(3), N.M.R. Civ. P. (deemed superseded by this rule). *Fitzgerald v. Blueher Lumber Co.*, 82 N.M. 312, 481 P.2d 100 (1971).

Examined records admissible. - Examined copy of a public record whether made by person having or not having official custody thereof is admissible in evidence to prove its contents. Upon the same principles, original document offered by one who has examined it in its place of official custody is equally admissible. *State v. Miller*, 79 N.M. 117, 440 P.2d 792 (1968) (decided before enactment of this rule).

Foundation for admission of examined copy. - Examined copy may be admitted into evidence if person who made it or who compared it with original testifies that it is an accurate copy; therefore when dispatcher testified she made original entries and that copy was an accurate copy of original, and policeman that made copy testified he compared it with original and it was an accurate copy, there was a proper foundation for admission of log sheet. *State v. Sedillo*, 82 N.M. 287, 480 P.2d 401 (Ct. App. 1971) (decided before enactment of this rule).

Where party can establish by means of maker of copy that the record is an examined copy, it may be introduced in evidence. *Higgins v. Fuller*, 48 N.M. 218, 148 P.2d 575 (1944) (decided before enactment of this rule).

Examined copy of public record is admissible in evidence where person who made it or compared it with original certifies that it is a true copy. *Higgins v. Fuller*, 48 N.M. 218, 148 P.2d 575 (1944) (decided before enactment of this rule).

Other evidence of contents. - When certified copy or examined copy of public record cannot be produced, it may be necessary for party to (1) establish loss of original document and (2) prove contents thereof by oral testimony. *Higgins v. Fuller*, 48 N.M. 218, 148 P.2d 575 (1944) (decided before enactment of this rule).

Fact that certified copy of public record is obtainable does not preclude proof of contents of record by other proper evidence. *Higgins v. Fuller*, 48 N.M. 218, 148 P.2d 575 (1944) (decided before enactment of this rule).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 482, 486; 30 Am. Jur. 2d Evidence §§ 962, 963, 991, 1000, 1006, 1011 to 1013.

23 C.J.S. Criminal Law § 1025 et seq.; 32 C.J.S. Evidence §§ 626 to 629, 638, 640, 641; 82 C.J.S. Statutes §§ 85, 90, 450, 451, 457.

11-1006. Summaries.

The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 1006 of the Federal Rules of Evidence.

Qualified person may testify in regard to summary of voluminous records which that person has examined without necessity of requiring records themselves to be in court. *State v. Schrader*, 64 N.M. 100, 324 P.2d 1025 (1958) (decided before enactment of this rule).

Proper authentication of summary. - An affidavit in support of the defendants' motion for summary judgment, in properly authenticating a summary of medical records relating to the issue raised by the pleadings, (i.e., indifference to a prisoner's medical needs), was admissible. *Archuleta v. Goldman*, 107 N.M. 547, 761 P.2d 425 (Ct. App 1987).

Material which is not summary is not subject to availability requirement. - Evidence supports trial court's ruling that statistical evidence relating to quality of seller's goods over two-year period was not a summary and, therefore, not subject to requirement that originals be made available. *Kirk Co. v. Ashcraft*, 101 N.M. 462, 684 P.2d 1127 (1984).

Complaining party must object at trial or be prejudiced by testimony. - Reversal of embezzlement conviction was not proper where no showing was made that defendant ever sought ruling of trial court on matter of primary accounting records or that defendant was actually prejudiced in any sense because records were not actually introduced into evidence. *State v. Peke*, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962) (decided before enactment of this rule).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 458, 470.

Admissibility of evidence summaries under Uniform Evidence Rule 1006, 54 A.L.R.4th 971.

Admissibility of summaries of writings, recordings, or photographs under Rule 1006 of the Federal Rules of Evidence, 50 A.L.R. Fed. 319.

32 C.J.S. Evidence §§ 634, 646, 647; 32A C.J.S. Evidence §§ 753, 763.

11-1007. Testimony or written admission of party.

Contents of writings, recordings or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 1007 of the Federal Rules of Evidence.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 448, 450, 452, 453, 459.

32A C.J.S. Evidence § 837.

11-1008. Functions of judge and jury.

When the admissibility of other evidence of contents of writings, recordings or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the judge to determine in accordance with the provisions of Rule 11-104. However, when an issue is raised

A. whether the asserted writing ever existed, or

B. whether another writing, recording or photograph produced at the trial is the original, or

C. whether other evidence of contents correctly reflects the contents,

the issue is for the trier of fact to determine as in the case of other issues of fact.

Committee commentary. - This rule was changed to conform to federal rule. The amendment makes it clear that the principles of the rule on preliminary questions, Rule 11-104, apply to a determination of admissibility under this rule.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 1008 of the Federal Rules of Evidence.

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Evidence § 960.

Admissibility of photographs of stolen property, 94 A.L.R.3d 357.

48A C.J.S. Judges § 53 et seq.; 50 C.J.S. Juries § 1 et seq.; 88 C.J.S. Trial § 207.

Article 11

Miscellaneous Rules

11-1101. Applicability of rules.

A.

Courts. These rules apply to all the courts of the State of New Mexico in the proceedings and to the extent hereinafter set forth. The word "judge" in these rules includes magistrates, and masters and referees appointed by the court.

B.

Proceedings generally. These rules apply generally to civil actions, to criminal proceedings and to contempt proceedings except those in which the judge may act summarily.

C.

Rules of privilege. The rules with respect to privileges apply at all stages of all actions, cases and proceedings.

D.

Rules inapplicable. The rules (other than those with respect to privileges) do not apply in the following situations:

(1)

Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under Rule 11-104;

(2)

Miscellaneous proceedings. Proceedings for sentencing by the court without a jury, or granting or revoking probation; issuance of warrants for arrest, criminal summonses and search warrants; and proceedings with respect to release on bail or otherwise.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 1101 of the Federal Rules of Evidence.

The Rules of Evidence are applicable to preliminary examinations. - Witnesses may be cross-examined and their credibility and character tested. State v. Massengill, 99 N.M.

283, 657 P.2d 139 (Ct. App. 1983).

The Rules of Evidence are inapplicable to suppression hearings, since hearings on motions to suppress evidence obtained as the result of an allegedly illegal search and seizure require the determination of questions of fact preliminary to admissibility of evidence. *State v. Hensel*, 106 N.M. 8, 738 P.2d 126 (Ct. App.), cert. denied, 484 U.S. 958, 108 S. Ct. 358, 98 L. Ed. 2d 383 (1987).

For proper usage of hearsay in proceeding to revoke probation, a court looks to the law not involving these rules. *State v. Vigil*, 97 N.M. 749, 643 P.2d 618 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Applicability of rules of evidence in juvenile delinquency proceeding, 43 A.L.R.2d 1128.

Situations in which federal courts are governed by state law of privilege under Rule 501 of Federal Rules of Evidence, 48 A.L.R. Fed. 259.

Federal Rules of Evidence or state evidentiary rules as applicable in diversity cases, 84 A.L.R. Fed. 283.

21 C.J.S. Courts § 176.

11-1102. Title.

These rules may be known and cited as the New Mexico Rules of Evidence.

COMPILER'S ANNOTATIONS

Compiler's notes. - This rule is similar to Rule 1103 of the Federal Rules of Evidence.