Rules of Evidence

ARTICLE 1
General Provisions

11-101. 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.

[As amended, effective December 1, 1993.]

ANNOTATIONS

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

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

The 1993 amendment, effective December 1, 1993, deleted "and title" following "Scope" in the rule heading, deleted the Paragraph A designation and the paragraph heading "Scope of rules", and deleted Paragraph B which provided a short title and style of citation.

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 § 1 et seq.

11-102. Purpose and construction.

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-102 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes.

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. Bludworth*, 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), overruled on other grounds, *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 749 P.2d 1105 (1988).

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. **Preserving a claim of error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and

(1) if the ruling admits evidence, the party, on the record

(a) timely objects or moves to strike, and

(b) states the specific ground, unless it was apparent from the context, or

(2) if the ruling excludes evidence, the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

B. **Not needing to renew an objection or offer of proof.** Once the court rules definitively on the record – either before or at trial – a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

C. **Court's statement about the ruling; directing an offer of proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

D. **Preventing the jury from hearing inadmissible evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

E. **Taking notice of plain error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

[Approved, effective July 1, 1973; as amended, effective December 1, 1993; as amended by Supreme Court Order 06-8300-25, effective December 18, 2006; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-103 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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 NMRA, which established the harmless error rule for evidentiary issues and Paragraph C of Rule 1-043 NMRA, which related to creating a record of excluded evidence.

Cross references. — For making objections known to trial court, *see* Rules 1-046 and 12-216 NMRA.

For formal exceptions not being required, *see* Rules 1-046 and 12-216 NMRA.

The 1993 amendment, effective December 1, 1993, substituted "court" for "judge" and made gender neutral changes throughout the rule.

The 2006 amendment, approved by Supreme Court Order 06-8300-25 effective December 18, 2006, added the second sentence of Subparagraph (2) of Paragraph A relating to the preservation of error.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes.

I. GENERAL CONSIDERATION.

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).

Paragraph C encourages the use of bench conferences to prevent inadmissible evidence from coming before the jury. *State v. Reynolds*, 111 N.M. 263, 804 P.2d 1082 (Ct. App. 1990).

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 Cnty. Comm'n*, 85 N.M. 794, 518 P.2d 774 (1974), overruled on other grounds, *El Dorado at Santa Fe, Inc. v. Bd. of Cnty. 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).

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).

Right not violated if 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).

Improper admission of expert testimony. — Since the verdict awarded an amount close to the figure given by the expert, there was a high probability that the expert's testimony influenced the verdict. Since the improper admission of his testimony affected a "substantial right" of the city, in a condemnation action, the court had to set aside the judgment. *City of Albuquerque v. PCA-Albuquerque #19*, 115 N.M. 739, 858 P.2d 406 (1993).

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).

Error in the admission of evidence in a criminal trial must be declared prejudicial and not harmless if there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Clark v. State*, 112 N.M. 485, 816 P.2d 1107 (1991).

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. Schs.*, 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).

Alleged error harmless 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).

Improper evidence used for impeachment purposes. — Where the improper evidence has been used for impeachment purposes, not only does the error permit the jury to consider the substantive effect of the evidence itself; it also discredits the testimony of the witness, including, of course, the defendant if he or she has testified. *Clark v. State*, 112 N.M. 485, 816 P.2d 1107 (1991).

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. NMRA.

Trial judge's treatment of inadmissible evidence may defect objection. — 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), overruled on other grounds, *State v. Reynolds*, 98 N.M. 527, 650 P.2d 811 (1982).

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).

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).

Where defense counsel made the tactical decision that, in the absence of live testimony by a defendant's wife, the prior testimony of his wife would be advantageous to the defendant, there was neither plain error nor fundamental error in admitting the testimony, even though the evidence would have been inadmissible if either party had objected. *State v. Crislip*, 110 N.M. 412, 796 P.2d 1108 (Ct. App. 1990), overruled on other grounds, *Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993).

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).

Failure to timely object. — Where defendant made an objection to the expertise of a social worker after the social worker had already testified about several types of situations and circumstances that would likely make a child recant previous testimony, the jury had already heard a great deal of evidence about recantation and the objection was not timely. *State v. Neswood*, 2002-NMCA-081, 132 N.M. 505, 51 P.3d 1159, cert. denied, 132 N.M. 551, 52 P.3d 411 (2002).

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).

Review where evidence excluded. — Although an appellate court is not required to review every sua sponte exclusion of evidence that is made without a timely objection of counsel, Paragraph A of this rule and Rule 12-216 clearly permit review in a case where the substantial rights of defendant were affected by the trial court's ruling and the substance of the evidence to be admitted was made known or was apparent to the court. *State v. Balderama*, 2004-NMSC-008, 135 N.M. 329, 88 P.3d 845.

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 NMRA). *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 NMRA, 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).

The general rule that there is no error in a ruling approving the admission of evidence unless the party opposing the evidence timely objects and states the specific ground of the objection did not apply in a case when the trial court excluded the evidence in question rather than admitting it. *Padilla v. Hay*, 120 N.M. 220, 900 P.2d 969 (Ct. App. 1995).

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 NMRA), 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. *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 NMRA), relating to other crimes, wrongs or acts, and Rule 608 (now 11-608 NMRA), 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 that third person may have murdered victim to get out from under debt was insufficient to determine whether district court abused its discretion in excluding it, since there was no evidence that third person heard statement so as to make it admissible on issue of motive. *State v. Rosales*, 2004-NMSC-022, 136 N.M. 25, 94 P.3d 768.

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).

When trial judge feels compelled to exclude evidence sua sponte, the parties should first be informed of the judge's specific concerns, and this should be done on the record, before excluding the evidence, and outside the presence of the jury. *State v. Balderama*, 2004-NMSC-008, 135 N.M. 329, 88 P.3d 845.

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).

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 NMRA), 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).

Denial of offered polygraph expert's testimony improper. — It was an abuse of discretion to exclude polygraph evidence without permitting defendant's offer of proof or listening to the tape of the pretest interview. *State v. Aragon*, 116 N.M. 291, 861 P.2d 972 (Ct. App. 1993).

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 (1974).

"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).

To the extent that New Mexico common law has stated or intimated that the plain error rule "applies only to errors in evidentiary rulings" it is overruled; the plain error rule hereafter applies to "evidentiary matters" in general, regardless of their specific preservation for appeal. *State v. Lucero*, 116 N.M. 450, 863 P.2d 1071 (1993).

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); *State v. Hennessy*, 114 N.M. 283, 837 P.2d 1366 (Ct. App. 1992).

Doubts concerning validity of verdict required. — Even if defendant did not raise proper objections at trial, he may be entitled to relief if the errors of which he complains on appeal constituted plain error. In any case, the appellate court must be convinced that admission of the testimony constituted an injustice that creates grave doubts concerning the validity of the verdict. *State v. Barraza*, 110 N.M. 45, 791 P.2d 799 (Ct. App. 1990); *State v. Contreras*, 120 N.M. 486, 903 P.2d 228 (1995).

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).

Comment on defendant's silence plain error 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).

In proceeding to terminate mother's parental rights, where the record was insufficient to determine whether the mother, who was mentally impaired, had waived any privilege she may have had with regard to communications made to her psychologist, and since the waiver issue was not raised at the trial level, under the plain error rule the court's order terminating parental rights was upheld on the grounds that there was clear and convincing evidence other than the allegedly confidential testimony supporting the determination that the mother was an unfit parent. *State ex rel. Human Servs. Dep't*, 113 N.M. 201, 824 P.2d 341 (Ct. App. 1991).

No plain error 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).

No plain error 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 NMRA 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).

No plain error 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 NMRA). *State v. Carrillo*, 88 N.M. 236, 539 P.2d 626 (Ct. App. 1975).

No plain error where prosecutor's remarks in closing were not evidence. — The principle of plain error applies only to error in the presentation of evidence. Thus, while the prosecutor's questioning of defendant could be analyzed as plain error, the prosecutor's remarks in closing regarding the defendant's silence were not evidence and therefore were not subject to a plain error analysis. *State v. Hennessy*, 114 N.M. 283, 837 P.2d 1366 (Ct. App. 1992).

Preclusion of right to cross-examination. — Under the proper circumstances, preclusion of the right to cross-examine may be plain error requiring reversal despite the lack of objection or offer of proof. *Empire West Cos. v. Albuquerque Testing Labs, Inc.*, 110 N.M. 790, 800 P.2d 725 (1990).

Termination of cross-examination did not rise to the level of plain error requiring reversal, where party had the opportunity to exercise extensively that right without substantial interference and no prejudice or substantial miscarriage of justice appeared from the record. *Empire West Cos. v. Albuquerque Testing Labs, Inc.*, 110 N.M. 790, 800 P.2d 725 (1990).

Judge's questioning of witness. — Where a judge exceeded the bounds of Rule 11-614 NMRA, in questioning a witness and commenting upon the evidence, she substantially conveyed a position concerning the issues before the jury and the fairness of the trial was vitiated to the extent that it constituted plain error. *State v. Paiz*, 1999-NMCA-104, 127 N.M. 776, 987 P.2d 1163.

Exclusion of a witness' grand jury testimony was not plain error where the exclusion did not hamper defendant's right to put forth her defense, nor taint the validity of the verdict rendered in the case. *State v. Baca*, 1997-NMSC-045, 124 N.M. 55, 946 P.2d 1066.

Violation of Rule 104 (now 11-104 NMRA) 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*, 109 N.M. 21, 781 P.2d 293 (1989).

Defendant cannot challenge memorandum on appeal where no objection 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).

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. — 5 Am. Jur. 2d Appellate Review §§ 622, 713 et seq.; 58 Am. Jur. 2d New Trial §§ 129, 131, 132; 75 Am. Jur. 2d Trial § 321 et seq.

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.

4 C.J.S. Appeal and Error § 202 et seq.; 66 C.J.S. New Trial § 40; 88 C.J.S. Trial §§ 115, 117, 123, 133, 144 to 146.

11-104. Preliminary questions.

A. **In general.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

B. **Relevance that depends on a fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

C. **Conducting a hearing so that the jury cannot hear it.** The court must conduct any hearing on a preliminary question so that the jury cannot hear it if

(1) the hearing involves the admissibility of a confession,

(2) a defendant in a criminal case is a witness and so requests, or

(3) justice so requires.

D. **Cross-examining a defendant in a criminal case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

E. **Evidence relevant to weight and credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-104 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

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

The 1993 amendment, effective December 1, 1993, added "or when an accused is a witness and so requests" at the end of Paragraph C, and substituted "court" for "judge" and made gender neutral changes throughout the rule.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes.

ANNOTATIONS

Failure to timely provide discovery. — Where, in an insurance bad faith case, the insured failed to comply with the district court's scheduling order and failed to disclose the substance and grounds for an expert's proposed testimony; the insured never provided the insurer an expert report; the insured submitted a witness list that did not include the expert's professional qualifications or a summary of the expert's anticipated testimony; the insured furnished the expert's affidavit and curriculum vitae belatedly as an attachment to the insured's response to the insurer's motion for summary judgment; the expert's affidavit recounted the expert's background and experience of decades

examining insurance bad faith cases, and indicated that the expert had reviewed the pleadings, documents, and depositions in the case; the insured furnished the affidavit to the insurer more than a month before trial and a month after the close of discovery; and the district court ordered the insured to make the expert available for a pre-trial deposition and to pay the costs of the deposition, the district court did not err in denying the insurer's motion to exclude the testimony of the insured's expert at trial. *Am. Nat'l. Prop. & Cas. Co. v. Cleveland,* 2013-NMCA-013, 293 P.3d 954.

The scientific aspects of a breathalyzer machine are foundational issues. — The scientific reliability and functionality of a breathalyzer machine, which are foundational issue that are only subject to challenge through expert testimony, are non-testimonial facts and do not implicate the confrontation clause. *State v. Anaya*, 2012-NMCA-094, 287 P.3d 956, cert. denied, 2012-NMCERT-007.

Scientific accuracy and reliability of a breathalyzer machine. — Where the court admitted the results of defendant's breath alcohol test results after police officers testified regarding the procedure for administering defendant's breathalyzer test, the regulations and procedures for certifying and calibrating the breathalyzer machine, the officers' belief that the breathalyzer machine was working properly and that the test was properly administered, and the officers' certification to administer breathalyzer tests and experience administering breathalyzer tests; the officers testified that they had no knowledge of the breathalyzer machine's inner workings; and defendant claimed that defendant's confrontation rights had been violated because the breath test results had been admitted without testimony from a witness, whom defendant could cross-examine, as to the scientific accuracy and reliability of the breathalyzer machine, the confrontation clause did not apply because the scientific aspects of the breathalyzer machine are non-testimonial facts. *State v. Anaya*, 2012-NMCA-094, 287 P.3d 956, cert. denied, 2012-NMCERT-007.

Parol evidence rule did not prevent enforcement of premium payment agreement. — Where the insurer required policyholders who wanted to pay premiums in monthly installments to enter into a premium payment agreement with a separate corporation before the insurer would issue a policy that allowed monthly payments; the payee corporation imposed a monthly service charge to cover the increased costs of monthly billing and payment; the policy issued by the insurer did not specify any service charge to be paid by policyholders who bought insurance on a monthly basis; although the policy declaration provided that no fees were payable with respect to the policy, it referred to the premium payment agreement with the payee corporation; and the policy included a merger clause and an endorsement amending the policy period to one calendar month, continuing for successive monthly periods if the premium was paid when due, the policy was only partially integrated and the parol evidence rule did not prevent the proof and enforcement of the premium payment agreement. *Nellis v. Farmers Ins. Co. of Ariz.*, 2012-NMCA-020, 273 P.3d 143, cert. denied, 2011-NMCERT-011.

Admissibility of confessions to establish the *corpus delicti*. — The district court should determine at a preliminary hearing whether the state has evidence that supports the essential facts admitted in a defendant's confession. First, the court assesses whether the confession's trustworthiness may be established by the state. Second, the court must ensure that the state has evidence that can corroborate the existence of the alleged loss or injury. At the preliminary hearing, the court can use inadmissible evidence to determine the trustworthiness of a confession. Admission of the confession at trial is conditioned upon the state adducing independently admissible evidence at trial that can contribute to establishing the *corpus delicti*. At the preliminary hearing, the court should determine whether the state can provide admissible evidence supporting the *corpus delicti*. *State v. Hardy*, 2012-NMCA-005, 268 P.3d 1278, cert. granted, 2012-NMCERT-001.

Sufficient foundation for BAT card admissibility. — The arresting officer's testimony that he saw a certification sticker on the breathalyzer indicating that the machine's certification was current was sufficient foundation for the breath alcohol test card's admissibility. *State v. Martinez*, 2007-NMSC-025, 141 N.M. 713, 160 P.3d 894, overruling *State v. Lizzol*, 2006-NMCA-130, 141 N.M. 403, 156 P.3d 694.

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).

Competency of child at a meaningful time. — Where a defendant was charged with criminal sexual contact and sexual penetration of a child under the age of 13, and the determination of the child's competency by the district court was made without adequate inquiry into the elements of competency at a meaningful time, the appropriate remedy was to remand for a competency hearing. *State v. Macias*, 110 N.M. 246, 794 P.2d 389 (Ct. App. 1990).

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).

Foundation for admitting telephone conversations. *State v. Garcia*, 110 N.M. 419, 796 P.2d 1115 (Ct. App. 1990).

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).

"Preliminary matters" refer to evidentiary issues that are decided by the judge. *State v. Delgado*, 112 N.M. 335, 815 P.2d 631 (Ct. App. 1991).

Testimony "upon a preliminary matter". — Testimony presented to the jury for its consideration is not testimony "upon a preliminary matter". *State v. Delgado*, 112 N.M. 335, 815 P.2d 631 (Ct. App. 1991).

Applicability of Paragraph D. — Paragraph D does not apply unless the testimony relates solely to a preliminary matter. *State v. Delgado*, 112 N.M. 335, 815 P.2d 631 (Ct. App. 1991).

All that Paragraph D provides is that when the defendant's testimony is limited to the purpose of assisting the judge in determining whether evidence should be admissible,

the defendant is not subject to cross-examination on other issues. *State v. Delgado*, 112 N.M. 335, 815 P.2d 631 (Ct. App. 1991).

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).

For annual survey of New Mexico law of evidence, 19 N.M.L. Rev. 679 (1990).

For note, "The Admission of Polymerase Chain Reaction DNA Evidence in New Mexico - State v. Sills," see 29 N.M.L. Rev. 429 (1999).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 523; 5 Am. Jur. 2d Appellate Review § 601; 75 Am. Jur. 2d Trial §§ 324, 413, 414, 418; 75A Am. Jur. 2d Trial §§ 741, 742.

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.

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 125, 132 A.L.R. Fed. 415.

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.

Sufficiency of corroboration of confession for purpose of establishing corpus delicti as question of law or fact, 33 A.L.R.5th 571.

Admissibility of evidence of voice identification of defendant as affected by allegedly suggestive voice lineup peocedures, 55 A.L.R.5th 423.

Admissibility of evidence relating to accused's attempt to commit suicide, 73 A.L.R.5th 615.

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.

Duty of court, in federal criminal prosecution, to conduct inquiry into voluntariness of accused's statement - modern cases, 132 A.L.R. Fed. 415.

4 C.J.S. Appeal and Error §§ 202, 207, 217; 5 C.J.S. Appeal and Error § 824; 88 C.J.S. Trial §§ 97, 273.

11-105. Limiting evidence that is not admissible against other parties or for other purposes.

If the court admits evidence that is admissible against a party or for a purpose – but not against another party or for another purpose – the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

[As renumbered, effective April 1, 1976; as amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-105 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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

The 1993 amendment, effective December 1, 1993, substituted "the court" for "the judge" near the middle of the rule.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

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 was not required 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).

Defendant who failed to request a limiting instruction as to testimony from codefendant's preliminary hearing that was not admissible against defendant was precluded from arguing on appeal that introduction of the testimony at trial violated his right to confront the witness. *State v. Gonzales*, 113 N.M. 221, 824 P.2d 1023 (1992).

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 § 321 et seq.

88 C.J.S. Trial §§ 87, 130 to 132.

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

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time.

[As renumbered, effective April 1, 1976; as amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-106 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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

The 1993 amendment, effective December 1, 1993, substituted "require the introduction at that time of" for "require him at that time to introduce" near the middle of the rule.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes.

Letters written in jail. — Where defendant was charged with murdering the victim; the court admitted into evidence three letters that defendant wrote while in custody in which defendant admitted attacking and killing the victim without remorse; and the court refused to admit five letters introduced by defendant that arguably indicated that defendant had expressed remorse for the killing and made claims to have acted in self-defense, the rule of completeness did not apply to the letters defendant introduced because fact that the five letters were not admitted did not distort the context of the letters that were admitted. *State v. Guerra,* 2012-NMSC-014, 278 P.3d 1031.

Rule of completeness not applicable. — Where defense counsel attempted to impeach a witness with the minor inconsistencies between the witness's in-court testimony and the witness's videotaped statement to police officers by asking the witness whether the witness remembered telling the police certain details of the killing of the victim and where the state failed to show that the entire videotaped statement of the witness was relevant and either qualified or explained the portion of the statement relied

upon by defense counsel during cross-examination, the videotaped statement was not admissible under the rule of completeness. *State v. Barr*, 2009-NMSC-024, 146 N.M. 301, 210 P.3d 198.

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. 1981), cert. denied, 95 N.M. 669, 625 P.2d 1186, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), overruled on other grounds, *State v. Olguin*, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

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. 1981), cert. denied, 95 N.M. 669, 625 P.2d 1186, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), overruled on other grounds, *State v. Olguin*, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

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).

Probative value weighed against potential confusion. — Trial court did not abuse its discretion in refusing to admit a portion of a recorded phone conversation of defendant because its probative value was substantially outweighed by its potential to confuse the jury. *State v. Lucero*, 1998-NMSC-044, 126 N.M. 552, 972 P.2d 1143.

Evidence admissible to impeach misleading statement. — A videotape proffered to impeach the statement of the victim of attempted murder that "they killed me" should have been admitted under the rule of completeness since the videotape placed the victim's statement in context and showed that when she said "they" she meant one particular person. *State v. Baca*, 120 N.M. 383, 902 P.2d 65 (1995).

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 § 357 et seq.

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.

32A C.J.S. Evidence § 980.

11-107. Comment by court.

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

[As renumbered, effective April 1, 1976; as amended, effective December 1, 1993.]

Committee commentary. — 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 NMRA.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

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.

The 1993 amendment, effective December 1, 1993, substituted "court" for "judge" in the rule heading and substituted "court" for "judge" near the beginning of the rule.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, replaced the committee commentary in its entirety.

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

B. **Kinds of facts that may be judicially noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it

(1) is generally known within the court's territorial jurisdiction,

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned, or

(3) notice is provided for by statute.

C. **Taking notice.** The court

(1) may take judicial notice on its own, or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

D. **Timing.** The court may take judicial notice at any stage of the proceeding.

E. **Opportunity to be heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

F. **Instructing the jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

[As amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-201 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility. Paragraph B(3) is not in the analogous federal rule, but has been incorporated from the previous version of New Mexico's rule.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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 NMRA).

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

For irrigation districts cooperating with federal reclamation laws, *see* Section 73-10-20 NMSA 1978.

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

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

The 1993 amendment, effective December 1, 1993, deleted "judge or" near the beginning of Paragraphs C and D and substituted "court" for "judge" in the first sentence of Paragraph G.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes.

I. GENERAL CONSIDERATION.

Municipal ordinances are law and Rule 11-201 NMRA does not apply to the introduction of municipal ordinances into a case. *City of Aztec v. Gurule*, 2010-NMSC-006, 147 N.M. 693, 228 P.3d 477, overruling *Muller v. City of Albuquerque*, 92 N.M. 264, 587 P.2d 42 (1978); *Coe v. City of Albuquerque*, 81 N.M. 361, 467 P.2d 27 (1970); and *Gen. Servs. Corp. v. Bd. of Comm'rs of Bernalillo Cnty.*, 75 N.M. 550, 408 P.2d 51 (1965).

Rule does not apply to municipal ordinances. — Where defendant was convicted in municipal court of aggravated DWI contrary to a municipal ordinance; defendant appealed to district court; at the trial de novo in district court, the municipality failed to introduce the municipal ordinance into evidence; and the district court properly denied defendant’s motion to dismiss on the grounds that the municipality did not prove its case because it failed to introduce the municipal ordinance into evidence. *City of Aztec v. Gurule*, 2010-NMSC-006, 147 N.M. 693, 228 P.3d 477, overruling *Muller v. City of Albuquerque*, 92 N.M. 264, 587 P.2d 42 (1978); *Coe v. City of Albuquerque*, 81 N.M. 361, 467 P.2d 27 (1970); and *Gen. Servs. Corp. v. Bd. of Comm'rs of Bernalillo Cnty.*, 75 N.M. 550, 408 P.2d 51 (1965).

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).

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), overruled on other grounds, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 954 P.2d 93.

Judicial notice properly taken 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. N.M. State Hwy. Comm'n*, 82 N.M. 550, 484 P.2d 770 (Ct. App. 1971).

Judicial notice properly taken of 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), overruled on other grounds, *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

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).

No judicial notice of 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).

No judicial notice of 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).

No judicial notice of 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).

No judicial notice of 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.

Termination of parental rights proceedings. — If the district court feels it necessary to take judicial notice of all or part of a case file in a termination of parental rights proceeding, the court should state what information, specifically, is being judicially noticed and how the court intends to use the judicially noticed information. *State of N.M. ex rel. CYFD v. Brandy S.*, 2007-NMCA-135, 142 N.M. 705, 168 P.3d 1129.

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).

Ordinances not noticed 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 (Section 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 Section 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).

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).

Action of constitutional convention may be noticed. — 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).

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 § 24 et seq.

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.

Judicial notice of attorney customs and practices, 61 A.L.R.5th 707.

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.

What constitutes "adjudicative facts" within meaning of Rule 201 of Federal Rules of Evidence concerning judicial notice of adjudicative facts, 150 A.L.R. Fed. 543.

4 C.J.S. Appeal and Error §§ 572, 573; 31A C.J.S. Evidence §§ 8 et seq., 61 et seq., 70 et seq.; 35A C.J.S. Federal Civil Procedure § 442.

ARTICLE 3
Presumptions

11-301. Presumptions in civil cases generally.

In a civil case, unless a state statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

[As amended, effective July 1, 1980; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-201 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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

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

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule, rewrote the rule to make stylistic changes.

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

Effect of a presumption on appellate review of sufficiency of evidence. — A presumption once raised in both jury and non-jury trials continues to have evidentiary force, regardless of the contradictory evidence presented by the party against whom it is employed. Although the raising of the presumption does not mandate any final result at trial, if the fact finder concludes that the party raising the presumption has prevailed and the appellate court finds sufficient evidence to support the raising of the presumption, the appellate court will not set aside the fact finder's conclusion on appeal. *Chapman v. Varela*, 2009-NMSC-041, 146 N.M. 680, 213 P.3d 1109.

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); *Montoya v. Torres*, 113 N.M. 105, 823 P.2d 905 (1991).

"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).

This rule eliminated the "bursting bubble" theory of presumptions, and a presumption now retains evidentiary effect throughout the trial, so as to permit the fact finder to draw

an inference of the presumed fact from proof of the basic or predicate fact. *Roberts Oil Co. v. Transamerica Ins. Co.*, 113 N.M. 745, 833 P.2d 222 (1992).

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 of his employment but was not required to make this presumption, and upon weighing the evidence, could properly resolve the issue against employee. *Mortg. 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.), rev'd on other grounds, 106 N.M. 467, 745 P.2d 375 (1987).

Presumption that settlement creates accord and satisfaction. — While a settlement is presumed to create an accord and satisfaction, the presumption may be rebutted if the appropriate elements are not present, most significantly a meeting of the minds. *Bennett v. Kisluk*, 112 N.M. 89, 814 P.2d 89 (1991).

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), overruled on other grounds, *Ellingwood v. N.N. Investors Life Ins. Co.*, 111 N.M. 301, 805 P.2d 70 (1991).

Presumption that move out of state is in best interests of the children. — A sole custodian seeking to relocate with a child is entitled to a presumption that the move is in the best interests of the child, and the burden is on the noncustodial parent to show that the move is against those interests or motivated by bad faith on the part of the custodial parent. *Jaramillo v. Jaramillo*, 113 N.M. 57, 823 P.2d 299 (1991).

Presumption of adverse use for prescriptive easement. — In plaintiff recreational trail users' appeal of a district court judgment that dismissed with prejudice their claims to a public easement by prescription over defendant landowners' property, while the trial court never explicitly found the "express permission" required to avoid the presumption of adverse use, it did find that the use of the property for purposes such as walking, jogging, and bicycling by neighborhood property owners, their neighbors, and invitees had always been permissive, and presumptions did not dictate a result in a civil trial under this rule. *Algermissen v. Sutin*, 2003-NMSC-001, 133 N.M. 50, 61 P.3d 176.

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 § 181 et seq.

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.

Adverse presumption or inference based on party's failure to produce or question examining doctor - modern cases, 77 A.L.R.4th 463.

Adverse presumption or inference based on party's failure to produce or examine that party's attorney - modern cases, 78 A.L.R.4th 571.

Adverse presumption or inference based on party's failure to produce or examine witness who was occupant of vehicle involved in accident - modern cases, 78 A.L.R.4th 616.

Adverse presumption or inference based on party's failure to produce or examine spouse - modern cases, 79 A.L.R.4th 694.

Adverse presumption or inference based on party's failure to produce or examine friend - modern cases, 79 A.L.R.4th 779.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse - modern cases, 80 A.L.R.4th 337.

Adverse presumption or inference based on party's failure to produce or examine witness with employment relationship to party - modern cases, 80 A.L.R.4th 405.

Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel - modern cases, 81 A.L.R.4th 872.

Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue - modern cases, 81 A.L.R.4th 939.

31A C.J.S. Presumptions § 130 et seq.

11-302. Presumptions in criminal cases.

A. **Scope.** Except as otherwise provided by statute, in criminal cases, presumptions against an accused are governed by this rule.

B. **Submission to jury.** The court shall not direct the jury to find a presumed fact against the accused. When a presumed fact is an element of the offense or negates a defense, the court may submit the presumed fact for the jury's consideration only if a reasonable juror could find the presumed fact proved beyond a reasonable doubt. When the presumed fact is not an element of the offense or does not negate a defense, its existence may be submitted to the jury only if a reasonable juror could find that it is supported by substantial evidence.

C. **Instructing the jury.** If the presumed fact is an element of the offense or negates a defense, the court shall instruct the jury that its existence must be proved beyond a reasonable doubt. If the presumed fact is not an element of the offense or does not negate a defense, the court shall instruct the jury that it may, but is not required to, accept the presumed fact, provided the jury finds that it is supported by substantial evidence.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — There is no federal equivalent to this rule, but the committee amended the language of the rule in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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

For uniform jury instruction on statutory presumptions in criminal cases, *see* UJI 14-5061 NMRA.

The 1993 amendment, effective December 1, 1993, substituted "court" for "judge" throughout the rule.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes.

A statutory presumption does not change the burden of proof. — An evidentiary presumption does not change the state's burden to establish the essential elements of the crime without reference to the presumption itself. When the legislature has directed

that one or more basic facts may be considered prima facie evidence of a presumed fact, the trial court must test the sufficiency of the evidence of the presumed fact before the jury may be instructed that the presumed fact may be inferred from the basic fact or facts. *State v. Trossman*, 2009-NMSC-034, 146 N.M. 462, 212 P.3d 350, overruling *In re Shaneace L.*, 2001-NMCA-005, 130 N.M. 89, 18 P.3d 330.

Statutory presumption of child abuse by endangerment. — Where the defendant was convicted of negligently permitting child abuse by endangerment under Section 30-6-1 NMSA 1978 after the defendant was arrested in a house where chemicals and equipment involved with methamphetamine production were found, the trial court had to be satisfied that sufficient evidence had been presented to prove endangerment before the trial court could give an instruction in accordance with UJI 14-5061 NMRA based on the presumption of endangerment created by Section 30-6-1 NMSA 1978. *State v. Trossman*, 2009-NMSC-034, 146 N.M. 462, 212 P.3d 350, overruling *In re Shaneace L.*, 2001-NMCA-005, 130 N.M. 89, 18 P.3d 330.

Instruction based on the statutory presumption of child abuse by endangerment. — Where the defendant was convicted of negligently permitting child abuse by endangerment after the defendant was arrested in a house where chemicals and equipment involved with methamphetamine production were found and where the trial court, in addition to an instruction on the essential elements of child abuse by endangerment, instructed the jury, based on the presumption created by Section 30-6-1 NMSA 1978, that “Evidence that demonstrates that a child has been knowingly, intentionally or negligently allowed to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance may be deemed evidence of abuse of the child”, the instruction was erroneous because a reasonable juror could have concluded that he or she was not required to find the essential element of endangerment beyond a reasonable doubt. *State v. Trossman*, 2009-NMSC-034, 146 N.M. 462, 212 P.3d 350, overruling *In re Shaneace L.*, 2001-NMCA-005, 130 N.M. 89, 18 P.3d 330.

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 Section 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 Section 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 Section 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 § 236 et seq.; 75B Am. Jur. 2d Trial § 1293 et seq.

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.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial - modern criminal cases, 76 A.L.R.4th 812.

Adverse presumption or inference based on party's failure to produce or examine that party's attorney - modern cases, 78 A.L.R.4th 571.

Adverse presumption or inference based on party's failure to produce or examine spouse - modern cases, 79 A.L.R.4th 694.

Adverse presumption or inference based on party's failure to produce or examine friend - modern cases, 79 A.L.R.4th 779.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse - modern cases, 80 A.L.R.4th 337.

Adverse presumption or inference based on party's failure to produce or examine witness with employment relationship to party - modern cases, 80 A.L.R.4th 405.

Adverse presumption or inference based on state's failure to produce or examine informant in criminal prosecution - modern cases, 80 A.L.R.4th 547.

Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel - modern cases, 81 A.L.R.4th 872.

Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue - modern cases, 81 A.L.R.4th 939.

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. Test for relevant evidence.

Evidence is relevant if

A. it has any tendency to make a fact more or less probable than it would be without the evidence, and

B. the fact is of consequence in determining the action.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-401 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

I. GENERAL CONSIDERATION.

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

Breath alcohol content results. — Where defendant was convicted of driving under the influence of intoxicating liquor under Subsection A of Section 66-8-102 NMSA 1978; defendant's breath alcohol content was tested approximately forty-seven minutes after defendant was stopped; and there was no evidence relating defendant's blood alcohol content results of .07 and .08 back to the time of driving, the breath alcohol content results showed that defendant had alcohol in defendant's system and were relevant evidence. *State v. Pickett*, 2009-NMCA-077, 146 N.M. 655, 213 P.3d 805.

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).

II. SPECIFIC APPLICATIONS.

Defendant's accusations against the victim. — Where defendant was charged with the first degree murder of the victim; defendant was embittered by the victim's rejection of defendant and the breakup of the relationship between defendant and the victim; and defendant made accusations to the ex-wife of the victim and police that the victim intended to sodomize the victim's son, tie the victim's son up, kill the victim's son, and drop the victim's son by a river, defendant's accusations were relevant evidence to prove defendant's motives and malicious intent toward the victim. *State v. Flores*, 2010-NMSC-002, 147 N.M. 542, 226 P.3d 641.

Evidence of methamphetamine manufacturing process. — Where the state's witness testified using a PowerPoint presentation that described the manufacture methamphetamine; the PowerPoint included a manufacturing step that involved anhydrous ammonia; no anhydrous ammonia was not found in the defendant's possession; the witness acknowledged that no anhydrous ammonia was found in the defendants' possession; and the witness testified that it was not necessary to have anhydrous ammonia to manufacture methamphetamine, the trial court did not abuse its discretion in permitting the entire manufacturing process to be described as context for the items that were found in the defendant's possession. *State v. Vance*, 2009-NMCA-024, 145 N.M. 706, 204 P.3d 31, cert. denied, 2009-NMCERT-001.

Evidence of lawful business dealings. — Defendant may introduce evidence of lawful business dealings to rebut the prosecution's evidence of fraudulent intent under this rule. *State v. Mercer*, 2005-NMCA-023, 137 N.M. 36, 106 P.3d 1283, cert. denied, 2005-NMCERT-002.

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).

Post-traumatic stress disorder testimony admissible. — Post-traumatic stress disorder (PTSD) testimony is admissible to show sexual abuse, as potentially probative of whether in fact a rape occurred, because it is grounded in scientific knowledge, assists the trier of fact and is not unduly prejudicial under Rule 11-403 NMRA. PTSD

however is inadmissible as to credibility of victim, defendant identification and causality of symptoms. *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993).

Rape and kidnapping conviction relevant to civil harassment suit. — In tort action against employer based on sexual harassment, evidence of harasser's conviction for kidnapping and rape was relevant to show employer's knowledge of and reaction to employee's conduct. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

Rape trauma syndrome testimony inadmissible. — Expert testimony concerning rape trauma syndrome is inadmissible mainly because it is not part of the specialized manual DSMIII-R used by the American Psychiatric Association. *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993).

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 defendant's wealth. — In a drug trafficking prosecution, evidence of unexplained wealth may be highly relevant. *State v. Rael*, 1999-NMCA-068, 127 N.M. 347, 981 P.2d 280, cert. denied, 127 N.M. 390, 981 P.2d 1208 (1999).

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).

Blood-alcohol content of other driver, passenger not relevant. — In trial of driver for vehicular homicide and great bodily injury by vehicle while under the influence, the trial court did not err in excluding evidence of the blood-alcohol concentration of the driver of the struck motorcycle, which was below the legal limit for intoxication, and that of the motorcycle's passenger, since neither fact was relevant to the case. *State v. Telles*, 1999-NMCA-013, 126 N.M. 593, 973 P.2d 845.

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).

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. 194, 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).

Photograph of victim before victim was medically attended to was relevant because it depicted the extent of the victim's injuries and it made more probable than not the potential of great bodily harm, which is an element of aggravated battery for which the defendant was on trial. The photograph was also relevant because it illustrated the treating physician's testimony concerning the injuries to the victim. *State v. Pettigrew*, 116 N.M. 135, 860 P.2d 777 (Ct. App. 1993).

Photographs competent evidence 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).

Newspaper clippings admissible. — Newspaper clippings with a sizeable headline concerning the crime found in defendant's home are admissible into evidence. *State v. Vargas*, 117 N.M. 534, 873 P.2d 280 (Ct. App. 1994).

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 Sections 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).

Drawing of stick figure in child sexual abuse case. — In a child sexual abuse case, where the court drew a stick figure to help the victim testify, the drawing was relevant, and the court's leading questions to the victim tended to clarify the evidence. *State v. Benny E.*, 110 N.M. 237, 794 P.2d 380 (Ct. App. 1990).

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), overruled on other grounds, *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 824 P.2d 293 (1992).

Subsequent remedial measures. — The prohibition against admitting evidence of subsequent remedial measures, stated in Rule 11-407 NMRA, does not apply to measures taken by non-defendants. Thus, evidence that an employer, subsequent to an injury, added a safety device next to a machine was highly relevant in an action by an employee against the manufacturer of the machine and any prejudice to the manufacturer was mitigated by the court's instructions to the jury. *Couch v. Astec*

Indus., Inc., 2002-NMCA-084, 132 N.M. 631, 53 P.3d 398, cert. denied, 132 N.M. 551, 52 P.3d 411 (2002).

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), 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).

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 entrustee'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).

Evidence of plaintiff's mental state relevant, but excluded. — In action for mental distress arising out of sexual harassment, evidence of plaintiff's husband's incarceration for murder, while somewhat probative as to plaintiff's mental state, was properly excluded because of the danger of unfair prejudice. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

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), overruled on other grounds, *Ellingwood v. N.N. Investors Life Ins. Co.*, 111 N.M. 301, 805 P.2d 70 (1991).

Testimony regarding accident scene. — Evidence pertaining to the seriousness of the injuries, the extent of the wreck and the heroic efforts required of rescuers to deal with the devastation was admissible in the trial of the perpetrator as proof of the elements of depraved mind murder. *State v. Landgraf*, 1996-NMCA-024, 121 N.M. 445, 913 P.2d 252.

Testimony by police and fire officers that they quit their jobs as a consequence of involvement in a high speed chase and wreck involving serious injuries was admissible in the trial of the perpetrator as proof of the elements of depraved mind murder. *State v. Landgraf*, 1996-NMCA-024, 121 N.M. 445, 913 P.2d 252.

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).

Witness’s negative opinion of defendant. — Where the defense counsel elicited testimony from a prosecution witness that the witness did not respect the defendant and the prosecution subsequently examined the witness regarding her reasons for not respecting the defendant, the reasons were helpful to the jury in evaluating the weight to be given the witness’s testimony and therefore met the relevancy standard of this rule.

State v. Abril, 2003-NMCA-111, 134 N.M. 326, 76 P.3d 644, cert. denied, 134 N.M. 320, 76 P.3d 638 (2003).

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).

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. 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).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29 Am. Jur. 2d Evidence § 301 et seq.

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.

Admissibility of evidence of commission of similar crime by one other than accused, 22 A.L.R.5th 1.

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 § 197 et seq.

11-402. General admissibility of relevant evidence.

Relevant evidence is admissible unless any of the following provides otherwise: the United States or New Mexico constitution, a statute, these rules, or other rules prescribed by the Court. Irrelevant evidence is not admissible.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-402 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

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 NMRA).

Cross references. — For procedures for the consideration of DNA evidence, *see* Section 31-1A-2 NMSA 1978.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

Exclusion of toxicology report showing victim's blood alcohol content to be .245 percent at the time of his death was proper. *State v. Garcia*, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, cert. denied, 2005-NMCERT-004.

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).

Evidence of plaintiff's mental state relevant, but excluded. — In action for mental distress arising out of sexual harassment, evidence of plaintiff's husband's incarceration for murder, while somewhat probative as to plaintiff's mental state, was properly excluded because of the danger of unfair prejudice. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

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 NMRA). *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).

Evidence of lawful business dealings. — Defendant may introduce evidence of lawful business dealings to rebut the prosecution's evidence of fraudulent intent under this rule. *State v. Mercer*, 2005-NMCA-023, 137 N.M. 36, 106 P.3d 1283, cert. denied, 2005-NMCERT-002.

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).

Admission of photographs discretionary. — 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).

Admission of 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).

Permission for jury to view premises discretionary. — 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 NMRA); 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 NMRA. *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).

Past offense admissible as relating to retaliation charge. — In a prosecution for retaliation against a witness, it was not error to admit evidence regarding the name and nature of the prior felony offense which formed the basis for the charge to which the person was a witness. *State v. Warsop*, 1998-NMCA-033, 124 N.M. 683, 954 P.2d 748, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

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).

Blood-alcohol content of other driver, passenger not relevant. — In trial of driver for vehicular homicide and great bodily injury by vehicle while under the influence, the trial court did not err in excluding evidence of the blood-alcohol concentration of the driver of the struck motorcycle, which was below the legal limit for intoxication, and that of the motorcycle's passenger, since neither fact was relevant to the case. *State v. Telles*, 1999-NMCA-013, 126 N.M. 593, 973 P.2d 845.

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).

Admission of drug paraphernalia. — Drug scale was admissible at trial to show that defendant had the means and intent to commit the crime charged, the sale of marijuana, even though he was not charged with possession of drug paraphernalia. *State v. Vallejos*, 1998-NMCA-151, 126 N.M. 161, 967 P.2d 836.

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).

Testimony on co-defendant's dangerous disposition irrelevant. — Since the defendant indicated his intention to call a defense attorney with "20 years" experience, "someone who has seen literally thousands of defendants" and who would allegedly testify "that the co-defendant was the most dangerous he had ever seen," the judge properly did not allow the testimony as it was irrelevant. *State v. Duncan*, 117 N.M. 407, 872 P.2d 380 (Ct. App. 1994).

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).

Evidence of victims' injuries. — In a prosecution for homicide by vehicle and great bodily injury by vehicle, testimony concerning the victims' injuries was admissible. *State v. Telles*, 1999-NMCA-013, 126 N.M. 593, 973 P.2d 845.

Evidence that victim's wounds were not immediately fatal. — Where defendant stabbed the victim thirty-one times piercing the victim's lungs repeatedly from the front and the back and severing the victim's jugular vein; the victim died quickly, before police and paramedics arrived; and the wounds were inflicted with such force that both of the knives used by defendant were bent, the court did not abuse its discretion in excluding expert testimony that the victim's wounds were not immediately fatal. *State v. Guerra,* 2012-NMSC-014, 278 P.3d 1031.

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 NMRA 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).

Rape and kidnapping conviction relevant to civil harassment suit. — In tort action against employer based on sexual harassment, evidence of harasser's conviction for kidnapping and rape was relevant to show employer's knowledge of and reaction to employee's conduct. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

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. Zarafonetis*, 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).

Evidence of intoxication. — In a wrongful death action arising out of an automobile collision, evidence of the intoxication of a non-party driver was admissible as relevant to whether the driver could have avoided the accident by exercising due care, and evidence of the intoxication of the deceased passenger was admissible as relevant to whether he exercised due care by voluntarily riding with an impaired driver. *Buffett v. Vargas*, 1996-NMSC-012, 121 N.M. 507, 914 P.2d 1004.

In a prosecution for homicide by vehicle and great bodily injury by vehicle, evidence of the blood alcohol level of the victims did not bear on any fact of consequence to determination of the charges and was not relevant. *State v. Telles*, 1999-NMCA-013, 126 N.M. 593, 973 P.2d 845.

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. — 29 Am. Jur. 2d Evidence § 301 et seq.

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, 53 A.L.R.3d 1005, 47 A.L.R.4th 1202, 77 A.L.R.4th 927.

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.

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.

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, 98 A.L.R. Fed. 20.

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 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 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 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.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids, 75 A.L.R.4th 897.

Admissibility of hypnotically refreshed or enhanced testimony, 77 A.L.R.4th 927.

Permissibility of in-court demonstration to show effect of injury in action for bodily injury, 82 A.L.R.4th 980.

Admissibility, in criminal prosecution, of expert opinion evidence as to "blood splatter" interpretation, 9 A.L.R.5th 369.

Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 10 A.L.R.5th 371.

Admissibility of evidence of polygraph test result, or offer or refusal to take test, in action for malicious prosecution, 10 A.L.R.5th 663.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 11 A.L.R.5th 497.

Admissibility of evidence in homicide case that victim was threatened by one other than defendant, 11 A.L.R.5th 831.

Admissibility of evidence of battered child syndrome on issue of self-defense, 22 A.L.R.5th 787.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 23 A.L.R.5th 672.

Search conducted by school official or teacher as violation of Fourth Amendment or equivalent state constitutional provision, 31 A.L.R.5th 229.

Admissibility in homicide prosecution of allegedly gruesome or inflammatory visual recording of crime scene, 37 A.L.R.5th 515.

Admissibility of expert testimony concerning domestic-violence syndromes to assist jury in evaluating victim's testimony or behavior, 57 A.L.R.5th 315.

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 § 197 et seq.

11-403. Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons.

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-403 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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

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

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

I. GENERAL CONSIDERATION.

Evidence does not have to conclusively prove proposition to be relevant. It is enough that the evidence have some tendency to make a fact in issue more or less probable than it would be without the evidence. *State v. Montoya*, 2005-NMCA-078, 137 N.M. 713, 114 P.3d 393, cert. denied, 2005-NMCERT-006.

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 gives the trial court a great deal of discretion in admitting or excluding evidence, and the supreme court will reverse the trial court only when it is clear that the court has abused its discretion. *Behrmann v. Phototron Corp.*, 110 N.M. 323, 795 P.2d 1015 (1990).

This rule applies to all evidence. *Simon Neustadt Family Center v. Bludworth*, 97 N.M. 500, 641 P.2d 531 (Ct. App. 1982), overruled on other grounds, *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 749 P.2d 1105 (1988).

Rule applies to admission of all evidence, including evidence admissible under Rule 11-609 NMRA and thus impeachment evidence admissible under Rule 11-609 NMRA 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).

Criminal misconduct of third persons. — Even though evidence of wrongdoing on the part of a third party is normally inadmissible as irrelevant to a given case, evidence that contraband was possessed by other occupants of the mobile home where defendant was arrested was admissible as reasonably having probative value. *State v.*

Phillips, 2000-NMCA-028, 128 N.M. 777, 999 P.2d 421, cert. denied, 128 N.M. 689, 997 P.2d 821 (2000).

Evidence in probable cause hearing. — Evidence inadmissible at trial as unfairly prejudicial or as evidence of other crimes may be considered in a hearing to determine probable cause to proceed with death-penalty proceedings. *State v. Smith*, 1997-NMSC-017, 123 N.M. 52, 933 P.2d 851.

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).

Even if a defendant has made a showing of relevancy of the past sexual conduct of the victim, the balancing test of this rule must be applied by the trial court. *State v. Lucero*, 118 N.M. 696, 884 P.2d 1175 (Ct. App. 1994).

Trial court has great deal of discretion in applying this rule and Rule 11-411 NMRA 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).

The trial court is vested with great discretion in applying this rule, and it will not be reversed absent an abuse of that discretion. *State v. Chamberlain*, 112 N.M. 723, 819 P.2d 673 (1991).

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. 1981), cert. denied, 95 N.M. 669, 625 P.2d 1186, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), overruled on other grounds, *State v. Olguin*, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

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 NMRA, 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 predicating 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 NMRA 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).

Mistrial not required. — Where the trial court sustained an objection to a question asked by the prosecutor of defendant's witness, for defendant to demonstrate that the court abused its discretion by denying a mistrial for prosecutorial misconduct, he must have established that the prosecutor did not have a valid basis for the question. *State v. Salas*, 1999-NMCA-099, 127 N.M. 686, 986 P.2d 482, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

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).

II. CUMULATIVE EVIDENCE.

Needless presentation of cumulative evidence. — Evidence may be excluded if its probative value is substantially outweighed by needless presentation of cumulative evidence. *Payne v. Hall*, 2004-NMCA-113, 136 N.M. 380, 98 P.3d 1030, cert. granted, 2004-NMCERT-010.

Basis for reversal. — Cumulative evidence in the absence of an abuse of discretion will not be the basis for a reversal. *Payne v. Hall*,2004-NMCA-113, 136 N.M. 380, 98 P.3d 1030, cert. granted, 2004-NMCERT-010.

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), overruled on other grounds, *State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

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.

Partial erasure of video tape. — Where the victim erased part of a video tape showing the defendant sodomizing the victim with a carrot and the victim testified that she could not remember the incident because she was drugged and that she would not have consented to such an act, the district court did not abuse its discretion in admitting the tape into evidence. *State v. Dombos*, 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, cert. denied, 2009-NMCERT-008, 147 N.M. 395, 223 P.3d 940, and cert. denied, 2009–NMCERT-010, 147 N.M. 452, 224 P.3d 1257.

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).

Photographs of burned victim and crime scene were admissible. — Where defendant’s co-conspirators placed the victim in the trunk of the victim’s car, doused the car with charcoal lighter fluid, and burned the car; the trial court admitted into evidence photographs of the victim’s burned body, the burned car, firefighters extinguishing the fire, and the location where the vehicle was burned; the photographs were relevant to the existence of the essential elements of the crimes of murder and arson and showed the scene as it was investigated with no undue emphasis on the burned body or anything that would unfairly prejudice the defendant; and the trial court weighed the probative and prejudicial impact of the photographs outside the presence of the jury, the trial court did not abuse its discretion in admitting the photographs into evidence. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

Videotape of murder scene and victim admissible. — Videotape and pictures of the condition and position of murder victim's body as well as the disarray in the murder scene allowed the jury to draw an inference of a struggle prior to the victim's death and thus were relevant, and admissible, to show that defendant had the requisite intent to kill. *State v. Hernandez*, 115 N.M. 6, 846 P.2d 312 (1993).

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).

"Day in the Life" video. — Where the personal representative of the decedent sued defendants for the wrongful death of the decedent based on the negligent medical care provided by defendants; plaintiff presented to the jury a "Day in the Life" video of the decedent that lasted five minutes, opened and closed with a view of the cemetery where the decedent was buried, and included descriptions of the decedent's interests and character, and in bucolic settings with intermittent guitar music, six unidentified people speaking about the decedent; defendant cross-examined two of the three main people who spoke on the video; and the district court allowed defendant the opportunity to cross-examine the third person and to again cross-examine the other two people, the district court did not abuse its discretion in admitting the video into evidence. *Estate of Lajeuenesse v. Univ. of N.M. Bd. of Regents*, 2013-NMCA-004, 292 P.3d 485, cert. granted, 2012-NMCERT-012.

IV. EVIDENCE OF OTHER OFFENSES OR ACTS.

Limited probative value of cross-admitting evidence of offenses against each of two victims to show an "opportunity" to commit the offenses is overwhelmed by its substantial prejudicial effect. *State v. Gallegos*, 2005-NMCA -142, 138 N.M. 673, 125 P.3d 652, cert. granted, 2005-NMCERT-012.

This rule reinforces the very purpose of Paragraph B of Rule 11-404 NMRA. *State v. Otto*, 2005-NMCA-047, 137 N.M. 371, 111 P.3d 229, cert. granted, 2005-NMCERT-004.

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 NMRA 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).

Evidence bearing on defendant's intent. — In a prosecution for murder in which the defendant's specific intent was at issue and there was little, if any, other evidence as to his considerations for and against killing the victim, the probative value of evidence of his prior bad acts outweighed its prejudicial effect. *State v. Niewiadowski*, 120 N.M. 361, 901 P.2d 779 (Ct. App. 1995).

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) NMRA evidence is always subject to possible exclusion under this rule. *Lenz v. Chalamidas*, 109 N.M. 113, 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).

Where the transcript revealed the trial court properly engaged in a balancing test before ruling the prior felonies would be admissible if defendant testified, the trial court did not abuse its discretion in denying defendant's motion to exclude his prior felonies. *State v. Lara*, 110 N.M. 507, 797 P.2d 296 (Ct. App. 1990).

Unsubstantiated reference to defendant as known drug dealer inappropriate. — Repeated references to defendant as a known drug dealer when the state lacked sufficient evidence to convict defendant of possession or distribution of illegal drugs, and instead relied on unsubstantiated hearsay to convince the jury defendant was a "known drug dealer" so, ipso facto, the shotgun must belong to him, is prohibited and should be excluded. *State v. Rael*, 117 N.M. 539, 873 P.2d 285 (Ct. App. 1994).

Evidence of past drug dealings in drug case. — Testimony regarding the defendant's prior cocaine sales to the witness was inadmissible as an attempt by the state to insinuate that the defendant sold cocaine to the witness on the day in question because he had done so in the past; the testimony was not highly probative to prove context, and the probative value, if any, was substantially outweighed by the danger of unfair prejudice. *State v. Wrighter*, 1996-NMCA-077, 122 N.M. 200, 922 P.2d 582.

Admission of syringe in murder case. — In robbery and murder prosecution, error in admitting syringe into evidence, if any, was harmless; there was no evidence that jury inferred drug usage or was influenced by the admission of the syringe in reaching its robbery and murder verdicts. *State v. Duffy*, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807.

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 Section 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 other acts held not admissible. — In child sexual assault case, evidence that the defendant's request for oral sex by his girlfriend was more prejudicial than probative and the trial court erred in admitting it; and, although the conduct in question was not criminal, it seemed likely that some significant percentage of jurors would find such conduct sufficiently offensive so as to create probable prejudice to require a new trial. *State v. Lucero*, 114 N.M. 489, 840 P.2d 1255 (Ct. App. 1992).

Evidence of past sexual misconduct against victim admissible. — In a prosecution for criminal sexual contact of a minor, the trial court did not abuse its discretion in admitting evidence of the defendant's past sexual misconduct against the victim, notwithstanding the fact that it occurred ten years prior to the acts for which the defendant was convicted. Evidence of defendant's past sexual misconduct, similar in nature to the crime of which defendant was indicted, was illustrative of a lewd and lascivious disposition of defendant toward the victim. *State v. Scott*, 113 N.M. 525, 828 P.2d 958 (Ct. App. 1991), cert. quashed, 113 N.M. 524, 828 P.2d 957 (1992).

Evidence of prior legal consensual sexual conduct. — In a prosecution for murder and criminal sexual penetration, testimony by defendant's girlfriend regarding defendant's enjoyment of anal sex was inadmissible since evidence was not relevant to the defendant's identity because it was not so distinctive as to constitute a unique or distinct pattern easily attributable to one person; nor, was evidence relevant to defendant's motive because merely enjoying anal sex is not sufficient to suggest that defendant had cause to force himself on victim. *State v. Williams*, 117 N.M. 551, 874 P.2d 12 (1994).

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).

Evidence of a feud between two families. — Evidence of a feud between two families was relevant in a prosecution for second degree murder and involuntary manslaughter to show that the defendant's act was intentional and not merely accidental or the result of "sufficient provocation". *State v. Mireles*, 119 N.M. 595, 893 P.2d 491 (Ct. App. 1995).

Specific instances of prior violence. — Since the specific instances from victim's background would have been cumulative and as such would not have affected the verdict, the trial court did not abuse its discretion in excluding the proffered specific instances of victim's prior violent conduct. *State v. Baca*, 114 N.M. 668, 845 P.2d 762 (1992).

Prior acts of spousal abuse. — In a prosecution of the defendant for the murder of his wife, hearsay testimony concerning prior incidents when the defendant struck the victim was admissible as evidence of motive, intent, plan or knowledge to establish the requisite mental state for first-degree murder. *State v. Woodward*, 121 N.M. 1, 908 P.2d 231 (1995).

Unrelated incidents of co-defendant excluded. — The court did not err in excluding examination of a police detective as to other unrelated incidents in which the co-defendant was involved. *State v. Duncan*, 117 N.M. 407, 872 P.2d 380 (Ct. App. 1994).

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).

Admission by defendant regarding felony of which not convicted. — A prosecutor seeking, under Rule 11-608 NMRA, 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.

Two year delay in disclosing intent to use release as evidence and a defense. — Where plaintiffs and defendants executed a final agreement to dissolve their business relationship in several businesses and plaintiffs released all claims plaintiff had against defendants; in subsequent litigation, although defendants had nearly two years after plaintiff produced the release, defendants waited until the weekend prior to the start of trial to notify plaintiffs that defendants intended to use the release as evidence and a defense; the district court admitted the release into evidence as well as extrinsic evidence concerning the meaning of the release; plaintiffs had an opportunity to present evidence on the release and cross-examined defendants about their intentions concerning it; plaintiffs did not request a continuance following the district court's decision to allow defendants to present evidence on the release, and plaintiffs did not demonstrate how the district court's decision was prejudicial to them, the district court did not abuse its discretion by admitting the release into evidence. *Benz v. Town Ctr. Land, L.L.C.*, 2013-NMCA-111.

Testimony about a witness involving a person threatening people with a gun was prejudicial. — Where defendant was charged with shooting the victim with a .45 caliber revolver; the shooting occurred in the presence of a witness who had driven the victim to the location of the shooting; two and a half weeks prior to the shooting, the witness had been with a third person when the third person threatened people with a .22 caliber revolver; the district court precluded defendant from soliciting any testimony from the witness about the incident involving the .22 caliber revolver on the grounds that the

incident was more prejudicial than probative; and defendant argued that the court's ruling prohibited defendant from offering evidence that the witness was the slayer of the victim, the district court did not abuse its discretion by excluding testimony about the incident. *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

Defendant's accusations against the victim. — Where defendant was charged with the first degree murder of the victim; defendant was embittered by the victim's rejection of defendant and the breakup of the relationship between defendant and the victim; defendant made accusations by telephone calls to the ex-wife of the victim and police that the victim intended to sodomize the victim's son, tie the victim's son up, kill the victim's son, and drop the victim's son by a river; defendant also faxed to the ex-wife of the victim what defendant claimed to be pages from the victim's notebook depicting the abuse that the victim purportedly planned to inflict on the victim's son; the trial judge balanced the prejudicial and probative aspects of the evidence of defendant's accusations against the victim, excluded the faxed graphic images from evidence and admitted testimony about the telephone calls; and the testimony was probative of defendant's motive and intent, and the admission of testimony about defendant's accusations against the victim was not an abuse of discretion. *State v. Flores*, 2010-NMSC-002, 147 N.M. 542, 226 P.3d 641.

Gang behavior. — Where a police officer, who was qualified to testify on the subject of gang-related law enforcement and gang culture, testified from his personal experience with gangs that gang members retaliate in violent ways when disrespected and that disrespect can occur in a number of ways, some of which would have been applicable in the defendant's situation if evidence of the defendant's gang affiliation had been presented to the jury; the officer's testimony was offered to rebut the defendant's claim of self defense and to establish the defendant's motive for shooting at a house in retribution for having been disrespected; and there was no evidence that the defendant was a gang member at the time of the shooting, that the party in the house was a gang party, or that the shooting was in any way gang-related, the officer's expert testimony was unfairly prejudicial and the admission of the testimony was not harmless. *State v. Torrez*, 2009-NMSC-029, 146 N.M. 331, 210 P.3d 228.

Blood alcohol level. — Where the trial court excluded the blood alcohol concentration score, finding that it would be unduly prejudicial, but allowed the state to inform the jury that defendant did have alcohol in his blood when tested because such evidence was relevant, and when combined with the other evidence in the case, it provided corroborating evidence of impairment, the fact that the trial court excluded evidence of the actual result of the test under this rule did not mandate that evidence of the presence of alcohol was also too prejudicial. *State v. Montoya*, 2005-NMCA-078, 137 N.M. 713, 114 P.3d 393, cert. denied, 2005-NMCERT-006.

DNA evidence admissible. — Although the aura of infallibility surrounding DNA evidence does present the possibility of a decision based on the perceived infallibility of the evidence, the damaging nature of the DNA evidence and the potential prejudice caused by this evidence does not require exclusion when the FBI's testing procedures

have already met the requirements of Rules 702 and 703. *State v. Anderson*, 118 N.M. 284, 881 P.2d 29 (1994).

The probative value of the DNA typing evidence outweighs its prejudicial effect. This evidence and the testimony will be probative because it links defendant to the crimes for which he has been charged. Any debate over the resulting probabilities that the "match" is random goes to the weight of the evidence and is properly left for the jury to determine. *State v. Duran*, 118 N.M. 303, 881 P.2d 48 (1994).

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).

Inflammatory effect does not necessarily require exclusion 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).

Use of mannequin to demonstrate crime. — Court did not commit error in permitting the medical examiner to use a mannequin dressed in the blood-stained clothes of the victim as a demonstrative exhibit during his testimony; there was probative value in showing the mannequin with the clothing and that outweighed any prejudice. *State v. Foster*, 1998-NMCA-163, 126 N.M. 177, 967 P.2d 852, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Testimony about gang activities. — The admission of testimony about activities was not prejudicial where the defendant had introduced the topic of the reputation and activities of gangs in order to portray the incident as self-defense. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

In a murder prosecution, a detective's testimony, both as to defendant's affiliation with a particular gang and the specific rituals and procedures of that gang was not unfairly prejudicial because, as evidence of defendant's motive and intent, the testimony had

considerable probative value. *State v. Nieto*, 2000-NMSC-031, 129 N.M. 688, 12 P.3d 442.

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).

Sexual history of victim's mother properly excluded. — In a prosecution for sexual offenses against a child, evidence of the sexual history of the mother was properly excluded. *State v. La Madrid*, 1997-NMCA-057, 123 N.M. 463, 943 P.2d 110.

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).

Subsequent remedial measures. — The prohibition against admitting evidence of subsequent remedial measures, stated in Rule 11-407 NMRA, does not apply to measures taken by non-defendants. Thus, evidence that an employer, subsequent to an injury, added a safety device next to a machine was highly relevant in an action by an employee against the manufacturer of the machine and any prejudice to the manufacturer was mitigated by the court's instructions to the jury. *Couch v. Astec Indus., Inc.*, 2002-NMCA-084, 132 N.M. 631, 53 P.3d 398, cert. denied, 132 N.M. 551, 52 P.3d 411 (2002).

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), overruled on other grounds, *Baxter v. Gannaway*, 113 N.M. 45, 822 P.2d 1128 (Ct. App. 1991); *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).

Evidence of workers' compensation claim. — In a suit for recovery of damages for injuries sustained in a motor vehicle accident, the trial court did not abuse its discretion

in refusing to admit plaintiff's workers' compensation complaint into evidence given that the complaint would likely have confused the jury because the definition of "total disability" under worker's compensation law is much narrower than the basis for the damages plaintiff was alleging at trial. *Blacker v. U-Haul Co.*, 113 N.M. 542, 828 P.2d 975 (Ct. App. 1992).

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 NMRA 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 NMRA 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).

Assault victim's reputation for violence. — Probative value of evidence of assault victim's reputation for violence outweighed its prejudicial effect, where the very gruesomeness of information that the victim had cut off people's ears in Vietnam established the great impact it could have had on defendant's state of mind. *State v. Salgado*, 112 N.M. 793, 819 P.2d 1351 (Ct. App. 1991).

Rape and kidnapping conviction relevant to civil harassment suit. — In tort action against employer based on sexual harassment, evidence of harasser's conviction for kidnapping and rape was relevant to show employer's knowledge of and reaction to employee's conduct. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

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).

Past offense admissible as relating to retaliation charge. — In a prosecution for retaliation against a witness, it was not error to admit evidence regarding the name and nature of the prior felony offense which formed the basis for the charge that defendant retaliated against a person who witnessed that offense. *State v. Warsop*, 1998-NMCA-033, 124 N.M. 683, 954 P.2d 748, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

Lack of license irrelevant in bad check case. — The trial court did not abuse its discretion in excluding evidence that some of the work performed by interior decorator required a contractor's license where the probative value of such evidence was substantially outweighed by the danger of confusing the issues. *State v. Platt*, 114 N.M. 721, 845 P.2d 815 (Ct. App. 1992).

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).

Separate attacks evidence of pattern. — Joinder in one trial of all counts arising from separate attacks on two victims was proper where the evidence relating to the attacks displayed sufficiently distinctive similarities to permit an inference of pattern for purposes of proving identity and the evidence of both crimes did not outweigh its probative value. *State v. Peters*, 1997-NMCA-084, 123 N.M. 667, 944 P.2d 896.

Testimony regarding damage in condemnation proceeding. — In a proceeding for condemnation of property owned by a company, the trial court did not abuse its discretion in excluding the testimony of a director of the company since the president and a project manager had already testified as to the loss of value due to the taking. *City of Albuquerque v. Westland Dev. Co.*, 121 N.M. 144, 909 P.2d 25 (Ct. App. 1995), cert. denied, 120 N.M. 828, 907 P.2d 1009 (1995), and cert. denied, 517 U.S. 1244, 116 S. Ct. 2499, 135 L. Ed. 2d 190 (1996).

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).

Post-traumatic stress disorder admissible. — Post-traumatic stress disorder (PTSD) is both valid and probative and, because it is not unduly prejudicial, it is admissible for establishing whether an alleged rape victim exhibits symptoms of PTSD that are consistent with rape or sexual abuse. State v. Alberico, 116 N.M. 156, 861 P.2d 192 (1993).

Psychologist's testimony was extremely prejudicial and went beyond the permissible boundaries of Post-Traumatic Stress Disorder testimony outlined in *State v. Alberico,* 116 N.M. 156, 861 P.2d 192 (1993), since the expert improperly commented upon the credibility of the complainant; the expert's naming of the perpetrator was tantamount to saying that complainant was telling the truth; and the expert testified that the victim's PTSD symptoms were in fact caused by sexual abuse. *State v. Lucero*, 116 N.M. 450, 863 P.2d 1071 (1993).

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), overruled on other grounds, *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 749 P.2d 1105 (1988).

Evidence of plaintiff's mental state relevant, but excluded. — In action for mental distress arising out of sexual harassment, evidence of plaintiff's husband's incarceration for murder, while somewhat probative as to plaintiff's mental state, was properly excluded because of the danger of unfair prejudice. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

Exclusion of neuropsychologist’s testimony held error. — Where neuropsychologist’s testimony was relevant to the essential element of deliberate intent in a murder prosecution, and because the testimony was not cumulative, the trial court’s exclusion on the basis that it was a "waste of time" was error. *State v. Balderama*, 2004-NMSC-008, 135 N.M. 329, 88 P.3d 845.

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).

Extrajudicial inconsistent statement by a witness concerning an admission made by the defendant is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is inconsistent with the testimony of the declarant at trial. *State v. Vigil*, 110 N.M. 254, 794 P.2d 728 (1990); *State v. Woodward*, 121 N.M. 1, 908 P.2d 231 (1995).

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).

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).

Findings by physician which were consistent with victim's report does not constitute the type of expert opinion based on scientific, technical, or other expert knowledge that triggers a reliability hearing. *State v. Lente*, 2005-NMCA-111, 138 N.M. 232, 119 P.3d 737, cert. denied, 2005-NMCERT-008.

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), overruled on other grounds, *Baxter v. Gannaway*, 113 N.M. 45, 822 P.2d 1128 (Ct. App. 1991).

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, 442 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 regarding accident scene. — Evidence pertaining to the seriousness of the injuries, the extent of the wreck and the heroic efforts required of rescuers to deal with the devastation was admissible in the trial of the perpetrator as proof of the elements of depraved mind murder. *State v. Landgraf*, 1996-NMCA-024, 121 N.M. 445, 913 P.2d 252.

Testimony by police and fire officers that they quit their jobs as a consequence of involvement in high speed chase and wreck involving serious injuries was admissible in the trial of the perpetrator as proof of the elements of depraved mind murder. *State v. Landgraf*, 1996-NMCA-024, 121 N.M. 445, 913 P.2d 252.

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).

Post-injury foreclosure. — In an personal injury case, evidence of foreclosure proceedings and repossession of a plaintiff's car after the accident due to financial problems resulting from the plaintiff's inability to work was properly excluded under this

rule because this evidence may have given the jury the wrong impression that the plaintiffs should have been compensated for these events. *Lozoya v. Sanchez*, 2003-NMSC-009, 133 N.M. 579, 66 P.3d 948.

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).

No abuse of discretion found. *State v. Gibbins*, 110 N.M. 408, 796 P.2d 1104 (Ct. App. 1990).

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. 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).

For annual survey of New Mexico law of evidence, 19 N.M.L. Rev. 679 (1990).

For note, "Criminal Law - New Mexico Expands the Entrapment Defense: Baca v. State," 20 N.M.L. Rev. 135 (1990).

For note, "Boundaries, Balancing, and Prior Felony Convictions: Federal Rule of Evidence Rule 403 After United States v. Old Chief," see 28 N.M.L. Rev. 583 (1998).

For note, "The Admission of Polymerase Chain Reaction DNA Evidence in New Mexico - State v. Sills," see 29 N.M.L. Rev. 429 (1999).

For comment, "State v. Jacobs: A Comment on One State's Choice to Restrict Victim Impact Evidence at Death Penalty Sentencing," see 31 N.M.L. Rev. 539 (2001).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29 Am. Jur. 2d Evidence § 324 et seq.

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.

Admissibility of DNA identification evidence, 84 A.L.R.4th 313.

Admissibility of tape recording or transcript of "911" emergency telephone call, 3 A.L.R.5th 784.

Sufficiency of evidence that witness in criminal case was hypnotized, for purposes of determining admissibility of testimony given under hypnosis or of hypnotically enhanced testimony, 16 A.L.R.5th 841.

Admissibility and prejudicial effect of evidence, in criminal prosecution, of defendant's involvement with witchcraft, satanism, or the like, 18 A.L.R.5th 804.

Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse, 24 A.L.R.5th 465.

Admissibility in homicide prosecution of allegedly gruesome or inflammatory visual recording of crime scene, 37 A.L.R.5th 515.

Admissibility of expert testimony concerning domestic-violence syndromes to assist jury in evaluating victim's testimony or behavior, 57 A.L.R. 5th 315.

Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense, 58 A.L.R.5th 749.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape person other than prosecutrix - prior offenses, 86 A.L.R.5th 59.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other then prosecutrix - subsequent acts, 87 A.L.R.5th 181.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape, person other than prosecutrix - offenses unspecified as to time, 88 A.L.R.5th 429.

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 § 197 et seq.

11-404. Character evidence; crimes or other acts.

A. **Character evidence.**

(1) **Prohibited uses.** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) **Exceptions for a defendant or victim in a criminal case.** The following exceptions apply in a criminal case:

(a) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(b) subject to the limitations in Rule 11-413 NMRA, a defendant may offer evidence of a victim's pertinent trait, and if the evidence is admitted, the prosecutor may

(i) offer evidence to rebut it, and

(ii) offer evidence of the defendant's same character trait, and

(c) in a homicide case, the prosecutor may offer evidence of the victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) **Exceptions for a witness.** Evidence of a witness's character may be admitted under Rules 11-607, 11-608, and 11-609 NMRA.

B. **Crimes, wrongs, or other acts.**

(1) **Prohibited uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) **Permitted uses; notice in a criminal case.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case, the prosecution must

(a) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial, and

(b) do so before trial – or during trial if the court, for good cause, excuses lack of pretrial notice.

[Approved, effective July 1, 1973; as amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order 06-8300-25, effective December 18, 2006; by Supreme Court Order 07-8300-35, effective February 1, 2008; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-404 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

Paragraph B(2) of this rule, unlike the federal rule, does not require the defendant to request the prosecution to provide notice of intent to introduce evidence under this paragraph. Instead, it requires the prosecution in a criminal case to provide notice of evidence the prosecution intends to offer under this paragraph regardless of any request.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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

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

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

The 1993 amendment, effective December 1, 1993, substituted "proving action" for "proving that he acted" in paragraph A, substituted "show action" for "show that he acted" in Paragraph B, and substituted "trait of character" for "trait of his character" in Paragraph A and Subparagraph A(1).

The 2006 amendment, approved by Supreme Court Order 06-8300-25, effective December 18, 2006, added the last sentence of Paragraph B relating to notice of other crimes, wrongs or acts.

The 2007 amendment, approved by Supreme Court Order 07-8300-35, effective February 1, 2008, amended Paragraph A to add at the beginning of Subparagraph (1) "In a criminal case" and to add at the beginning of Subparagraph (2) "In a criminal case, subject to limitations imposed by Rule 11-413 NMRA".

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

I. GENERAL CONSIDERATION.

In most cases, "grooming" for sexual exploitation should be established by expert testimony. *State v. Sena*, 2007-NMCA-115, 142 N.M. 677, 168 P.3d 1101, cert. granted, 2007-NMCERT-008.

Insufficient evidence of "grooming". — Evidence that defendant possessed a nude photograph of this ex-wife and owned pornographic videos, that defendant showered with the victim, that defendant walked about the house naked in front of the victim, and that defendant showed the victim a pornographic movie and his ex-wife's thong underwear did not satisfy the requirements of "grooming" behavior. *State v. Sena*, 2007-NMCA-115, 142 N.M. 677, 168 P.3d 1101, cert. granted, 2007-NMCERT-008.

Evidence in probable cause hearing. — Evidence inadmissible at trial as unfairly prejudicial or as evidence of other crimes may be considered in a hearing to determine probable cause to proceed with death-penalty proceedings. *State v. Smith*, 1997-NMSC-017, 123 N.M. 52, 933 P.2d 851.

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 NMRA, 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).

Character and prior act evidence admissible to rebut inference of witness bias. — Evidence of the defendant's character and prior acts was admissible to rebut the inference of bias raised by the defendant's questioning of a prosecution witness about her negative feelings toward the defendant, even though this evidence may have been inadmissible for other purposes under this rule. *State v. Abril*, 2003-NMCA-111, 134 N.M. 326, 76 P.3d 644, cert. denied, 134 N.M. 320, 76 P.3d 638 (2003).

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).

Specific instances of character evidence are not admissible under Paragraph A of this rule to prove that defendant acted in conformity with any particular trait. *State v. Schoonmaker*, 2005-NMCA-012, 136 N.M. 749, 105 P.3d 302, cert. granted, 2005-NMCERT-001.

Mistrial not required. — The trial court did not err in denying a mistrial based on the prosecutor's questions that introduced irrelevant evidence of other crimes or bad acts into the defendant's trial. *State v. Lucero*, 1999-NMCA-102, 127 N.M. 672, 986 P.2d 468, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

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 NMRA, 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).

Where character is an element of the crime or defense, this rule does not apply, and evidence of specific conduct may be admitted to prove the character. *State v. Reneau*, 111 N.M. 217, 804 P.2d 408 (Ct. App. 1990).

Common-law exception. — The lewd and lascivious common-law exception to the general proscription of admitting evidence of uncharged conduct is not perpetuated by Rule 11-404 NMRA. *State v. Kerby*, 2005-NMCA-106, 138 N.M. 232, 118 P.3d 740, cert. granted, 2005-NMCERT-008.

Circumstantial use of character evidence 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).

Defendant's character is not element of self-defense. — The character of the defendant is not an element of self-defense; therefore, the defendant's character, whether peaceful or violent, has nothing to do with whether he feared the victim and acted reasonably in accordance with that fear. *State v. Reneau*, 111 N.M. 217, 804 P.2d 408 (Ct. App. 1990).

Character of coercer as element of defense of duress. — Although the character of a coercer is not an element of the defense of duress, a psychologist's opinion of the alleged coercer's character is admissible as relevant to prove defendant's reasonable apprehension that the coercer would carry out his threats. *State v. Duncan*, 111 N.M. 354, 805 P.2d 621 (1991).

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).

Absent an abuse of discretion, the district court's decision to admit evidence under Paragraph B will not be disturbed on appeal. *State v. Altgilbers*, 109 N.M. 453, 786 P.2d 680 (Ct. App. 1989).

Inadmissible evidence not reversible error if it does not induce verdict. — Where the district court erred when it admitted defendant’s prior robbery conviction as propensity evidence; the testimony of eye witnesses provided substantial evidence to support defendant’s convictions; the convictions did not rely on the inadmissible robbery conviction; there was such a disproportionate volume of admissible evidence that, in comparison, the single item of inadmissible evidence was minuscule; and there was no substantial conflicting evidence that discredited the state’s case, there was no probability that the admission of the robbery conviction affected the verdict and the error was harmless. *State v. Branch*, 2010-NMSC-042, 148 N.M. 601, 241 P.3d 602.

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. *State v. Garcia*, 99 N.M. 771, 664 P.2d 969 (1983).

Evidence of identity. — Where defendant raised the issue of mistaken identity, the district court properly allowed the state's witnesses to verify their identity of defendant by defendant's prison mug shot and by reference to defendant's pen packet during the trial. *State v. Contreras*, 2007-NMCA-045, 141 N.M. 434, 156 P.3d 725, cert. granted, 2007-NMCERT-004.

II. CHARACTER OF ACCUSED.

Evidence of prior arrest. — Where defendant was asked to perform field sobriety tests and was subsequently arrested for DWI; at trial, defendant testified that defendant did not understand what the field sobriety tests were looking for; defendant also raised a question about whether defendant understood the arresting officer when the officer explained what defendant was required to do on the tests; defendant acknowledged that defendant had performed field sobriety tests before, but that defendant did not remember what the tests required defendant to do; the prosecution asked defendant when defendant had previously performed the field sobriety tests; the prosecution was trying to establish how long ago the prior arrest had occurred; and defendant's trial was a bench trial and the trial court was careful to make clear that the evidence regarding defendant's prior arrests was relevant only to whether or not defendant understood what defendant was required to do for the field sobriety test, it was not reversible error to allow the prosecution to question defendant about prior DWI arrests in connection with defendant's performance of field sobriety tests where the trial court did not rely on that evidence to support defendant's convection of DWI. *State v. Mitchell*, 2010-NMCA-059, 148 N.M. 842,242 P.3d 409, cert. denied, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Evidence of reputation for truth. — Defendant's truthfulness is not a pertinent trait of character in a prosecution for criminal sexual penetration of a minor or criminal sexual contact with a minor and the district court did not abuse its discretion in excluding testimony about defendant's reputation for truth in the community where defendant had not testified. *State v. Ruiz*, 2007-NMCA-014, 141 N.M. 53, 150 P.3d 1003, cert. denied, 2007-NMCERT-001.

Solicitation of aggravated burglary. — Defendant's character for honesty and truthfulness is pertinent to the charge of solicitation of aggravated burglary where the underlying felony of the burglary was a theft. *State v. Martinez*, 2006-NMCA-148, 140 N.M. 792, 149 P.3d 108.

Accused's concession of unlawful conduct.— Nothing in this rule expressly conditions the exclusion of propensity evidence upon an accused's concession that his conduct was unlawful. *State v. Kerby*, 2005-NMCA-106, 138 N.M. 232, 118 P.3d 740, cert. granted, 2005-NMCERT-008.

Drafters of rule carefully prescribed circumstances under which evidence of an accused's character is admissible in rebuttal. *State v. Kerby*, 2005-NMCA-106, 138 N.M. 232, 118 P.3d 740, cert. granted, 2005-NMCERT-008.

Evidence of third party's experience with defendant. — Where evidence of third party's experience with defendant tends to make it appear more likely that plaintiff's roughly contemporaneous experience with defendant was intentional, rather than mistaken or accidental, this evidence is persuasive precisely because it tends to establish defendant's character for reneging on its promises to small, unsophisticated businesses; therefore evidence of third party's experience with defendant constituted improper evidence. *Santa Fe Custom Shutters & Doors, Inc. v. Home Depot USA, Inc.*, 2005-NMCA-051, 137 N.M. 524, 113 P.3d 347, cert. denied, 2005-NMCERT-005.

Evidence of prior lawful business dealings. — This rule does not bar a defendant from offering evidence of prior lawful business dealings to attempt to rebut the state's evidence of fraudulent intent. *State v. Mercer*, 2005-NMCA-023, 137 N.M. 36, 106 P.3d 1283, cert. denied, 2005-NMCERT-002.

Testimony about gang activities. — Testimony was admissible evidence of character where the defendant had introduced the topic of the reputation and activities of gangs in order to portray the incident as self-defense. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

In a murder prosecution, a detective's testimony, both as to defendant's affiliation with a particular gang and the specific rituals and procedures of that gang, was admissible to show defendant's alleged motive (to rise up in the ranks of the gang by performing a hit on its behalf) and intent to murder the victims. *State v. Nieto*, 2000-NMSC-031, 129 N.M. 688, 12 P.3d 442.

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).

Preservation of objection for appeal. — Defendant's general relevancy objection based solely upon Rule 11-401 NMRA did not preserve for appeal the issue of character evidence under Paragraph B of this rule. *State v. Phillips*, 2000-NMCA-028, 128 N.M. 777, 999 P.2d 421, cert. denied, 128 N.M. 689, 997 P.2d 821 (2000).

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

Testimony as evidence of character.---The court abused its discretion in excluding the testimony of a satisfied customer as extrinsic evidence of character under this rule because its exclusion precluded defendant from an opportunity to fully develop a major element of her defense. *State v. Mercer*, 2005-NMCA-023, 137 N.M. 36, 106 P.3d 1283, cert. denied, 2005-NMCERT-002.

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).

Handgun not used in offense admissible. — Although handgun was not used in robbery, it was admissible as relevant to prove the intent and severity of his plan, as well as his possible plan to flee. *State v. Duffy*, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807.

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), cert. denied, 476 U.S. 1183, 106 S. Ct. 2918, 91 L. Ed. 2d 547 (1986).

Admission of drug paraphernalia. — Drug scale was admissible at trial to show that defendant had the means and intent to commit the crime charged, the sale of marijuana, even though he was not charged with possession of drug paraphernalia. *State v. Vallejos*, 1998-NMCA-151, 126 N.M. 161, 967 P.2d 836.

Unsubstantiated reference to defendant as drug dealer inappropriate. — Repeated references to defendant as a known drug dealer when the state lacked sufficient evidence to convict defendant of possession or distribution of illegal drugs, and instead relied on unsubstantiated hearsay to convince the jury defendant was a "known drug dealer" so, ipso facto, the shotgun must belong to him, is prohibited and should be excluded. *State v. Rael*, 117 N.M. 539, 873 P.2d 285 (Ct. App. 1994).

Error to admit unrelated threatening letters in murder prosecution. — In a prosecution for second-degree murder, it was reversible error to admit threatening letters written by the defendant to a third party on an unrelated matter one month before the shooting. *State v. Elinski*, 1997-NMCA-117, 124 N.M. 261, 948 P.2d 1209.

Evidence concerning family member. — Officer's testimony as to a prior traffic stop of defendant's brother in which a box of bullets was found was too attenuated to have caused sufficient prejudice to defendant so as to have denied him a fair trial. *State v. Foster*, 1998-NMCA-163, 126 N.M. 177, 967 P.2d 852, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

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.

Exclusion of evidence of specific acts of violence during cross-examination of prosecution witnesses. — Where the state called witnesses who testified about the victim’s peaceable character before the defendant had raised any issue of the victim’s aggressiveness; the trial court precluded the defendant from cross-examining the witnesses about specific instances of the victim’s violent tendencies; and the trial court allowed the defendant to call witnesses who testified that the victim had a reputation for

violent behavior, to cross-examine the state's rebuttal witnesses about their knowledge of the victim's reputation and prior instances of violent conduct, and to raise the victim's criminal record to the jury in closing argument, the defendant was not deprived of the right to present the defendant's self-defense claim to the jury. *State v. Balenquah*, 2009-NMCA-055, 146 N.M. 267, 208 P.3d 192.

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).

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).

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).

Evidence may require severance of trials. — Trial court abused its discretion in not severing trials where the evidence pertaining to each minor sexual assault victim would not have been cross-admissible in separate trials. *State v. Ruiz*, 2001-NMCA-097, 131 N.M. 241, 34 P.3d 630, cert. denied, 131 N.M. 363, 36 P.3d 953 (2002).

Hearsay statement in business record not admissible. — Statement in a report by the youth diagnostic development center from the commitment of a minor to the New Mexico boys school offered to prove character of the victim through opinion evidence was not admissible since it lacked trustworthiness because of the unreliability of the source of information contained therein. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

Specific violent act not inadmissible. — 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).

In a murder trial where the defendant alleged self-defense in shooting at an occupied vehicle but conceded that he did not know of his assailant's juvenile conviction for armed robbery, the trial court did not abuse its discretion in disallowing introduction of the evidence, especially when it is considered that the defendant fired at the vehicle while it was moving away. *State v. Gonzales*, 110 N.M. 166, 793 P.2d 848 (1990).

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).

Absence of mistake exception. — The absence of mistake exception is limited to situations when a defendant claims to have made a mistake; therefore, it does not apply to show absence of mistake on the part of a witness or the victim. *State v. Ruiz*, 2001-NMCA-097, 131 N.M. 241, 34 P.3d 630, cert. denied, 131 N.M. 363, 36 P.3d 953 (2002).

Evidence of specific instances of a victims' prior violent conduct may not be admitted to show that the victim was the first aggressor when the defendant is claiming self-defense. A victim's violent character is not an essential element of self-defense. *State v. Armendariz*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

Evidence of victim's drug use and sales. — Where defendant and another assailant broke into the home of the victim armed with metal bars or bats and defendant struck victim with a metal bar; defendant's aggravated burglary conviction was supported by the testimony of the victim, the victim's spouse and the victim's child; and defendant proffered testimony to show that the victim and the victim's spouse used methamphetamine and that defendant had seen numerous cars making short stops at the victim's house to show that the victim was using or selling drugs and that, therefore, the victim was untruthful and likely to initiate fraudulent civil lawsuits, the trial court properly exclude the testimony because the probative value of the evidence was far outweighed by the prejudice to the victim of being portrayed as a drug user or drug dealer. *State v. Trujillo*, 2012-NMCA-112, 289 P.3d 238, cert. granted, 2012-NMCERT-011.

IV. OTHER CRIMES, WRONGS OR ACTS.

Admissibility of prior convictions under Section 31-31A-2(D)(5) NMSA 1978. — Any evidence of a prior conviction referred to in Section 31-31A-2(D)(5) NMSA 1978 must also be admissible under Rules 11-403 and 11-404(B) NMRA. *State v. Serna*, 2013-NMSC-033.

Admission of prior convictions under Section 31-31A-2(D)(5) NMSA 1978 was error. — Where defendant was charged with trafficking imitation controlled substances for selling baking soda as cocaine; pursuant to Section 31-31A-2(D)(5) NMSA 1978; the district court allowed testimony about defendant's prior criminal convictions for possession of a controlled substance and credit card fraud; and the evidence of defendant's prior convictions went solely to propensity, painting defendant as a bad character from the drug world, the convictions were inadmissible. *State v. Serna*, 2013-NMSC-033.

Admission of prior convictions under Section 31-31A-2(D)(5) NMSA 1978 was harmless error. — Where defendant was charged with trafficking imitation controlled substances for selling baking soda as cocaine and first degree murder; pursuant to

Section 31-31A-2(D)(5) NMSA 1978, the district court erroneously allowed testimony about defendant's prior criminal convictions for possession of a controlled substance and credit card fraud; the evidence was admitted through the testimony of a police officer; neither side placed much emphasis on the convictions; the jury was given a limiting instruction that the jury could consider the convictions only to determine whether defendant committed the offense of distribution of an imitation controlled substance; defendant did not inquire into the convictions on cross-examination; the State briefly mentioned the convictions in closing arguments; the evidence of defendant's guilt was substantial; and the convictions were cumulative and not necessary to the State's case, the admission of the evidence about defendant's prior convictions was harmless error. *State v. Serna*, 2013-NMSC-033.

Defendant's accusations against the victim. — Where defendant was charged with the first degree murder of the victim; defendant was embittered by the victim's rejection of defendant and the breakup of the relationship between defendant and the victim; defendant made accusations to the ex-wife of the victim and police that the victim intended to sodomize the victim's son, tie the victim's son up, kill the victim's son, and drop the victim's son by a river; and the state informed the court that the rationale for admitting the evidence was to demonstrate attempts by defendant to hurt and isolate the victim from others after the relationship between defendant and the victim broke up, evidencing defendant's motive and intent, evidence of defendant's accusations against the victim was admissible. *State v. Flores*, 2010-NMSC-002, 147 N.M. 542, 226 P.3d 641.

Nude photographs of victims of sexual exploitation. — Where victims of sexual exploitation identified nude photographs of themselves and testified that the defendant took the photographs when the victims were minors and where the photographs corroborated the victims' testimony and provided context for the events that occurred between the victims and the defendant, the photographs were properly admitted into evidence. *State v. Dietrich*, 2009-NMCA-031, 145 N.M. 733, 204 P.3d 748.

Grooming evidence admissible. — Where the defendant alleged that he touched the child's vagina while applying medicine to a rash, but had not done so with sexual intent, grooming evidence was admissible to refute the defendant's assertion that he touched the child strictly for medical reasons. *State v. Sena*, 2008-NMSC-053, 144 N.M. 821, 191 P.3d 1198.

Proof of crime. — Where defendant was charged with aggravated stalking of the victim; in a prior case involving the victim in which defendant had been convicted of false imprisonment and battery, the judgment and sentence prohibited defendant from having contact with the victim; and a stipulated restraining order had been agreed upon by defendant and the victim, the court did not abuse its discretion in admitting the judgment and sentence and the stipulated restraining order, because they served the purpose of proving the elements of aggravated stalking. *State v. Gutierrez*, 2011-NMCA-088, 150 N.M. 505, 263 P.3d 282, cert. denied, 2011-NMCERT-008.

Where defendant's daughter described an incident wherein she witnessed defendant touching the minor victim's genital area, the daughter's testimony provided evidentiary support for one incident of sexual abuse of the victim and was not evidence of uncharged misconduct. *State v. Ruiz*, 2007-NMCA-014, 141 N.M. 53, 150 P.3d 1003, cert. denied, 2007-NMCERT-001.

Proof of intent. — Where defendant's ex-wife testified about a specific incident that occurred when the minor victim of sexual abuse was spending the night as a guest wherein the ex-wife observed defendant crouching beside the victim's bed, stroking her forehead and speaking softly to her, the testimony tended to establish that defendant behaved in an unusual manner, displaying a peculiar form and degree of attention toward the victim and was relevant and admissible. *State v. Ruiz*, 2007-NMCA-014, 141 N.M. 53, 150 P.3d 1003, cert. denied, 2007-NMCERT-001.

Proof of plan. — Paragraph B of this rule permits evidence of other crimes, wrongs or acts to be admitted to prove a "plan". *State v. Gallegos*, 2005-NMCA-142, 138 N.M. 673, 125 P.3d 652, cert. granted, 2005-NMCERT-012.

Proof of lack of accident. — Evidence of incident where defendant purposefully ran her vehicle into victim after finding victim in the company of another woman was admissible to show that defendant purposefully collided with victim's vehicle when she once again found victim in the company of other women. *State v. Flores*, 2015-NMCA-002, cert. granted, 2015-NMCERT- ___.

Limited probative value of cross-admitting evidence of offenses against each of two victims to show an "opportunity" to commit the offenses is overwhelmed by its substantial prejudicial effect. *State v. Gallegos*, 2005-NMCA-142, 138 N.M. 673, 125 P.3d 652, cert. granted, 2005-NMCERT-012.

Evidence of prior altercation was not admissible to show that victim was the first aggressor. *State v. Garcia*, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, cert. denied, 2005-NMCERT-004.

Where evidence of prior bad acts is subject to exclusion under Paragraph B of this rule, the district court did not abuse its discretion in excluding the evidence. *State v. Garcia*, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, cert. denied, 2005-NMCERT-004.

Paragraph B is fundamentally a rule of exclusion. *State v. Otto*, 2005-NMCA-047, 137 N.M. 371, 111 P.3d 229, cert. granted, 2005-NMCERT-004.

Rule 11-403 NMRA reinforces the very purpose of Paragraph B of this rule. *State v. Otto*, 2005-NMCA-047, 137 N.M. 371, 111 P.3d 229, cert. granted, 2005-NMCERT-004.

Purpose of Paragraph B of this rule is to protect a defendant from the circumstantial use of other bad acts to establish a character trait or propensity that might be given

more weight by the jury than it deserves, and might lead a fact finder to punish the defendant because he is a bad person. *State v. Otto*, 2005-NMCA-047, 137 N.M. 371, 111 P.3d 229, cert. granted, 2005-NMCERT-004.

Admissible exceptions to bad acts evidence in Paragraph B of this rule are subject to a general qualifier: prejudice to defendant. *State v. Otto*, 2005-NMCA-047, 137 N.M. 371, 111 P.3d 229, cert. granted, 2005-NMCERT-004.

The exceptions to Paragraph B of this rule exist to reel the defendant back into the case. *State v. Otto*, 2005-NMCA-047, 137 N.M. 371, 111 P.3d 229, cert. granted, 2005-NMCERT-004.

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 (1969), 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, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

Under this rule, evidence of other acts may be admissible to prove motive, intent, and absence of mistake. *State v. Mercer*, 2005-NMCA-023, 137 N.M. 36, 106 P.3d 1283, cert. denied, 2005-NMCERT-002.

Prejudice established by erroneous admission. — Since it was error to admit evidence of other crimes under Paragraph B, prejudice was established. *State v. Jones*, 120 N.M. 185, 899 P.2d 1139 (Ct. App. 1995).

Inadverdent introduction of prior bad acts. — Denial of defendant's motion for a mistrial after a witness inadvertently testified that defendant told him he was incarcerated on another charge was not an abuse of discretion where the trial court sustained defendant's objection and instructed the jury not to consider the testimony. *State v. Gonzales*, 2000-NMSC-028, 129 N.M. 556, 11 P.3d 131.

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).

Evidence bearing on intent. — Evidence showing that defendant committed other bad acts is admissible if it bears upon other issues, such as intent, in a way that does not merely show propensity. *State v. Sarracino*, 1998-NMSC-022, 125 N.M. 511, 964 P.2d 72.

Purposes listed in Paragraph B not exclusive. — The specific purposes listed in Paragraph B are not the exclusive purposes for which other-crime evidence is admissible. *State v. Lara*, 109 N.M. 294, 784 P.2d 1037 (Ct. App.), cert. denied, 109 N.M. 262, 784 P.2d 1005 (1989).

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 NMRA. *State v. Beachum*, 96 N.M. 566, 632 P.2d 1204 (Ct. App. 1981).

The court did not abuse its discretion in refusing to admit evidence of a witness' prior convictions, where the convictions were 25 and 29 years old and were not relevant to behavior at the time of the defendant's crime. *State v. Litteral*, 110 N.M. 138, 793 P.2d 268 (1990), appeal dismissed, 203 F.3d 835 (10th Cir. 2000).

Record insufficient to support admission of prior conduct evidence. — Where the reviewing court was not able to determine whether the trial court properly balanced admission of the testimony regarding prior bad acts with its prejudicial effects due to the state's failure to articulate what the evidence was probative of, or why a cognizable exception to the rationale underlying Paragraph B of this rule applied, it was prejudicial error to admit evidence of such prior uncharged conduct. *State v. Aguayo*, 114 N.M. 124, 835 P.2d 840 (Ct. App. 1992).

When improperly admitted evidence requires new trial. — Where the evidence, while being sufficient to sustain a conviction of a heinous crime, is marginal, the admission of unexplained dissimilar prior bad acts may make a new trial appropriate. However, a new trial may not be necessary, despite such improperly admitted evidence, where the evidence of guilt is overwhelming. *State v. Aguayo*, 114 N.M. 124, 835 P.2d 840 (Ct. App. 1992).

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).

In a prosecution for first degree child abuse, evidence that the defendant battered his wife after the death of the child to dissuade her from testifying, and evidence of his abuse of the wife's child, was admissible as relevant to the defendant's consciousness of guilt and lack of mistake or accident; however, the relevance of evidence concerning batteries of the wife prior to the child's death was outweighed by the possibility of improper prejudice. *State v. Ruiz*, 119 N.M. 515, 892 P.2d 962 (Ct. App. 1995).

Evidence of defendant's prior crime, introduced at the penalty phase of his trial by calling the victim of the crime, was relevant to prove defendant's motive for murder in the context of the aggravating circumstance of murdering a witness. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Admission of defendant's post-arrest statement of his intent to "shoot it out" with officers prior to his arrest was permissible under Paragraph B for the purpose of showing his consciousness of guilt. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Under Paragraph B of this rule, the proponent of evidence of other acts must identify the particular consequential fact upon which the proffered evidence bears. *State v. Kerby*, 2005-NMCA-106, 138 N.M. 232, 118 P.3d 740, cert. granted, 2005-NMCERT-008.

Uncharged bad acts. — In the case of evidence of other uncharged bad acts, unfair prejudice refers to the risk that the jury, notwithstanding limiting instructions, nevertheless will draw unfavorable inferences about the defendant's propensity for criminal conduct from evidence of non-charged bad acts. *State v. Kerby*, 2005-NMCA-106, 138 N.M. 232, 118 P.3d 740, cert. granted, 2005-NMCERT-008.

Past offense admissible as relating to retaliation charge. — In a prosecution for retaliation against a witness, it was not error to admit evidence regarding the name and nature of the prior felony offense which formed the basis for the charge that defendant retaliated against a person who witnessed that offense. *State v. Warsop*, 1998-NMCA-033, 124 N.M. 683, 954 P.2d 748, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

Evidence of other acts 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).

In a prosecution of the defendant for the murder of his wife, testimony of a witness that, before the murder, defendant had solicited his assistance in planning the murder of the victim's female best friend, who defendant believed was responsible for the deterioration of his marriage, was admissible as evidence of motive. *State v. Woodward*, 121 N.M. 1, 908 P.2d 231 (1995).

Evidence of other acts to show motive. — Evidence of the deterioration of defendant's relationship with the victim, and of the specific actions that gave her cause for rejecting him, was admissible where it directly addressed motivational theories presented at trial. *State v. Rojo*, 1999-NMSC-001, 126 N.M. 438, 971 P.2d 829.

Prior acts of spousal abuse. — In a prosecution of the defendant for the murder of his wife, hearsay testimony concerning prior incidents when the defendant struck the victim was admissible as evidence of motive, intent, plan or knowledge to establish the requisite mental state for first-degree murder. *State v. Woodward*, 121 N.M. 1, 908 P.2d 231 (1995).

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).

Motive evidence relating to witness credibility governed by Rule 11-608 NMRA. — 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 NMRA. *State v. Lovato*, 91 N.M. 712, 580 P.2d 138 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Evidence of other acts to show 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).

In a prosecution for murder in which the defendant's specific intent was at issue and evidence of his prior bad acts bore on that intent in a way that did not merely show his propensity for violence, the evidence was not barred. *State v. Niewiadowski*, 120 N.M. 361, 901 P.2d 779 (Ct. App. 1995).

Evidence of a feud between two families. Evidence of a feud between two families was relevant in a prosecution for second degree murder and involuntary manslaughter to show that the defendant's act was intentional and not merely accidental or the result of "sufficient provocation". *State v. Mireles*, 119 N.M. 595, 893 P.2d 491 (Ct. App. 1995).

Confession of prior criminal acts inadmissible to prove intent. — 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).

Factually similar incidents cannot, alone, prove plan. — The state's reliance on two factually similar incidents that occurred seven years apart, without more, was not enough to prove the existence of a plan; without some other proof that such a plan actually existed, evidence that the charged conduct was part of a bigger plan because the defendant did the same thing once before was nothing more than irrelevant propensity evidence. *State v. Montoya*, 116 N.M. 72, 860 P.2d 202 (Ct. App. 1993).

Evidence of other offenses to show 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).

Evidence of consciousness of guilt. — Trial court did not err in admitting defendant's contradictory statements to police regarding his involvement in a prior shooting incident as evidence of a consciousness of guilt. *State v. Martinez*, 1999-NMSC-018, 127 N.M. 207, 979 P.2d 718.

Evidence of other offenses to show 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); *State v. Stout*, 82 N.M. 455, 483 P.2d 510 (Ct. App. 1971).

Flight from police. — Trial court did not abuse its discretion in admitting evidence of defendant's flight from police, where the evidence was used to prove, not defendant's character, but his identity and consciousness of guilt. *State v. Kenny*, 112 N.M. 642, 818 P.2d 420 (Ct. App. 1991).

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).

Other attacks probative of pattern and identity. — Joinder in one trial of all counts arising from separate attacks on two victims was proper where the evidence relating to the attacks displayed sufficiently distinctive similarities to permit an inference of pattern for purposes of proving identity and the evidence of both crimes did not outweigh its probative value. *State v. Peters*, 1997-NMCA-084, 123 N.M. 667, 944 P.2d 896.

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).

Evidence of prior legal consensual sexual conduct. — In a prosecution for murder and criminal sexual penetration, testimony by defendant's girlfriend regarding defendant's enjoyment of anal sex was inadmissible since evidence was not relevant to the defendant's identity because it was not so distinctive as to constitute a unique or

distinct pattern easily attributable to one person; nor, was evidence relevant to defendant's motive because merely enjoying anal sex is not sufficient to suggest that defendant had cause to force himself on victim. *State v. Williams*, 117 N.M. 551, 874 P.2d 12 (1994).

Evidence of other sex acts held not admissible. — Evidence of occasional rejection of defendant's request for oral sex by his girlfriend was not admissible to prove the defendant coerced the child victim into various sexual activities, including oral sex. *State v. Lucero*, 114 N.M. 489, 840 P.2d 1255 (Ct. App. 1992).

Evidence admissible to show abuse of authority. — In a prosecution for criminal sexual contact of a minor, a patient at the facility where defendant worked, defendant's son's testimony regarding his father's use of his position of domestic authority to influence him for sexual ends, was relevant as it went directly to the question of whether defendant had the plan, design, or intent to control the victim in same way for factually similar purposes. *State v. Lamure*, 115 N.M. 61, 846 P.2d 1070 (Ct. App. 1992).

Evidence of past drug dealings in drug case. — Where a witness at a trial testified to her past drug dealings with the defendant and she also testified that the substance defendant injected into her arm, shown in a seized videotape, was methamphetamine, the testimony was admissible to establish the witness' ability to identify the drugs and to establish knowledge on behalf of the defendant. *State v. Attaway*, 114 N.M. 83, 835 P.2d 81 (Ct. App. 1992), aff'd, 117 N.M. 141, 870 P.2d 103 (1994).

Testimony regarding the defendant's prior cocaine sales to the witness was inadmissible as an attempt by the state to insinuate that the defendant sold cocaine to the witness on the day in question because he had done so in the past; the testimony was not highly probative to prove context, and the probative value, if any, was substantially outweighed by the danger of unfair prejudice. *State v. Wrighter*, 1996-NMCA-077, 122 N.M. 200, 922 P.2d 582.

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).

Time between incidences offered to show state of mind. — The time between incidences is an important factor to consider when determining the admissibility of a prior crime, wrong, or act under Paragraph B of Rule 11-404 NMRA to establish a defendant’s state of mind. The closer a prior act is to the act at issue, the more likely the prior act can establish a defendant’s state of mind at the relevant time, while the further the two incidents are apart in time, the less likely the prior act can establish a

defendant's state of mind. *State v. Branch*, 2010-NMSC-042, 148 N.M. 601, 241 P.3d 602.

Other act not admissible to show state of mind. — Where defendant was charged with first degree murder; defendant committed the alleged murder while under the influence of alcohol and drugs; the district court admitted evidence of defendant's prior robbery conviction because defendant had committed the robbery under the influence of alcohol and drugs and knew how drugs and alcohol affected defendant; and defendant's conduct that led to the robbery conviction occurred about five years prior to the incident that led to the murder, because the robbery occurred five years before the murder, the conduct that led to the robbery could not establish defendant's state of mind at the time of the murder and the prior robbery conviction was inadmissible propensity evidence. *State v. Branch*, 2010-NMSC-042, 148 N.M. 601, 241 P.3d 602.

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).

Evidence of other acts to corroborate defendant's version of events. — Where the victim was smoking and injecting methamphetamine; the victim's behavior became increasingly erratic; the victim was playing with two knives; defendant wrestled with the victim, in a long and violent struggle, attempting to disarm and restrain the victim; the victim was uncontrollable, violent, and wild; defendant put the victim in a "choke hold" on three occasions, but did not choke the victim to unconsciousness; each time defendant released the victim, the victim continued to violently struggle; even though defendant eventually duct taped the victim, the victim continued to struggle; the victim eventually stopped breathing and could not be revived; and defendant proffered the testimony of three police officers, who had prior experience with the victim while the victim was under the influence of methamphetamine, regarding prior specific instances of the victim's violent behavior, unusual strength, resistance to restraint, and imperviousness to pain when the officers attempted to arrest the victim, the testimony of the officers was admissible, not as character evidence or as evidence to prove actions by the victim in conformity with a generalized disposition to violence, but as evidence to corroborate defendant's claim that the victim's behavior while on methamphetamine necessitated defendant's continued use of force throughout the encounter. *State v. Maples*, 2013-NMCA-052, 300 P.3d 749, cert. quashed, 2013-NMCERT-003.

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).

Other acts admissible to show 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 NMRA, 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).

Other acts admissible to show 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).

Other acts admissible 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).

Other acts admissible 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 NMRA. *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 NMRA 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).

Specific instances of prior violence. — Since the specific instances from victim's background would have been cumulative and as such would not have affected the verdict, the trial court did not abuse its discretion in excluding the proffered specific instances of victim's prior violent conduct. *State v. Baca*, 114 N.M. 668, 845 P.2d 762 (1992).

Evidence of other acts to show propensity. — Evidence of other acts solely to show propensity is inadmissible. *State v. Jones*, 120 N.M. 185, 899 P.2d 1139 (Ct. App. 1995).

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 (1969), 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 NMRA, 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), overruled on other grounds, *Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993).

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).

Failure to sever two counts of forgery arising from two separate incidents involving alteration of bingo cards did not prejudice defendant where evidence of the two offenses would be independently admissible in separate trials to prove the essential elements of intent and knowledge. *State v. Nguyen*, 1997-NMCA-037, 123 N.M. 290, 939 P.2d 1098.

Defendant's prior lewd behavior toward sexual assault victim. — The general prohibition against evidence of other misconduct does not bar testimony concerning the relationship between the accused and a victim of sexual misconduct if the testimony is offered to show a lewd and lascivious disposition of the defendant toward the victim. *State v. Delgado*, 112 N.M. 335, 815 P.2d 631 (Ct. App. 1991); *State v. Trujillo*, 119 N.M. 772, 895 P.2d 672 (Ct. App. 1995).

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).

Defendant must make preliminary showing of relevancy as to rape victim's past sexual conduct. — 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).

Prior bad acts against sexual assault victim admissible. — In a prosecution for criminal sexual contact with a minor, the admission of evidence of prior "bad" acts, including uncharged sexual battery dating back to the victim's early childhood, was not error. The evidence corroborated the victim's testimony and placed the charged acts in

context. The evidence of defendant's treatment of the victim was relevant to the issue of credibility and not merely offered to show defendant's character and propensity to commit the crime. *State v. Landers*, 115 N.M. 514, 853 P.2d 1270 (Ct. App. 1993).

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).

Prior 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).

Evidence of uncharged acts. — Where defendant’s statement to the police could have been interpreted by the jury as admitting to sexual penetration, but doing so unconsciously, evidence of subsequent uncharged sexual acts by defendant with respect to the victim to show lack of accident or mistake was properly admitted because without evidence of the uncharged acts, the jury was likely to believe that the charged act was a mistake or accident and there was no other evidence available to rebut this potential inference. *State v. Otto*, 2007-NMSC-012, 141 N.M. 443, 157 P.3d 8.

Where defendant’s statement to the police could have been interpreted by the jury as admitting to sexual penetration, but doing so unconsciously, evidence of subsequent uncharged sexual acts by defendant with respect to the victim was admissible to show that the defendant’s actions were intentional and not committed accidentally or by mistake. *State v. Otto*, 2007-NMSC-012, 141 N.M. 443, 157 P.3d 8.

Evidence of sexual intent. — Evidence that defendant constructed a peephole which allowed him to peer into the victim’s bathroom while defendant hid in a cubbyhole adjacent to the master bedroom was admissible to show that defendant touched the victim’s buttocks with a sexual intent to rebut evidence that defendant innocently touched the victim’s buttocks. *State v. Kerby*, 2007-NMSC-014, 141 N.M. 413, 156 P.3d 704.

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).

For note, "New Mexico Rejects the 'Lewd and Lascivious' Exception to Rule 404(B): *State v. Lucero*," see 24 N.M.L. Rev. 427 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 752 et seq.; 29 Am. Jur. 2d Evidence §§ 363 et seq., 404 et seq.

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 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.

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 of evidence of other offense where record has been expunged or erased, 82 A.L.R.4th 913.

Admissibility of evidence of commission of similar crime by one other than accused, 22 A.L.R.5th 1.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial, 37 A.L.R.5th 319.

Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense, 58 A.L.R.5th 749.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape person other than prosecutrix - prior offenses, 86 A.L.R.5th 59.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other then prosecutrix - subsequent acts, 87 A.L.R.5th 181.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape, person other than prosecutrix - offenses unspecified as to time, 88 A.L.R.5th 429.

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, 171 A.L.R. Fed. 483.

Admissibility, under Rule 404(b) of Federal Rules of Evidence (28 USCS Appx, Federal Rules of Evidence, Rule 404(b)), of evidence of accused's prior use of illegal drugs in prosecution for conspiracy to distribute such drugs, 114 A.L.R. Fed. 511.

23 C.J.S. Criminal Law §§ 816 to 832; 32 C.J.S. Evidence § 495 et seq.; 98 C.J.S. Witnesses §§ 489, 491 to 537.

11-405. Methods of proving character.

A. **By reputation or opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

B. **By specific instances of conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of conduct.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-405 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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

The 1993 amendment, effective December 1, 1993, substituted "that person's conduct" for "his conduct" at the end of Paragraph B.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes.

Rule 11-403 NMRA 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 NMRA 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 NMRA (relating to evidence of character and other acts), and is admissible under Rule 11-402 NMRA 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).

Admissibility of psychologist's opinion. — Although the character of a coercer is not an element of the defense of duress, a psychologist's opinion of the alleged coercer's

character is admissible as relevant to prove defendant's reasonable apprehension that the coercer would carry out his threats. *State v. Duncan*, 111 N.M. 354, 805 P.2d 621 (1991).

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).

Defendant's trait of character for peacefulness was relevant to prosecution for child abuse based on shaken baby syndrome, and, therefore, admissible under this rule. *State v. Schoonmaker*, 2005-NMCA-012, 136 N.M. 749, 105 P.3d 302, cert. granted, 2005-NMCERT-001.

Specific conduct evidence is not admissible to prove a pertinent trait of character under Rule 11-404 NMRA. *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 NMRA 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 NMRA 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).

In a murder trial where the defendant alleged self-defense in shooting at an occupied vehicle but conceded that he did not know of his assailant's juvenile conviction for armed robbery, the trial court did not abuse its discretion in disallowing introduction of the evidence, especially when it is considered that the defendant fired at the vehicle while it was moving away. *State v. Gonzales*, 110 N.M. 166, 793 P.2d 848 (1990).

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).

Victim's violent acts not admissible. — Evidence of the victim's specific violent acts is not admissible to prove that the victim acted violently on a specific occasion and was the first aggressor, although evidence of reputation or opinion would be admissible for that purpose. *State v. Baca*, 115 N.M. 536, 854 P.2d 363 (Ct. App. 1993).

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).

Booking photo to show defendant’s character. — Where the trial court admitted into evidence defendant’s photograph, which was taken when defendant was booked into the county jail while wearing inmate clothing, during defendant’s trial for first degree

murder; defendant's identity or appearance were not an issue in the case; and the state argued that the photograph was material to defendant's character which the State claimed was central to defendant's claim of self-defense, the trial court erred in admitting the photograph into evidence. *State v. Leyba*, 2012-NMSC-037, 289 P.3d 1215.

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).

For note, "Whether a Defendant's Claim of Victim Aggressiveness is an 'Essential Element' of the Defense of Self-Defense: *State v. Baca I & II*," see 24 N.M.L. Rev. 449 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29 Am. Jur. 2d Evidence § 375 et seq.

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.

Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense, 58 A.L.R.5th 749.

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 § 495 et seq.; 98 C.J.S. Witnesses §§ 489, 491 to 537.

11-406. Habit; routine practice.

A. **Admissibility.** Evidence of a person's habit or an organization's routine practice may by admitted to prove that on a particular occasion the person or organization acted

in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

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.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-406(A) NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility. This rule retains Paragraph B from the earlier version of the New Mexico rule. There is no federal equivalent to Paragraph B.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 406 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes.

"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. *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 § 390 et seq.

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; 32A C.J.S. Evidence §§ 768, 785.

11-407. Subsequent remedial measures.

When measures are taken by a defendant that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove the following: negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or – if disputed – proving ownership, control, or the feasibility of precautionary measures.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-407 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. The amended rule now states that evidence of subsequent remedial measures taken by a defendant are not admissible to prove defects in a product or design or the need for a warning. The rule is not applicable to subsequent remedial measures taken by non-defendants. *See Couch v. Astec Indus., Inc.*, 2002-NMCA-084, 132 N.M. 631, 53 P.3d 398, *cert. denied*, 132 N.M. 551, 52 P.3d 411 (2002).

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 407 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes and to provide that evidence of subsequent remedial measures is inadmissible to prove a defect in a product or its design or to prove a need for a warning or instruction.

Non-defendants. — The prohibition against admitting evidence of subsequent remedial measures does not apply to measures taken by non-defendants. Thus, under Rules 401 and 403, NMRA, evidence that an employer, subsequent to an injury, added a safety device next to a machine was highly relevant in an action by an employee against the manufacturer of the machine and any prejudice to the manufacturer was mitigated by the court's instructions to the jury. *Couch v. Astec Indus., Inc.*, 2002-NMCA-084, 132 N.M. 631, 53 P.3d 398, cert. denied, 132 N.M. 551, 52 P.3d 411 (2002).

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).

Impeachment exception not applicable. — Merely because a defendant denies that it was negligent and contends that it acted in a reasonable manner does not automatically open the door for the admission of evidence of remedial action under the impeachment

exception; thus, in an action against a county race track by a jockey who was injured when his horse veered causing him to fall and strike a post and track rail, merely because the defendants' witness testified that he did not believe a dangerous situation existed, evidence of subsequent remedial measures taken by the track should not have been admitted. *Yardman v. San Juan Downs, Inc.*, 120 N.M. 751, 906 P.2d 742 (Ct. App. 1995).

Determination of negligence. — Where in light of all the evidence presented, the appellate court cannot say that defendants were prejudiced because the trial court instructed the jury not to consider evidence that manufacturer of ride at New Mexico State Fair had subsequently added a safety cable and rewritten their manual after the accident, defendants were not prejudiced by the trial court's instruction to the jury that it should not consider subsequent remedial measures in determining negligence. *Atler v. Murphy Enterprises, Inc.*, 2005-NMCA-006, 136 N.M. 701, 104 P.3d 1092, cert. granted, 2005-NMCERT-001.

Product liability cases. — This rule does not apply to product liability cases. *Garcia v. Fleetwood Enterprises, Inc.*, 200 F. Supp. 2d 1302 (D.N.M. 2002).

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 § 463 et seq.

Admissibility of evidence of repairs, change of conditions or precautions taken after accident, 64 A.L.R.2d 1296, 15 A.L.R.5th 119.

Admissibility of evidence of repairs, change of condition, or precautions taken after accident - modern state cases, 15 A.L.R.5th 119.

Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence, 50 A.L.R. Fed. 935.

Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence, 158 A.L.R. Fed. 609.

65A C.J.S. Negligence §§ 221, 224, 225.

11-408. Compromise offers and negotiations.

A. **Prohibited uses.** Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or contradiction:

(1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in order to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim.

B. **Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

[As amended, effective April 1, 1976; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-408 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility. New Mexico's rule, unlike its federal counterpart, does not create an exception for "conduct or statements made during compromise negotiations offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority." *See* Fed. R. Evid. 408(a)(2).

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 408 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

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).

Settlement offer is admissible to show wrongful conduct. — Rule 11-408 NMRA does not preclude admission of evidence of settlement negotiations in an insurance coverage dispute when the settlement negotiations are offered not to prove coverage or amount, but are offered to prove wrongful conduct such as bad or unfair practices during the claim investigation and upon denial of the claim. *Fin. Indem. Co. v. Cordoba*, 2012-NMCA-016, 271 P.3d 768.

Where plaintiff was involved in an motor vehicle accident; worker's compensation paid plaintiff's lost wages and medical bills; plaintiff sought additional payment from defendant under the uninsured/underinsured motor coverage of plaintiff's policy; when settlement negotiations failed, defendant filed a declaratory judgment action as to whether the policy covered plaintiff's claim and in what amount; and plaintiff filed a counterclaim, alleging bad faith and averring that defendant had acknowledged coverage of plaintiff's claim by two settlement offers that were less than the policy limits and that the declaratory judgment action was a tactic to cause delay, the district court erroneously dismissed plaintiff's counterclaim for failure to state a claim, because the settlement negotiations were not offered to show that defendant acknowledged coverage or admitted liability for benefits, but to show that defendant acted in bad faith in an attempt to delay payment or to pay less than defendant was required by law to pay. *Fin. Indem. Co. v. Cordoba*, 2012-NMCA-016, 271 P.3d 768.

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, Section 14-9-3 NMSA 1978. *Cano v. Lovato*, 105 N.M. 522, 734 P.2d 762 (Ct. App. 1986).

Cross-examination for purpose of showing witness' 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).

Information on settlements allowed. — In a personal injury action, the trial court did not abuse its discretion by informing the jury of the fact of settlement between the plaintiffs and other parties. *Fahrbach v. Diamond Shamrock, Inc.*, 1996-NMSC-063, 122 N.M. 543, 928 P.2d 269.

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 § 507 et seq.

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.; 32 C.J.S. Evidence § 379 et seq.

11-409. Offers to pay medical and similar expenses.

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-409 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective

December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 409 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

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 § 480 et seq.

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.

32 C.J.S. Evidence § 379 et seq.

11-410. Pleas, plea discussions, and related statements.

A. **Prohibited uses.** In a civil, criminal, or children’s court case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) an admission in a delinquency case;

(4) a statement made during a proceeding on any of those pleas or admissions in any court;

(5) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or resulted in a later-withdrawn guilty plea.

B. **Exceptions.** The court may admit a statement described in Rule 11-410(A)(4) or (5) NMRA

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness both statements ought to be considered together, or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

[As amended, effective February 1, 2000; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-410 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

The New Mexico rule, unlike the federal rule, also applies to Children's Court delinquency proceedings.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 410 of the Federal Rules of Evidence.

The 1999 amendment, effective February 1, 2000, inserted "or an admission in a children's court proceeding" near the beginning and substituted "no contest" for "nolo contendere" in two places.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

The admission of a guilty plea in violation of Rule 11-410 NMRA is subject to a harmless error test. *State v. Smile*, 2009-NMCA-064, 146 N.M. 525, 212 P.3d 413, *cert. granted*, 2009-NMCERT-007.

Admission of guilty plea was harmless. — Where, before the trial court admitted testimony that the defendant attempted to plead guilty to charges of aggravated stalking in magistrate court, the state offered the victim's eyewitness testimony that the defendant had threatened the victim on multiple occasions and similar eyewitness testimony by the victim's friends regarding the defendant's multiple threats toward the victim; police officers testified that the defendant stated that the defendant was going to make the victim feel the defendant's pain, that the defendant was going to put the fear of God in the victim, and that the defendant admitted that the defendant sat in front of the victim's apartment after receiving a temporary restraining order to inflict pain on the victim and to instill fear in the victim; and when the defendant testified, the defendant did not offer any testimony that was inconsistent with the guilty plea and the defendant admitted that the defendant had done everything that the victim had accused the defendant of doing, the guilty plea evidence was cumulative evidence and the erroneous admission of testimony about the defendant's guilty plea was harmless. *State v. Smile*, 2009-NMCA-064, 146 N.M. 525, 212 P.3d 413, *cert. granted*, 2009-NMCERT-007.

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).

Reliance on rule by defendant. — The determinative factor in excluding statements pursuant to this rule is whether it may be naturally inferred that the defendant relied on the rule in deciding to break silence, because the rule encourages cooperation only if the defendant relied on it. *State v. Anderson*, 116 N.M. 599, 866 P.2d 327 (1993).

Presumption of reliance. — To assure "fairness", when a suspect is induced by the state to engage in plea negotiations, as in formal plea negotiations with a state attorney or an agent of the attorney, there will be an irrebuttable presumption that such person has relied on the rule in breaking his silence, and all statements made during the course of "making a deal" are inadmissible in future proceedings, whether the statements are offers to confess or offers to plead guilty, and regardless of whether the declarant has been formally charged with a crime. The court may be guided by the established standards of voluntariness in finding inducement by the state. *State v. Anderson*, 116 N.M. 599, 866 P.2d 327 (1993).

Absent a finding by the court that statements were made with the belief they could not be "held against" the declarant, if a defendant or suspect makes uninduced statements after receiving *Miranda* warnings (i.e., being told that any statement made may be used against such person in court), there is no reason to presume that such person was motivated to make inculpatory statements in reliance on some rule of inadmissibility. *State v. Anderson*, 116 N.M. 599, 866 P.2d 327 (1993).

No reliance on rule where crimes admitted on direct. — Although admissions made for purposes of plea bargaining are inadmissible as probative evidence under this rule, since the defendant admitted to previous crimes during direct examination, his reliance on this rule was misplaced. *State v. Duncan*, 117 N.M. 407, 872 P.2d 380 (Ct. App. 1994).

Statements volunteered not protected. — Statements volunteered by the defendant in contacts and letters initiated with authorities are beyond the protection of this section. *State v. Fernandez*, 117 N.M. 673, 875 P.2d 1104 (Ct. App. 1994).

Right to discovery of statement of accomplice. — Even though the statement of the defendant's accomplice made in negotiations of a plea agreement was not admissible against the accomplice at his trial, the state did have a responsibility to provide the statement to the defendant. *State v. Setser*, 1997-NMSC-004, 122 N.M. 794, 932 P.2d 484.

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 § 517 et seq.

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.; 32 C.J.S. Evidence §§ 398, 399.

11-411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible to prove that the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-411 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

Rule 11-411 NMRA previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the rule. To improve the language of the rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the rule, its admissibility remains governed by other rules of evidence.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 411 of the Federal Rules of Evidence.

The 1993 amendment, effective December 1, 1993, substituted "the person acted" for "he acted" in the first sentence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes.

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).

This rule is a particularized application of the balancing test required by Rule 11-403 NMRA, and reflects a decision that the prejudicial effect of disclosure along with the injection of confusing collateral issues outweighs its probative value. *Martinez v. Reid*, 2002-NMSC-015, 132 N.M. 237, 46 P.3d 1237.

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 NMRA 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. *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).

Insurance evidence 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), overruled on other grounds, *Baxter v. Gannaway*, 113 N.M. 45, 822 P.2d 1128 (Ct. App. 1991). *See* Rule 11-403 NMRA.

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).

Irresponsive or inadvertent answer not grounds for mistrial. — If a lawyer propounds a question which calls for proper evidence, the fact that an irresponsive 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).

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).

Bifurcation of trial of negligence and insurance contract claims. — The trial court erred in denying the defendant's motion to bifurcate the plaintiff's negligence claims against the defendant from the plaintiff's contract claims against an uninsured motorist carrier and the carrier's subrogation claims, and in permitting the carrier to participate in the trial, since it had the effect of injecting liability insurance into the trial. *Sena v. N.M. State Police*, 119 N.M. 471, 892 P.2d 604 (Ct. App. 1995).

Joinder not to be disclosed to jury. — When subrogated insurers are required by Rule 1-017 NMRA to be joined as parties and the case is to be tried before a jury, the fact of the insurer's joinder is not to be disclosed to the jury; if it is the insured who has been joined, the requirement shall be the same. *Safeco Ins. Co. of Am. v. United States Fid. & Guar. Co.*, 101 N.M. 148, 679 P.2d 816 (1984).

Where a parent sued the driver and the insurer for negligence arising from a car accident, and the insurer sought to prohibit disclosure of its presence to the jury, the *Safeco* (101 N.M. 148, 679 P.2d 816 (1984)) procedure should be used in cases where joinder of a defendant's liability insurer was required; where, however, this rule would allow disclosure of insurance to the jury, the need for bifurcation was diminished, and the trial court would retain discretion not to bifurcate the trial. *Martinez v. Reid*, 2002-NMSC-015, 132 N.M. 237, 46 P.3d 1237.

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 § 483 et seq.

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 § 208; 98 C.J.S. Witnesses §§ 567, 568.

11-412. Sex crimes; testimony; limitations; in camera hearing.

A. **Prohibited uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior, or

(2) evidence offered to prove a victim’s sexual predisposition.

B. **Exceptions.** The court may admit evidence of the victim's past sexual conduct that is material and relevant to the case when the inflammatory or prejudicial nature does not outweigh its probative value.

C. **Procedure to determine admissibility.**

(1) **Motion.** If the defendant intends to offer evidence under Rule 11-412(B) NMRA, the defendant must file a written motion before trial. If the defendant discovers new information during trial, the defendant shall immediately bring the information to the attention of the court outside the presence of the jury.

(2) **Hearing.** Before admitting evidence under this rule, the court shall conduct an in camera hearing to determine whether such evidence is admissible.

(3) **Order.** If the court determines that the proposed evidence is 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. Unless the court orders otherwise, the motion, order, related materials, and the record of the hearing must remain sealed.

[Adopted, effective July 1, 1980; former Rule 11-413 amended and recompiled as Rule 11-412 by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — This rule, previously numbered Rule 11-413 NMRA, was renumbered in 2012 as Rule 11-412 NMRA, and Rule 11-412 NMRA was renumbered as Rule 11-413 NMRA. The renumbering was adopted because the subject matter of renumbered Rule 11-412 is now consistent with Federal Rule 412, although the rule is substantively different. Changes to the renumbered rule were intended to be stylistic only and not intended to change the rule in any substantive way.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes. This rule, which was previously numbered as Rule 11-413 NMRA, was renumbered as Rule 11-412 NMRA.

De novo review is the proper standard of review for analyzing cases implicating both the rape shield law and the Confrontation Clause. *State v. Montoya*, 2014-NMSC-032, *rev'g* 2013-NMCA-076, 306 P.3d 470.

Analysis of cases implicating both the rape shield law and the Confrontation Clause. — When a defendant makes a claim that the rape shield law bars evidence implicating the defendant's confrontation rights, the district court must first identify a theory of relevance implicating the defendant's constitutional right to confrontation and then weigh whether evidence elicited under that theory would be more prejudicial than probative. *State v. Montoya*, 2014-NMSC-032, *rev'g* 2013-NMCA-076, 306 P.3d 470.

Application of rape shield law violated Confrontation Clause. — Where defendant and the victim, who had a sexual relationship for two years, began arguing about a telephone call that defendant had received; during the argument, defendant indicated to the victim that defendant wanted sex; defendant and the victim went into defendant's bedroom where defendant got on top of the victim and tried to remove the victim's clothes; the victim told the defendant "no" several times and pushed and kicked defendant until defendant stopped making sexual advances; defendant was indicted for kidnapping with intent to commit a sexual offense; the district court refused to allow defendant on cross-examination to ask the victim whether the victim and defendant had a long-standing sexual relationship and whether they had a history of engaging in sex after an argument as "make-up sex" to resolve disputes for the purpose of showing that defendant never intended to sexually assault the victim but was pursuing consensual "make-up sex" as defendant and the victim had done after arguments in the past; the victim was the sole material witness against defendant and the only witness who could provide testimony necessary for defendant's theory of the case; and the evidence was relevant to defendant's defense and would not have had a prejudicial impact on the victim, the district court's ruling violated defendant's confrontation right because it denied defendant an opportunity to present a full and fair defense. *State v. Montoya*, 2014-NMSC-032, *rev'g* 2013-NMCA-076, 306 P.3d 470.

Standard of review for cases involving the rape shield rule and the Confrontation Clause. — There are three steps and three standards of review that relate to the application of the rape shield rule. First, the court reviews de novo whether a defendant has presented a theory of admissibility that implicates the defendant's confrontation rights. If the defendant has, the court undertakes a de novo balancing of the State's interest in excluding the evidence against the defendant's constitutional rights to determine if the district court acted within the wide scope of its discretion to limit cross-examination. If the Confrontation Clause is not implicated or if there has been no Confrontation Clause violation, the court examines whether the district court has abused its discretion in its application of the rule itself. *State v. Montoya*, 2013-NMCA-076, cert. granted, 2012-NMCERT-005.

Application of the rape shield rule did not implicate the Confrontation Clause. — Where defendant and the victim had been arguing; defendant wanted to have sex with the victim, but the victim refused; defendant got on top of the victim and attempted to remove the victim's clothing; the victim pushed and kicked defendant until defendant stopped; defendant did not force the victim to have sex; defendant was charged with kidnapping and attempt to commit criminal sexual penetration; to show that defendant did not have specific intent to commit the crimes, defendant sought to introduce

evidence of the sexual history of the victim and defendant to show that the defendant's intent and the victim's belief was that defendant was trying to have sex to "make-up" just as they had done in the past; the district court precluded defendant from inquiring into the party's sexual history; at trial, the victim testified that defendant and the victim had been friends for two years, the victim believed that defendant would not penetrate the victim unless the victim consented, and the victim perceived defendant's actions as an attempt to obtain the victim's consent to have sex; defendant claimed that defendant's confrontation rights had been violated because defendant was unable to challenge an opposing version of the facts, the district court's exclusion of the evidence did not implicate or violate the Confrontation Clause because defendant sought not to confront the victim, but to use the victim's testimony as evidence unrelated to the truth or accuracy of the victim's testimony and the district court did not abuse its discretion in excluding of evidence of the history of victim's and defendant's sexual relationship. *State v. Montoya*, 2013-NMCA-076, cert. granted, 2012-NMCERT-005.

Witness use immunity and transactional immunity distinguished. — Transactional immunity involves a promise by prosecutors that a witness will not be prosecuted for crimes related to the events about which the witness testifies. Transaction immunity affords the witness immunity related to the entire transaction, not just the witness's testimony. Transactional immunity is a legislative prerogative defined by statute. Under a grant of use immunity, the prosecution promises only to refrain from using the testimony in any future prosecution, as well as any evidence derived from the protected testimony. Under use immunity, the prosecution may proceed with charges against the witness so long as it does not use or rely on the witness's testimony or its fruits. The grant of use immunity is a power that the Supreme Court defines in the exercise of its inherent judicial authority. *State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783, rev'g *State v. Belanger*, 2007-NMCA-143, 142 N.M. 751, 170 P.3d 530 and overruling *State v. Cheadle*, 101 N.M. 282, 681 P.2d 708 (1983); *State v. Baca*, 1997-NMSC-045, 124 N.M. 55, 946 P.2d 1066; *State v. Sanchez*, 98 N.M. 428, 649 P.2d 496 (Ct. App. 1982).

Purpose of rule. — This rule and Rule 5-116 NMRA, which grant the judicial branch the authority to immunize a witness, strike a permissible balance between the state's interest in prosecuting crime and private rights under the Fifth Amendment. *State v. Brown*, 1998-NMSC-037, 126 N.M. 338, 969 P.2d 313.

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).

Use of immunized testimony precluded. — Section 31-6-15 NMSA 1978, and its implementing rules, Rule 5-116 NMRA and this rule, allow the government to compel a

witness to testify and then prosecute the witness for the crimes mentioned in the compelled testimony, as long as neither the testimony itself nor any information directly or indirectly derived from the testimony is used in the prosecution. However, it is not enough for the prosecutor to simply assert that all evidence to be used at trial was obtained prior to the defendant's immunized testimony; instead the state should have included testimony from key witnesses, along with testimony from the prosecutor and the investigators, that the witnesses had not had access or otherwise been exposed to the defendant's immunized testimony. *State v. Vallejos*, 118 N.M. 572, 883 P.2d 1269 (1994).

Law reviews. — For note, "Criminal Procedure - The Fifth Amendment Privilege Against Self-Incrimination Applies to Juveniles in Court-Ordered Psychological Evaluations: State v. Christopher P.," see 23 N.M.L. Rev. 305 (1993).

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 §§ 862, 863, 900.

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. Use of evidence obtained under immunity order precluded.

Testimony or evidence compelled under an order of immunity, or any information derived from such testimony or evidence, may not be used against the person compelled to testify or to produce evidence in any criminal case, except

1. in a prosecution for perjury committed during that testimony, or

2. in a contempt proceeding for failure to comply with an order of immunity.

[Adopted, effective April 1, 1976; former Rule 11-412 amended and recompiled as Rule 11-413 by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — This rule, previously numbered Rule 11-412 NMRA, was renumbered in 2012 as Rule 11-413 NMRA, and Rule 11-413 NMRA was renumbered as Rule 11-412 NMRA. The renumbering was adopted because the subject matter of renumbered Rule 11-412 is now consistent with Federal Rule 412, although the rule is substantively different. Changes to the renumbered rule were intended to be stylistic only and not intended to change the rule in any substantive way.

This rule was added in conjunction with adoption of witness immunity rule. *See also* Rule 5-116 NMRA. The New Mexico rules were derived from the federal statute. *See* 18 U.S.C. § 6003. There is no comparable federal rule.

For statute and rules on witness immunity, *see* Section 31-6-15, NMSA 1978, and Rules 5-116 and 10-341 NMRA.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes. This rule, which was previously numbered as Rule 11-412 NMRA, was renumbered as Rule 11-413 NMRA.

Accused's right of confrontation denied. — Where the defendant's sole defense in his rape trial was that the child victim consented to sexual intercourse with him and then fabricated an allegation of rape because her parents, who were opposed to premarital sex because of their deeply religious convictions, had previously punished the victim for engaging in consensual sex with someone else, the defendant was denied his constitutional right of confrontation when the trial court prohibited the defendant from cross-examining the victim and her parents about the victim's prior sexual encounter and the punishment the victim had received from her parents as a result of that encounter and the error was not harmless beyond a reasonable doubt. *State v. Stephen F.*, 2008-NMSC-037, 144 N.M. 360, 188 P.3d 84, aff'g 2007-NMCA-025, 141 N.M. 199, 152 P.3d 842.

Prior sexual abuse of a child. — To rebut the natural assumption that a young victim of sexual abuse is sexually naive and could only have learned about it because the victim was victimized by the defendant, the defendant may introduce the fact that the victim had been previously sexually abused to show an alternative source of sexual knowledge. *State v. Payton*, 2007-NMCA-110, 142 N.M. 385, 165 P.3d 1161, cert. denied, 2007-NMCERT-008.

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).

Evidence of victim's past sexual conduct excluded. — Even though evidence of a victim's prior sexual conduct may be admissible to show bias, motive to fabricate or for other purposes consistent with the constitutional right of confrontation, the trial court did not err in rejecting such evidence where defendant failed to show that it was material and relevant, and that its probative value equaled or outweighed its inflammatory nature. *State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

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*, 109 N.M. 132, 782 P.2d 385 (Ct. App. 1989).

In a prosecution for criminal sexual penetration, the trial court did not abuse its discretion under Rule 11-403 NMRA and this rule in prohibiting inquiry into the alleged prior rape of the victim. *State v. Hueglin*, 2000-NMCA-106, 130 N.M. 54, 16 P.3d 1113.

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 prosecution for sex offense of evidence of victim's sexual activity after the offense, 81 A.L.R.4th 1076.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 A.L.R.4th 685.

Admissibility in sex offense case, under Rule 412 of Federal Rules of Evidence, of evidence of victim's past sexual behavior, 166 A.L.R. Fed. 639.

ARTICLE 5
Privileges

11-501. Privileges recognized only as provided.

Unless required by the constitution, these rules, or other rules adopted by the supreme court, no person has a privilege to

A. refuse to be a witness;

B. refuse to disclose any matter;

C. refuse to produce any object or writing; or

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

[As amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

Cross references. — For privilege against self-incrimination, *see* N.M. Const., art. II, § 15.

For privileged communications generally, *see* Section 38-6-6 NMSA 1978.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-025, effective December 31, 2013, simplified the language of the rule; in the first sentence, deleted “Except as otherwise” and added “Unless”, after “required by”, deleted “and except as provided in”, and after “these rules, or”, deleted “in”; in Paragraphs A and B, at the end of the sentence, deleted “or”; and in Paragraph D, after “being a witness”, deleted “or”.

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).

Common law privileges not recognized. — Given the clear directive of 11-501 NMRA, the court will not recognize common law privileges. *Estate of Romero v. City of Santa Fe*, 2006-NMSC-028, 139 N.M. 761, 137 P3d 611.

No law enforcement privilege. — Neither the Constitution nor the Rules of Evidence recognizes a law enforcement privilege that protects law enforcement investigative materials from discovery. *Estate of Romero v. City of Santa Fe*, 2006-NMSC-028, 139 N.M. 761, 137 P3d 611.

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).

Victim Counselor Confidentiality Act is consistent with the psychotherapist-patient privilege in this rule and it is to be given effect. *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, 138 N.M. 398, 120 P.3d 820.

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 Section 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. *Sw. Cmty. 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 Section 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 §§ 285, 286, 290.

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.

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, 75 A.L.R.4th 1144.

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, 31 A.L.R.4th 1226.

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, 26 A.L.R.5th 628, 27 A.L.R.5th 76.

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.

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.

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, 87 A.L.R. Fed. 177.

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.

Privilege of newsgatherer against disclosure of confidential sources or information, 99 A.L.R.3d 37.

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 552.

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.

Insured-insurer communications as privileged, 55 A.L.R.4th 336.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution - modern state cases, 74 A.L.R.4th 223.

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, 74 A.L.R.4th 277.

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.

Waiver of evidentiary privilege by inadvertent disclosure - federal law, 159 A.L.R. Fed. 153.

Views of United States Supreme Court as to attorney-client privilege, 159 A.L.R. Fed. 243.

97 C.J.S. Witnesses § 252; 98 C.J.S. Witnesses §§ 430 to 457.

11-502. Required reports privileged by statute.

A. **Scope of the privilege.** Should any law require a return or report to be made and the law mandating the creation of that return or report provides for its confidentiality, the person or entity, in either a public or private capacity, making the return or report has a privilege to refuse to disclose, or to prevent any other person from disclosing, the return or report.

B. **Exceptions.** The privilege does not cover a return or report that does not comply with the law that mandates its creation, nor actions involving perjury, false statements, or fraud in the return or report.

[As amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

The 2013 amendment, approved by Supreme Court Order No. 13-8300-025, effective December 31, 2013, provided that the privilege applies only if the law mandating the creation of a return or report provides for the confidentiality of the return or report; provided that the privilege does not extend to a return or report that does not comply with the law that mandates its creation; in Paragraph A, added the title, in the first sentence, deleted “A person, corporation, association or other organization or entity, either public or private, making a return or report required by law to be made” and

added the new language beginning with “Should any law” and ending with “making the return or report”, after “refuse to disclose”, deleted “and” and added “or”, after “prevent any other person from disclosing”, deleted the language “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” and added “the return or report”; and in Paragraph B, added the title of the paragraph, deleted “No privilege exists under this rule in” and added “The privilege does not cover a return or report that does not comply with the law that mandates its creation”, after “false statements”, added “or”, and after “fraud in the return or report”, deleted “or other failure to comply with the law in question”.

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).

Gross receipts tax returns are confidential and privileged. — Where plaintiff sued defendants for employment discrimination; plaintiff’s spouse, who was not a party to the action, maintained a private law practice; plaintiff alleged that upon filing the complaint, defendants retaliated against plaintiff by asserting irregularities with regard to the gross receipts tax records and returns of the spouse’s private law practice; defendants asked the district court to issue subpoenas duces tecum to the spouse and to defendant taxation and revenue department for the spouse’s gross receipts tax records and returns; and plaintiff’s marital relationship to the spouse did not make plaintiff liable for payment of the gross receipts tax of the spouse’s private law practice; the gross receipts tax information sought by the subpoenas issued to the spouse and to defendant taxation and revenue department were confidential under Sections 7-1-4.2 and 7-1-8 NMSA 1978 and privileged under Rule 11-502 NMRA. *Breen v. N.M. Taxation & Revenue Dep't*, 2012-NMCA-101, 287 P.3d 379.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses § 289.

97 C.J.S. Witnesses § 264.

11-503. Lawyer-client privilege.

A. **Definitions.** For purposes of this rule,

(1) a “client” is a person, public officer, corporation, association, or other entity who consults with, seeks advice from, or retains the professional services of a lawyer or a lawyer’s representative;

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

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

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

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

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

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

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

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

(5) between lawyers representing the client.

C. **Who may claim the privilege.** The privilege may be claimed by

(1) the client;

(2) the client’s guardian or conservator;

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

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

The lawyer of the client at the time of the communication may claim the privilege only on behalf of the client. Authority to claim the privilege is presumed absent evidence to the contrary.

D. **Exceptions.** There is no privilege under this rule:

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

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

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

(4) ***Document attested by lawyer.*** For a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

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

[As amended, effective December 1, 1993; January 1, 1995; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

Cross references. — For statutory attorney-client privilege, *see* Section 38-6-6 NMSA 1978 and Rule 11-501 NMRA.

The 1993 amendment, effective December 1, 1993, made gender neutral and related changes throughout the rule.

The 1995 amendment, effective January 1, 1995, added the last sentence in Paragraph A(4).

The 2013 amendment, approved by Supreme Court Order No. 13-8300-025, effective December 31, 2013, clarified the language of the rule; in Paragraph A, at the beginning of the introductory sentence, deleted "As used in" and added "For purpose of"; in Subparagraph (1), after "public officer", deleted "or", after "association, or other", deleted "organization or", and after "or other entity", deleted "either public or private, who is rendered professional legal service by a lawyer, or who consults a lawyer or a representative of a lawyer with a view to obtaining professional legal services" and added the remainder of the sentence; deleted former Subparagraph (4), which defined a confidential communication as a communication not intended to be further disclosed except in furtherance of rendering legal services, and added current Subparagraph (4); in Paragraph B, deleted the former title "General rule of privilege" and added the current title, and in the introductory sentence, after "disclosing, a confidential", deleted "communication" and added "communications", and after "purpose of facilitating", deleted "the rendition of" and added "or providing"; in Subparagraph (1), after "client's

lawyer or", deleted "his lawyer's"; in Subparagraph (3), after "by", added "between" and after "client's lawyer", deleted "to a" and added "and another"; in Paragraph C, in the introductory sentence, after "may be claimed by", deleted "the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee or similar representative of a corporation, association or other organization whether or not in existence"; in Subparagraph (4), after "or other", deleted "organization" and added "entity"; in the last unnumbered paragraph in Paragraph C, after "The", deleted "person who was the", after "who was the lawyer", added "of the client", and after "may claim the privilege", deleted "but"; in the second sentence, deleted "The authority" and added "Authority", and after "privilege is presumed", deleted "in the absence of" and added "absent"; in Paragraph (D), Subparagraph (1), after "If the", added "professional legal", after "legal services", deleted "of the lawyer", after "enable or", deleted "aid" and added "assist", and after "assist anyone", deleted "to commit or plan to commit" and added "in committing or planning to commit"; and in Subparagraphs (2) through (5), at the beginning of the sentence, changed "As to a" to "For a".

Common interest doctrine applies to documents that meet the attorney-client privilege and that were created to further a common legal interest. *S.F. Pacific Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, 143 N.M. 215, 175 P.3d 309.

Privilege belongs to client. — Any claim of this privilege would have to come from the client. *State v. Armijo*, 118 N.M. 802, 887 P.2d 1269 (Ct. App. 1994).

Communications protected. — The attorney-client privilege does not extend to a client's grant of actual authority; the attorney could refuse to disclose only those communications made for the purpose of facilitating legal services and not intended to be disclosed to others. *Diversified Dev. & Inv., Inc. v. Heil*, 119 N.M. 290, 889 P.2d 1212 (1995).

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).

Waiver of privilege. — Waiver of the attorney-client privilege is governed exclusively by Rule 11-511 NMRA and its restriction to waiver by voluntary disclosure; thus, offensive or direct use of privileged materials is required before the party will be deemed to have waived its attorney-client privileges. *Pub. Serv. Co. of N.M. v. Lyons*, 2000-NMCA-077, 129 N.M. 487, 10 P.3d 166.

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).

Settlement agreements entered into between parties are outside the attorney-client privilege. *Bd. of Comm'rs v. Las Cruces Sun-News*, 2003-NMCA-102, 134 N.M. 281, 76 P.3d 36.

Claims of ineffective assistance of counsel. — A habeas corpus petitioner's claim of ineffective assistance of counsel removes from the protection of the attorney-client privilege those communications specifically relevant to the claim. A petitioner asserting the attorney-client privilege bears the burden of demonstrating that the privilege applies. It is then the judges' function to make evidentiary rulings determining whether attorney-client communications are relevant to the specific ineffective assistance of counsel claims raised by the petitioner and thereby subject to the exception in Subparagraph 3 of Paragraph D of Rule 11-503 NMRA. *Allen v. LeMaster*, 2012-NMSC-001, 267 P.3d 806.

Where defendant filed a petition for habeas corpus alleging ineffective assistance of counsel, any communications between defendant and trial counsel that were relevant to defendant's specific ineffectiveness claims were excepted from the attorney-client privilege, and those that were not relevant were neither excepted nor waived, because defendant filed a petition for writ of habeas corpus. *Allen v. LeMaster*, 2012-NMSC-001, 267 P.3d 806.

Memorandum of talking points was not privileged. — Where plaintiff and plaintiff's spouse were doctors at defendants' hospital; at a meeting to terminate plaintiff's spouse, plaintiff was told that plaintiff's spouse would be allowed to resign if plaintiff also resigned, otherwise, plaintiff's spouse would be terminated for cause; plaintiff was not the subject of any personnel action by the hospital; prior to the meeting, the hospital's general counsel, who was also a senior vice president, prepared a memorandum concerning the process of termination which was essentially a script for forcing plaintiff to resign; and the memorandum stated that it was confidential and subject to the attorney-client privilege, the memorandum was business advice and not privileged. *Bhandari v. Artesia Gen. Hosp.*, 2014-NMCA-018, cert. denied, 2014-NMCERT-001.

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

For note, "Corporate Law - Formulating and Applying a 'Proper Purpose' Analysis to a Books and Records Inspection Request - Schein v. Northern Rio Arriba Electric Cooperative, Inc.," see 28 N.M.L. Rev. 133 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses § 337 et seq.

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, 75 A.L.R.4th 1144.

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.

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

Waiver by party: of privilege as to communications with counsel by taking stand and testifying, 51 A.L.R.2d 521.

Privilege as to communications to attorney in connection with drawing of will, 66 A.L.R.2d 1302, 75 A.L.R.4th 1144.

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, 26 A.L.R.5th 628, 27 A.L.R.5th 76.

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.

Insured-insurer communications as privileged, 55 A.L.R.4th 336.

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.

Involuntary disclosure or surrender of will prior to testator's death, 75 A.L.R.4th 1144.

Determination of whether a communication is from a corporate client for purposes of the attorney-client privilege - modern cases, 26 A.L.R.5th 628.

What corporate communications are entitled to attorney-client privilege - modern cases, 27 A.L.R.5th 76.

What persons or entities may assert or waive corporation's attorney-client privilege - modern cases, 28 A.L.R.5th 1.

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. Physician-patient and psychotherapist-patient privilege.

A. **Definitions.** For purposes of this rule,

(1) a “patient” is a person who consults with or is examined by a physician, psychotherapist, or state or nationally licensed mental-health therapist;

(2) a “physician” is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient to be so licensed;

(3) a “psychotherapist” is a person engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, and who is

(a) a physician; or

(b) a person licensed or certified as a psychologist under the laws of any state or nation, or reasonably believed by the patient to be so licensed or certified.

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

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

C. **Who may claim the privilege.**

(1) The privilege may be claimed by

(a) the patient;

(b) the patient’s guardian or conservator; or

(c) the personal representative of the deceased patient.

(2) The privilege may be asserted on the patient’s behalf by

(a) the patient’s physician;

(b) the patient’s psychotherapist;

(c) the patient’s state or nationally licensed mental-health therapist; or

(d) any other person included in the communication to further the patient’s interests, including individuals participating under the direction of the patient’s physician, psychotherapist, or state or nationally licensed mental-health therapist.

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

D. **Exceptions.**

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

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

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

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

[As amended, effective July 1, 1990; January 1, 1995 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — Under the previous version of the rule, the privilege applied only to confidential communications with physicians, psychiatrists, and licensed or certified psychologists. The Supreme Court, however, endorsed expanding the scope of the privilege in *Albuquerque Rape Crisis Center vs. Blackmer*, 2005-NMSC-032, 138 N.M. 398, 120 P.3d 820 (holding that confidential communications with a victim counselor are privileged). Although *Blackmer* did not address the issue of licensure, expanding the privilege to include communications with a "state or nationally licensed mental-health therapist" is consistent with the broader view of the privilege recognized in that case. *See also generally Jaffee v. Redmond*, 518 U.S. 1 (1996) (applying the psychotherapist-patient privilege under the Federal Rules of Evidence to communications with a licensed social worker). The remaining amendments to the rule are intended to be stylistic only.

[Adopted by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

The 1990 amendment, effective July 1, 1990, inserted "physician or" throughout the rule; in Paragraph A, added Subparagraph (2) and redesignated former Subparagraphs (2) and (3) as Subparagraphs (3) and (4); and, in Paragraph D, inserted "physical" in Subparagraphs (2) and (3) and added Paragraph (4).

The 1995 amendment, effective January 1, 1995, made gender neutral changes throughout the rule.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-025, effective December 31, 2013, clarified the language of the rule; included communications with mental-health therapists within the scope of the rule; in Paragraph A, after the title, added "For purposes of this rule"; in Subparagraph (1), after "who consults", added "with", after "is examined", deleted "or interviewed", after "by a physician", deleted "or", and after "psychotherapist", added the remainder of the sentence; in Subparagraph (2), after "patient", deleted "so", and after "patient to be", added "so licensed"; in Subparagraph (3), after "'psychotherapist' is", added the remainder of the sentence, and deleted former Item (a) of Subparagraph (3), which defined "psychotherapist" as a person who diagnoses or treats a metal or emotional condition, including drug addiction, and added current Item (a); in Item (b) of Subparagraph (3), after "nation", deleted "while similarly engaged" and added the remainder of the sentence; deleted former Subparagraph (4), which defined confidential communications as communications not intended to be disclosed to third persons except as necessary for treatment of the patient; and added Subparagraphs (4) and (5); deleted former Paragraph B, which granted a patient the privilege to refuse to disclose and to prevent others from disclosing confidential communications, and added current Paragraph B; in Paragraph C, deleted the former language, which provided that a patient, guardian, conservator, personal representative and the patient's physician or psychotherapist may claim the privilege, and added Subparagraphs (1) through (3); in Paragraph D, deleted former Subparagraphs (1) through (4), which provided exceptions to the privilege in proceedings for hospitalizations and examinations ordered by the court, in proceedings in which the patient relies on the condition as an element of a claim or defense, and in reports required by law, and added current Subparagraphs (1) through (4).

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).

Social worker acting as a mental health provider. — Where defendant, who was charged with criminal sexual penetration of a minor, made confidential communications to a licensed social worker during private counseling sessions for the purpose of diagnosis and treatment; and defendant's ex-spouse participated in the counseling sessions, defendant had the privilege pursuant to Rule 11-504 NMRA to refuse to disclose and to prevent the social worker and defendant's ex-spouse from disclosing information defendant communicated during the counseling sessions because the mandatory reporting requirement in Section 32A-4-3(A) NMSA 1978 did not apply to the social worker or to defendant's ex-spouse. *State v. Strauch*, 2014-NMCA-020, cert. granted, 2014-NMCERT-____.

Victim Counselor Confidentiality Act is consistent with the psychotherapist-patient privilege in this rule and it is to be given effect. *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, 138 N.M. 398, 120 P.3d 820.

Purpose of psychotherapist-patient privilege is to protect confidential communications made during treatment of a patient's mental or emotional condition from disclosure during court proceedings. *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, 138 N.M. 398, 120 P.3d 820.

Confidentiality manifest in consent to treatment or diagnosis. — The defendant's consent to undergo treatment or diagnosis constituted sufficient conduct to manifest an intent of confidentiality. When a patient sees a physician for either or both of those purposes, it should be implicit that the information conveyed in the private consultation and examination is exclusively for the patient's eyes and ears, absent the patient's consent. *State v. Roper*, 1996-NMCA-073, 122 N.M. 120, 921 P.2d 322.

Privilege applies to civil and criminal cases. — This rule does not contain any language limiting its application to civil cases; therefore, the privilege applies to all cases, both civil and criminal. *State v. Roper*, 1996-NMCA-073, 122 N.M. 120, 921 P.2d 322.

Privilege applied in administrative proceeding. — Hearing officer's discovery order requiring a city employee in a grievance proceeding to produce documents that might contain communications with the employee's therapist, made for the purposes of diagnosis or treatment, infringed on material protected by the psychotherapist privilege. *Lara v. City of Albuquerque*, 1999-NMCA-012, 126 N.M. 455, 971 P.2d 846.

A communication includes: (1) verbal communication of a patient to the psychotherapist; (2) information or knowledge gained by observation and personal examination of the patent; (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).

Blood tests are communications. — A blood test taken in a personal examination for diagnosis and treatment can reveal a tremendous amount of information about a patient, including the existence of disease, illness, or drug addiction; therefore, the blood test is a communication and nondisclosure of the results would further his privacy interests. *State v. Roper*, 1996-NMCA-073, 122 N.M. 120, 921 P.2d 322.

Section 61-6-14B(5) NMSA 1978 does not create a privilege. — Section 61-6-14B(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).

Applicability of privilege in a child abuse and neglect case was not required to be addressed because the clear language of this rule and Sections 61-9A-27 and 61-31-24 NMSA 1978 permits disclosure. *In re Candice Y.*, 2000-NMCA-035, 128 N.M. 813, 999 P.2d 1045.

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 Paragraph D(3). *State ex rel. Human Servs. Dep't v. Levario*, 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

Paragraph D(3) exception did not apply to blood test. — A blood test was not a communication relevant to an element of the patient's claim or defense such that it would fall under the exception in Paragraph D(3), since the defendant did not put his physical condition in issue by merely pleading not guilty to a DUI charge. *State v. Roper*, 1996-NMCA-073, 122 N.M. 120, 921 P.2d 322.

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).

In a medical malpractice action, the psychotherapist-patient privilege applied to bar plaintiff's discovery regarding the defendant's communication with his psychotherapist. *Reaves v. Bergsrud*, 1999-NMCA-075, 127 N.M. 446, 982 P.2d 497.

In proceeding to terminate a mother's parental rights, where the record was insufficient to determine whether the mother, who was mentally impaired, had waived any privilege she may have had with regard to communications made to her psychologist, and since the waiver issue was not raised at the trial level, under the plain error rule the court's order terminating parental rights was upheld on the grounds that there was clear and convincing evidence other than the allegedly confidential testimony supporting the determination that the mother was an unfit parent. *State ex rel. Human Servs. Dep't*, 113 N.M. 201, 824 P.2d 341 (Ct. App. 1991).

***In camera* review by court proper.** — Trial court was in the best position to assess the probative value of the evidence as it relates to the particular case before it and to weigh that value against the interest in confidentiality of the records. The *in camera* review by the trial court was proper in this case. *State v. Ramos*, 115 N.M. 718, 858 P.2d 94 (Ct. App. 1993).

Privilege log. — A party claiming a physician-patient privilege must provide a privilege log that identifies each withheld communication, must include any supplemental affidavit that demonstrate reasonable bases for the assertions of privilege, and must have the log signed, as required by Rule 1-011 NMRA. *Pina v. Espinoza*, 2001-NMCA-055, 130 N.M. 661, 29 P.3d 1062, cert. denied, 130 N.M. 558, 28 P.3d 1099 (2001).

Waiver of privilege. — In a prosecution for criminal sexual penetration, the victim's release of her medical and psychotherapy to the police and state's attorneys constituted a waiver of her right to rely on the privilege of this rule and the trial court did not abuse its discretion in ordering the records produced for *in camera* review and in dismissing the case for her failure to do so. *State v. Gonzales*, 1996-NMCA-026, 121 N.M. 421, 912 P.2d 297.

Because the victim did not object to the release of the psychotherapeutic records at the time the court ordered an *in camera* review, the court appropriately prevented the victim

from testifying after the victim asserted the privilege under this rule to prevent the release of those records. The court and the defendant were entitled to rely upon the victim and state's failure to oppose disclosure as indicating that they were not opposed to disclosure. *State v. Luna*, 1996-NMCA-071, 122 N.M. 143, 921 P.2d 950.

Defendant waived his privilege against the disclosure of blood alcohol test results by raising the affirmative defense that the cause of the accident was a migraine headache, not his intoxication. *State v. House*, 1998-NMCA-018, 124 N.M. 564, 953 P.2d 737, rev'd on other grounds, 127 N.M. 151, 978 P.2d 967 (1999).

Statements made for the purpose of diagnosing or treating another person and not for the purpose of diagnosing or treating defendant are outside the scope of the physician-patient privilege. *State v. Ryan*, 2006-NMCA-044, 139 N.M. 354, 132 P.3d 1040, cert. denied, 2006-NMCERT-004.

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).

For note, "Evidence: Protecting Privileged Information - A New Procedure for Resolving Claims of the Physician-Patient Privilege in New Mexico - *Pina v. Espinoza*," see 32 N.M.L. Rev. 453 (2002).

For article, "Contours and Chaos: A Proposal for Courts to Apply the 'Dangerous Patient' Exception to the Psychotherapist-Patient Privilege", see 34 N.M.L. Rev. 109 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses § 236 et seq.

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.

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.

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.

Admissibility under state law of hospital record relating to intoxication or sobriety of patient, 80 A.L.R.3d 456.

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.

Physician's tort liability for unauthorized disclosure confidential information about patient, 48 A.L.R.4th 668.

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. Spousal privileges.

A. **Definition.** 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. **Scope of the privilege.** A person has a privilege to refuse to disclose, or to prevent another from disclosing, a confidential communication by the person to that person’s spouse while they were married.

C. **Who may claim the privilege.**

(1) The privilege may be claimed by

(a) the spouse who made the confidential communication;

(b) that spouse’s guardian or conservator; or

(c) that spouse’s personal representative.

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

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

D. **Exceptions.**

(1) ***Criminal cases.*** No privilege shall apply to confidential communications relevant to proceedings in which one spouse is charged with a crime against

(a) the person or property of the other spouse or a child of either; or

(b) the person or property of a third person committed during the course of a crime against the other spouse.

(2) ***Civil cases.*** No privilege shall apply to confidential communications relevant to 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.

[As amended, effective April 1, 1976; July 1, 1980; December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

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.

ANNOTATIONS

Cross references. — For statutory privilege as to communications between husband and wife, *see* Section 38-6-6 NMSA 1978 and Rule 11-501 NMRA.

The 1993 amendment, effective December 1, 1993, made gender neutral and related changes throughout the rule.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-025, effective December 31, 2013, clarified the language of the rule; deleted the exception for matters occurring prior to the marriage; in the title, deleted “Husband-wife” and added “Spousal”; in Paragraph A, at the beginning of the sentence, deleted “As used in this rule, a” and added “A”, and after “further disclosure”, added the remainder of the sentence; in Paragraph B, deleted the former title “General rule of privilege” and added the current title, after “has a privilege”, deleted “in any proceeding”, after “refuse to disclose”, changed “and” to “or”, and after “while they were”, deleted “husband and wife” and added “married”; in Paragraph C, deleted the former language, which provided that the privilege applied to confidential communications made to a guardian, conservator, personal representative or a spouse on behalf of the other spouse, and added Subparagraphs (1) through (3); and in Paragraph D, deleted the former language, which provided that there was no privilege in criminal proceedings involving a crime against the other spouse or child of either spouse or involving a third person that was committed in the course of committing a crime against the other spouse, in matters occurring prior to the marriage, and in civil actions by one spouse or a child against the other spouse or a child, and added Subparagraphs (1) and (2).

"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), cert. denied, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986).

Waiver of privilege. — The trial court did not err in admitting defendant's statement to his wife, since he waived the husband-wife privilege prior to trial by disclosing the statement to third parties. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

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 § 296 et seq.

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.

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.

Communications between spouses as to joint participation in crime as within privilege of interspousal communications, 62 A.L.R.4th 1134.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution - modern state cases, 74 A.L.R.4th 223.

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, 74 A.L.R.4th 277.

Adverse presumption or inference based on party's failure to produce or examine spouse - modern cases, 79 A.L.R.4th 694.

Testimonial privilege for confidential communications between relatives other than husband and wife - state cases, 62 A.L.R.5th 629.

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 clergy.

A. **Definitions.** For purposes of this rule,

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

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

B. **Scope of the privilege.** A person has a privilege to refuse to disclose, or to prevent another from disclosing, a confidential communication made for the purpose of seeking spiritual advice by the person to a member of the clergy.

C. **Who may claim the privilege.** The privilege may be claimed by

(1) the person who consults with a member of the clergy;

(2) the person’s guardian or conservator; or

(3) the person’s personal representative if the person is deceased.

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

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

The 1993 amendment, effective December 1, 1993, substituted "clergy" for "clergymen" in the rule heading and made gender neutral and related changes throughout the rule.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-025, effective December 31, 2013, clarified the language of the rule; in Paragraph A, at the beginning of the introductory sentence, deleted “As used in” and added “For purposes of”; in Subparagraph (1), after “rabbi, or”, deleted “other”; in Subparagraph (2), after “to other persons”, deleted “present”; in Paragraph B, in the title, deleted “General rule of” and added “Scope of the”, after “refuse to disclose”, changed “and” to “or”, after “confidential communication”, added “made for the purpose of seeking spiritual advise”, and after “member of the clergy”, deleted “as a spiritual adviser”; in Paragraph C, deleted the former language which provided that the privilege could be claimed by the person making the communication, guardian, conservator, personal representative and by clergy on behalf of the person, and added the current introductory sentence, Subparagraphs (1) through (3), and the last two unlettered sentences.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses §§ 291, 513, 515, 520, 521, 523.

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.

Subject matter and waiver of privilege covering communications to clergy member or spiritual adviser, 93 A.L.R.5th 327.

Who are "clergy" or like within privilege attaching to communications to clergy members or spiritual advisers, 101 A.L.R.5th 619.

Communications to clergyman as privileged in federal proceedings, 118 A.L.R. Fed. 449.

97 C.J.S. Witnesses §§ 263, 303.

11-507. Political vote.

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

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

The 1993 amendment, effective December 1, 1993, substituted "the person's vote" for "his vote" near the middle of the rule.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-025, effective December 31, 2013, clarified the language of the rule; after “person’s vote”, deleted “at” and added “in”, and after “secret ballot unless”, deleted “the vote was cast illegally” and added “the person voted unlawfully”.

Election contest. — In election contest, contestant may question those who voted unlawfully, or use circumstantial evidence to determine who the lawful plurality winner of the election was; such evidence is necessary to prevail under Section 3-8-64 NMSA 1978. *Darr v. Village of Tularosa*, 1998-NMCA-104, 125 N.M. 394, 962 P.2d 640, cert. denied, 125 N.M. 654, 964 P.2d 818 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Elections § 328.

29 C.J.S. Elections § 201.

11-508. Trade secrets.

A. **Scope of the privilege.** Unless upholding the privilege will tend to conceal fraud or otherwise work an injustice, a person or entity owning a trade secret has a privilege to refuse to disclose, or to prevent others from disclosing, the trade secret.

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

C. **Protective orders.** If a court orders the disclosure of a trade secret, the court must order any appropriate protective measures to safeguard the interests of the trade secret’s owner or any interests that justice requires.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

The 1993 amendment, effective December 1, 1993, in the first sentence, substituted "the person or the person's" for "him or his" near the beginning, "others" for "other persons" near the middle, and "the person" for "him" near the end, and substituted "court" for "judge" in the second sentence.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-025, effective December 31, 2013, clarified the language of the rule; in Paragraph A, added the title, deleted "A person has a privilege, which may be claimed by the person or the person's agent or employee" and added "Unless upholding the privilege will tend to conceal fraud or otherwise work an injustice, a person or entity owning a trade secrete has a privilege", after "refuse to disclose", changed "and" to "or", and after "trade secret", deleted "owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice"; added Paragraph B; and in Paragraph C, added the title, deleted "When disclosure if directed" and added "If a court orders the disclosure of a trade secret", after "trade secret, the court", deleted "shall take such" and added "must order any appropriate", after "appropriate protective", deleted "measure as" and added "measures to safeguard", after "interests of the", deleted "holder of the privilege and of the parties and the furtherance of" and added "trade secret's owner or any interests that", and after "interests that justice", deleted "may require" and added "requires".

Procedure and guidelines for protecting trade secrets. *Pincheira v. Allstate Ins. Co.*, 2008-NMSC-049, 144 N.M. 601, 190 P.3d 322, affirming 2007-NMCA-094, 142 N.M. 283, 164 P.3d 982.

Procedure for evaluating the protection to be given an alleged trade secret during discovery. — The party resisting the discovery of alleged trade secrets must establish that the material requested is a trade secret and that the discovery will result in harm to the resisting party. If the resisting party establishes that the requested information is a trade secret, then the requesting party must show that information is necessary for a fair adjudication of its claim. The trial court must then evaluate the requesting party's need for the information and the potential harm of disclosure to the resisting party. Based on weighing these factor, the court must determine if, to what extent, and how disclosure must be made. *Pincheira v. Allstate Insurance Co.*, 2007-NMCA-094, 142 N.M. 283, 164 P.3d 982, cert. granted, 2007-NMCERT-007.

Economic value of trade secrets establishes harm. — If the party resisting discovery of alleged trade secrets establishes that the information sought derives economic value that can be obtained by others if the information is disclosed, then the loss of that value results in harm. *Pincheira v. Allstate Insurance Co.*, 2007-NMCA-094, 142 N.M. 283, 164 P.3d 982, cert. granted, 2007-NMCERT-007.

The essential elements of a trade secret are confidentiality and value. *Pincheira v. Allstate Insurance Co.*, 2007-NMCA-094, 142 N.M. 283, 164 P.3d 982, cert. granted, 2007-NMCERT-007.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses §§ 68, 75 to 78.

98 C.J.S. Witnesses § 430.

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

A. **Definitions.** For purposes of this rule,

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

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

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

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

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

[As amended, effective December 1, 1993; February 1, 2000; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

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.

ANNOTATIONS

Cross references. — For Rules of Procedure for the Children's Court, *see* Rule 10-101 NMRA et seq.

For the Children's Code, *see* Section 32A-1-1 NMSA 1978 et seq.

The 1993 amendment, effective December 1, 1993, substituted "the children, youth and families department or successor entity" for "the probation services of a judicial district" in Subparagraph A(1), inserted "or successor entity" in Subparagraph A(2), substituted "Children's Court Rules and Forms" for "Children's Court Rules of Procedure" in Subparagraphs A(1) and A(2), substituted "the child, parent, guardian or custodian" for "himself" in Paragraph B, substituted "the child" for "said child" in the second sentence of Paragraph C, and made gender neutral changes in Paragraphs B and C.

The 1999 amendment, effective February 1, 2000, substituted "Children, Youth and Families Department" for "Social Services Division of Human Services Department" in Subparagraph A(2) and rewrote the first sentence of Paragraph C, which read: "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 a child."

The 2013 amendment, approved by Supreme Court Order No. 13-8300-025, effective December 31, 2013, made stylistic changes; in Paragraph A, at the beginning of the introductory sentence, deleted “As used in” and added “For purposes of”; and in Paragraph B, deleted the former title “General rule of privilege” and added the current title, and after “refuse to disclose”, changed “and” to “or”.

Appeal. — Where defendant argued this rule as the basis for a social worker-client privilege at his trial for criminal sexual contact with a minor, but he did not carry this argument to his brief on appeal, the issue was considered abandoned. *State v. Neswood*, 2002-NMCA-081, 132 N.M. 505, 51 P.3d 1159, cert. denied, 132 N.M. 551, 52 P.3d 411 (2002).

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 §§ 453, 524, 526, 528, 529, 535, 536, 541, 542.

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

(1) a law enforcement officer;

(2) a legislative committee member or staffer; or

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

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

C. **Who may claim the privilege.** The privilege may be claimed by an appropriate representative of the United States, a state, or a subdivision thereof.

D. **Exceptions:**

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

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

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

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

(3) ***Compelled testimony.***

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

(i) relevant and helpful to a criminal defendant;

(ii) necessary for a fair determination of the guilt or innocence of a criminal defendant; or

(iii) material to the merits in a civil case in which the United States, a state, or a subdivision thereof is a party.

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

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

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

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

(ii) order any remedy that justice requires.

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

(4) ***Lawfulness of obtaining evidence.***

(a) *Motion by a party or court.* When any employee of the United States, a state, or a subdivision thereof relies upon information from an informer to establish the legal means to obtain evidence and the court finds that the informer's information was not reliable or credible, the court may order the disclosure of the informer's identity. Such an order may be limited to a disclosure in camera, but the court may order any disclosure that justice requires.

(b) *Record.* If any counsel concerned with the legality of evidence obtained through an informer is permitted to be present before the court, all counsel shall be given the opportunity to appear. If the informer's identity is disclosed in camera and not ordered to be disclosed publicly, the record of that disclosure shall be placed under seal and preserved for appellate review. The evidentiary record shall not be revealed without an order from a court with jurisdiction over the case.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

Cross references. — For sealing of court records, *see* Rule 1-079 NMRA.

The 1993 amendment, effective December 1, 1993, substituted "court" for "judge" and made gender neutral changes throughout the rule.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-025, effective December 31, 2013, clarified the language of the rule; defined “informer” and “disclosure”; deleted former Paragraph A, which defined the scope of the privilege to refuse to disclose the identity of an informer; added current Paragraphs A and B; in Paragraph C, in the title, added “the privilege”, after “United States”, deleted “or”, and after “subdivision thereof”, deleted “except that in criminal cases the privilege shall not be allowed if the state objects”; in Paragraph D, deleted former Subparagraph (1), which eliminated the privilege if the identity of the informer was disclosed to those who would resent the informer’s communication and added current Subparagraph (1); deleted former Subparagraph (2), which provided the procedure for determining whether an informer should testify, and added current Subparagraph (2); deleted former Subparagraph (3), which provided the procedure for determining whether the identify of an informer should be disclosed when the legality of the means by which the informer obtained evidence is in question, and added current Subparagraph (3); and added Subparagraph (4).

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. Att’y Gen. v. First Jud. Dist. Ct.*, 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).

Refusal to require disclosure proper. — There was no abuse of discretion in trial court's refusal to require the state to disclose the identity of a confidential informant pursuant to Subparagraph (2) of Paragraph C of this rule where the trial court properly concluded that the informant, who was not a witness to the defendant's possession of a controlled substance but instead conveyed information that defendant would be engaging in illicit drug activity, did not possess information relevant to the preparation of defendant's defense or that would exculpate defendant. *State v. Campos*, 113 N.M. 421, 827 P.2d 136 (Ct. App. 1991), rev'd in part on other grounds, 117 N.M. 155, 870 P.2d 117 (1994).

The trial court did not abuse its discretion in refusing to order disclosure of a confidential informant under Subparagraph (3) of Paragraph C. The evidence before the trial court was sufficient to enable it to properly balance defendant's right to a fair trial and the state's interest in protecting its availability of information. *State v. Campos*, 113 N.M. 421, 827 P.2d 136 (Ct. App. 1991), rev'd in part on other grounds, 117 N.M. 155, 870 P.2d 117 (1994).

Since the crime charged was not based on a transaction witnessed by the confidential informant but based upon evidence found upon execution of the search warrant, there was no abuse of discretion in denying the defendant's motion to order disclosure of the identity of the informant, or to hold an *in camera* hearing to evaluate the request for disclosure. *State v. Chandler*, 119 N.M. 727, 895 P.2d 249 (Ct. App. 1995).

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. Att'y Gen. v. First Jud. Dist. Ct.*, 96 N.M. 254, 629 P.2d 330 (1981).

To invoke an in camera hearing under Rule 11-501 NMRA, 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 Rules 5-501 and 5-505 NMRA 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), overruled on other grounds, *State v. Martin*, 101 N.M. 595, 686 P.2d 937 (1984).

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).

Inadequate showing for in camera hearing. — District court did not abuse its discretion in finding that defendant did not make a showing adequate to require an in camera hearing regarding disclosure of a confidential informant, where defense counsel did not explain how the informant could assist in establishing that the individual who delivered drugs to defendant was an agent of the state who had entrapped defendant. *State v. Vasquez*, 109 N.M. 720, 790 P.2d 517 (Ct. App. 1990).

Court did not abuse discretion by not holding in camera interview. *State v. Lovato*, 117 N.M. 68, 868 P.2d 1293 (Ct. App. 1993).

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).

Response from prosecutor required to determine whether claim contested. — 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).

Value of informer's testimony not shown. — Neither disclosure of an informer's identity nor an in camera hearing were required under Paragraph C(2) where the informer's information was not directly exculpatory evidence and the informer was not an active participant or eyewitness to the crime. *State v. Rojo*, 1999-NMSC-001, 126 N.M. 438, 971 P.2d 829.

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).

For note, "Criminal Law - New Mexico Expands the Entrapment Defense: Baca v. State," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses §§ 532, 536.

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 who possesses a privilege against disclosure of a confidential matter or communication waives the privilege if the person voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is a privileged communication.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

Cross references. — For statutory provision as to waiver of privilege, *see* Section 38-6-6 NMSA 1978 and Rule 11-501 NMRA.

The 1993 amendment, effective December 1, 1993, substituted "the person or person's" for "he or his" in the first sentence.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-025, effective December 31, 2013, clarified the language of the rule; after “A person”, deleted “upon whom these rules confer” and added “who possesses”, after “privilege if the person”, deleted “or person’s predecessor while holder of the privilege”, and after “if the disclosure”, deleted “itself”.

Waiver of right found. — Where the defendant employed an attorney to investigate allegations made by the defendant's internal ethics investigators and report his findings, the defendant waived the attorney-client privilege with respect to the attorney's report when the defendant relied on the report in defending against plaintiff's claim. *Gingrich v. Sandia Corp.*, 2007-NMCA-101, 142 N.M. 359, 165 P.3d 1135, cert. denied, 2007-NMCERT-007.

Scope of waiver. — Where the defendant waived the attorney-client privilege with respect to an attorney's report that criticized the plaintiff, the scope of the waiver extended to communications between the attorney and the defendant's managers and in-house counsel relating to the report and to the defendant's in-house counsel's work product relating to the report that was communicated to the defendant's managers, but did not extend to the attorney's work product that was not disclosed or communicated to the defendant. *Gingrich v. Sandia Corp.*, 2007-NMCA-101, 142 N.M. 359, 165 P.3d 1135, cert. denied, 2007-NMCERT-007.

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).

Offensive or direct use of priveleged materials required. — Waiver of the attorney-client privilege is governed exclusively by this rule; thus, offensive or direct use of privileged materials is required before the party will be deemed to have waived its attorney-client privileges. *Pub. Serv. Co. of N.M. v. Lyons*, 2000-NMCA-077, 129 N.M. 487, 10 P.3d 166.

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).

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).

Waiver of right found. — Where, prior to defendants' first objection to plaintiff's cross-examination of one of the defendants concerning privileged conversations with his attorney, the defendant volunteered privileged information about his attorney's instructions, and defendants' attorney failed to object to three questions that implicated the privilege, and, after the one and only objection made by defendants was overruled, the defendants failed to object to several subsequent questions that also implicated the

privilege, defendants waived their right to assert attorney-client privilege on the matter. *DeMatteo v. Simon*, 112 N.M. 112, 812 P.2d 361 (Ct. App. 1991).

Defendant's communications with his trial counsel were not privileged because he disclosed the communications to a third party. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses § 294.

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.

Waiver of evidentiary privilege by inadvertent disclosure-state law, 51 A.L.R.5th 603.

97 C.J.S. Witnesses §§ 306 to 314.

11-512. Privileged matter disclosed under compulsion or without opportunity to claim privilege.

A disclosure of a privileged matter is not admissible against a holder of the privilege when the disclosure

A. was compelled erroneously; or

B. was made without the opportunity to claim the privilege.

[As amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

The 2013 amendment, approved by Supreme Court Order No. 13-8300-025, effective December 31, 2013, clarified the language of the rule; at the beginning of the introductory sentence, deleted “Evidence of a statement of other” and added “A”; and after “holder of the privilege”, deleted “if” and added “when”.

Claim of privilege by witness whose related conviction is pending appeal. — Where defendant and his wife were each charged with child abuse resulting in the death of defendant's stepson, the defendant's wife had been tried and convicted, and her conviction was being reviewed on appeal, the trial court had no authority to grant defendant's wife immunity from use against her of any testimony she gave at the defendant's trial. The grant of immunity to a witness is, absent prosecutorial misconduct,

within the sole control of the prosecution. *State v. Crislip*, 110 N.M. 412, 796 P.2d 1108 (Ct. App. 1990), overruled on other grounds, *Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses §§ 82, 117 to 120, 159 to 162.

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.** Neither the court nor counsel may comment when a privilege has been claimed at any time. No inference may be drawn from any claim of privilege.

B. **Claiming privilege without knowledge of jury.** To the extent possible, the court shall conduct jury trials to allow claims of privilege to be made without the jury's knowledge.

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

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

The 1993 amendment, effective December 1, 1993, substituted "the court" for "judge" near the end of the first sentence of Paragraph A.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-025, effective December 31, 2013, clarified the language of the rule; in Paragraph A, deleted the first sentence, which provided that the claim of privilege could not be commented upon by the court or counsel and added the current first sentence, and in the second sentence, after "may be drawn", deleted "therefrom" and added "from any claim of privilege"; in Paragraph B, deleted "In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of" and added "To the extent possible, the court shall conduct jury trials to allow", after "claims of privilege", added "to be made", after "without the", added "jury's", and after "knowledge", deleted "of the jury"; and in Paragraph C, after "privilege is entitled to", deleted "an" and added "a jury" and after "inference may be drawn", deleted "therefrom" and added "from the claim of privilege".

A defense witness may not be called before the jury to assert his privilege against self-incrimination for the purpose of having the jury draw inferences from his silence. *State v. Saiz*, 2008-NMSC-048, 144 N.M. 663, 191 P.3d 521.

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).

Comment on alibi not offered during arrest. — It is fundamentally unfair to assure a suspect that silence will carry no penalty and then, when the suspect offers an alibi at trial, suggest to the jury that anyone with that explanation would naturally have offered it at the time of arrest. *State v. Garcia*, 118 N.M. 773, 887 P.2d 767 (Ct. App. 1994).

Currative instruction inadequate. — The use of post-arrest silence is profoundly unfair and prejudicial and would ordinarily not be curable by an instruction. *State v. Garcia*, 118 N.M. 773, 887 P.2d 767 (Ct. App. 1994).

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).

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).

Questioning witness outside presence of jury. — A defendant's right to due process was not violated by the trial court's refusal of his request to call his wife as a witness and question her before the jury, where she intended to invoke the privilege against self-incrimination. *State v. Crislip*, 110 N.M. 412, 796 P.2d 1108 (Ct. App. 1990), overruled on other grounds, *Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 705, 940.

Adverse presumption or inference based on party's failure to produce or examine spouse - modern cases, 79 A.L.R.4th 694.

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, for purposes of this rule,

(1) a source who communicates information is “confidential” if the identity of the source is disclosed privately and not intended for further disclosure except to other persons in furtherance of the purpose of the communication;

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

(3) “in the course of pursuing professional news activities” does not include any situation in which a news media person participates in any act of criminal conduct;

(4) “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; and

(5) “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.

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

(1) a confidential source who provided information to the person in the course of pursuing professional news activities; and

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

The provisions of this rule do not apply to radio stations 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 do not apply to television stations 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 or 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, each of the following:

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

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

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

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

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

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

Following the in camera hearing, the court shall enter written findings of fact and conclusions of law without disclosing any of the matters for which the privilege is asserted, and a written order identifying what, if anything, shall be disclosed.

Evidence submitted to the court in camera, and any record of the in camera proceedings, shall be sealed and preserved to be made available to an appellate court in the event of an appeal. The contents of the sealed evidence shall not 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. The person asserting the privilege and counsel for that person shall be the only persons permitted to be present during the in camera proceedings with the court.

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

[Adopted, effective November 1, 1982; as amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

Cross references. — For sealing of court records, *see* Rule 1-079 NMRA.

The 1993 amendment, effective December 1, 1993, deleted "his" preceding "professional" in Subparagraphs A(2), B(1), and B(2), and deleted "trial" preceding "court" throughout Paragraph D.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-025, effective December 31, 2013, clarified the language of the rule, deleted the definitions of “newspaper”, “news agency”, “magazine”, “press association”, and “wire service”; in Paragraph A, in the introductory sentence, after “context of this rule”, deleted “as used in” and added “for purposes”; deleted former Subparagraph (1), which defined a “confidential” communication, and added a new Subparagraph (1); added Subparagraph (2); in Subparagraph (3), after “pursuing professional”, added “news” and after “participates in any act”, deleted “involving physical violence, property damage or” and added “of”; deleted former Subparagraph (4), which defined “newspaper”; deleted former Subparagraph (5), which defined “news agency”; deleted former Subparagraph (7), which defined “magazine”; deleted former Subparagraph (8), which defined “press association”; and deleted former Subparagraph (9), which defined “wire service”; in Paragraph B, in the title, deleted “General rule of” and added “Scope of the”; in Subparagraph (1), after “confidential source” added “from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered in the course of pursuing professional activities” and added the remainder of the sentence; in Subparagraph (2), after “pursuing professional”, added “news”; in the first unnumbered sentence following Subparagraph (2), after “of this rule”, deleted “insofar as it relates” and added “do not apply”, and after “radio stations”, deleted “shall not apply”; in the second unnumbered sentence following Subparagraph (2), after “of this rule”, deleted “insofar as it related” and added “do not apply”, and after “television stations”, deleted “shall not apply”, and after “an exact recording”, deleted “transcription, kinescope film or certified” and added “or”; in Paragraph C, in the introductory sentence, after “reasonable inferences”, deleted “that” and added “each of the following”; and in Paragraph D, in the first paragraph, after “claims the privilege”, deleted “granted”, in the third paragraph, after “and a written order”, deleted “directing that disclosure either shall or shall not be made to the party seeking disclosure” and added the remainder of the sentence; in the second sentence of the fourth paragraph, after “The contents”, added “of the sealed evidence” and after “shall not”, deleted “otherwise”, and in the first sentence of the fifth paragraph, after “in

camera hearing", deleted "at which no counsel or party, except the" and in the second sentence, after "person shall be", added "the only persons" and after "permitted to be present", added the remainder of the sentence.

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).

For note, "Coopting the Journalist's Privilege: Of Sources and Spray Paint," see 23 N.M.L. Rev. 435 (1993).

ARTICLE 6
Witnesses

11-601. Competency to testify in general.

Every person is competent to be a witness unless these rules provide otherwise.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-601 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 601 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

Identification of defendant. — Where a police officer stopped defendant for driving without headlights and issued a routine citation; two months later, the officer was called to testify at defendant's preliminary hearing and trial for forgery; when the officer arrived

at the courthouse for the preliminary hearing, the officer was told that defendant had given the officer another person's identifying information; the officer was shown a large mug shot of defendant and told that defendant was the driver to whom the officer had issued the citation; the citation had been issued for a minor traffic violation on a night when the officer had dealt with several traffic incidents of which the officer had little memory; the officer typically made nearly one hundred stops in a month; there was nothing to distinguish defendant's traffic stop from the many traffic stops the officer made over the two-month period between defendant's traffic stop and the preliminary hearing; and the officer had never described the driver who received the citation before the preliminary hearing, the officer's view of the mug shot immediately prior to the officer's in-court identification of defendant was highly suggestive and lacked other indicia that the identification was reliable, and the officer's identifications of defendant should have been suppressed. *State v. Combs*, 2011-NMCA-107, 150 N.M. 766, 266 P.3d 635.

Where defendant was charged with the first degree murder of the victim; defendant was embittered by the victim's rejection of defendant and the breakup of the relationship between defendant and the victim; defendant ascertained that the victim was taking an alcohol server class at a local motel; the receptionist at the motel testified that the receptionist observed and talked to defendant several days before the murder of the victim and observed defendant loitering around the motel on the day of the murder, and that defendant spoke with the receptionist to ascertain when the alcohol server class would recess for lunch; the receptionist described defendant's physical features, manner of speech and the clothing defendant wore on the day of the murder; two weeks after the murder, the victim's sister showed the receptionist a photograph of defendant; the receptionist immediately identified defendant as the person the receptionist saw around the motel on the day of the murder; and the receptionist subsequently identified defendant in court as the person the receptionist spoke with at the motel on the day of the murder, the receptionist's in-court identification of defendant was not tainted by the photograph of defendant that the receptionist saw before trial. *State v. Flores*, 2010-NMSC-002, 147 N.M. 542, 226 P.3d 641.

Competency to testify. – Where defendant's experts testified that there was a substantial likelihood that some of the information obtained from the minor victim of sexual abuse was not reliable and that the victim's memories were not necessarily valid, the district court did not abuse its discretion in admitting the victim's testimony into evidence. *State v. Ruiz*, 2007-NMCA-014, 141 N.M. 53, 150 P.3d 1003, cert. denied, 2007-NMCERT-001.

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 NMRA 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).

Capacity of children to testify is not determined alone 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).

Competency of Down's Syndrome witness. — In a prosecution for criminal sexual penetration, the trial court did not abuse its discretion in admitting the testimony of the victim who, because of Down's Syndrome, had a mental age equivalent to that of a person slightly below six years of age. *State v. Hueglin*, 2000-NMCA-106, 130 N.M. 54, 16 P.3d 1113.

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 Section 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. — 29 Am. Jur. 2d Evidence § 305; 75 Am. Jur. 2d Trial § 321 et seq.

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, 60 A.L.R.4th 369.

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, 77 A.L.R.4th 927.

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.

Admissibility of hypnotically refreshed or enhanced testimony, 77 A.L.R.4th 927.

Propriety and prejudicial effect of third party accompanying or rendering support to witness during testimony, 82 A.L.R.4th 1038.

Permissibility of testimony by telephone in state trial, 85 A.L.R.4th 476.

Sufficiency of evidence that witness in criminal case was hypnotized, for purposes of determining admissibility of testimony given under hypnosis or of hypnotically enhanced testimony, 16 A.L.R.5th 841.

97 C.J.S. Witnesses §§ 49 to 314.

11-602. Need for personal knowledge.

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to testimony by an expert witness under Rule 11-703 NMRA.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-602 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 602 of the Federal Rules of Evidence.

Cross references. — For admissibility of opinion testimony by lay witnesses, *see* Rule 11-701 NMRA.

The 1993 amendment, effective December 1, 1993, substituted "the witness" for "he" in the first sentence, and substituted "the witness's own testimony" for "the testimony of the witness himself" in the second sentence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrpte the title of the rule and the rule to make stylistic changes.

Dismissal of charges not appropriate remedy. — Fact that undercover officer failed to comply with the oath and appointment requirements of this section did not warrant dismissal of charges against defendant, as officer was still qualified to testify. *State v. Vallejos*, 1998-NMCA-151, 126 N.M. 161, 967 P.2d 836.

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. — 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 to testify truthfully.

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness’s conscience.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-603 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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.

Cross references. — For form of affirmation in lieu of oath, *see* Section 14-13-2 NMSA 1978.

The 1993 amendment, effective December 1, 1993, substituted "the witness" for "he" near the beginning, substituted "the witness's" for "his" in two places, and substituted "the duty" for "his duty" near the end.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

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 §§ 708 to 710.

Sufficiency, under rules 603 and 604 of Federal Rules of Evidence, of wording of oath, affirmation, or other declaration made by witness, or proposed witness or by court, relating to truthfulness of witness' testimony, 127 A.L.R. Fed. 207.

98 C.J.S. Witnesses § 320.

11-604. Interpreter.

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-604 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

See UJI 13-110B NMRA and UJI 14-6021 NMRA for the text of the oath to be given by the interpreter. *See also State v. Pacheco*, 2007-NMSC- 009, 141 N.M. 340, 155 P.3d 745, for the qualifications for an interpreter.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 604 of the Federal Rules of Evidence.

Cross references. — For rules regarding testimony by experts, *see* Rules 11-702 to 11-706 NMRA.

The 1993 amendment, effective December 1, 1993, substituted "to make" for "that he will make" near the end of the rule.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses §§ 281, 708, 709.

Disqualification, for bias, of one offered as interpreter of testimony, 6 A.L.R.4th 158.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of foreign language speaking defendant, 79 A.L.R.4th 1102.

Sufficiency, under rules 603 and 604 of Federal Rules of Evidence, of wording of oath, affirmation, or other declaration made by witness, or proposed witness or by court, relating to truthfulness of witness' testimony, 127 A.L.R. Fed. 207.

23A C.J.S. Criminal Law § 1152; 88 C.J.S. Trial § 42.

11-605. Judge’s competency as a witness.

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-605 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and

terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 605 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses §§ 276 to 279.

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, 77 A.L.R.4th 927.

4 C.J.S. Appeal and Error § 202 et seq.; 97 C.J.S. Witnesses §§ 105 to 114.

11-606. Juror's competency as a witness.

A. **At the trial.** A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

B. **During an inquiry into the validity of a verdict or indictment.**

(1) **Prohibited testimony or other evidence.** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) **Exceptions.** A juror may testify about whether

(a) extraneous prejudicial information was improperly brought to the jury's attention;

(b) an outside influence was improperly brought to bear on any juror; or

(c) a mistake was made in entering the verdict on the verdict form.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-606 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 606 of the Federal Rules of Evidence.

The 1993 amendment, effective December 1, 1993, substituted "the juror" and "the juror's" for "he", "him" and "his" throughout the rule.

The 2007 amendment, approved by Supreme Court Order 07-8300-35, effective February 1, 2008, amended Paragraph B to add Subparagraph (3) providing that a juror may testify about a mistake in entering the verdict onto the verdict form.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

Juror discussions of the evidence prior to final deliberations. — Juror discussions of the evidence throughout trial and among themselves prior to final deliberations, as permitted by UJI 13-110 NMRA, are protected from disclosure by Paragraph B of Rule 11-606 NMRA. *Acosta v. Shell W. Expl. & Prod., Inc.*, 2013-NMCA-009, 293 P.3d 917, cert. granted, 2012-NMCERT-012.

Where, in a toxic tort case, plaintiffs sued defendants for personal injuries resulting from defendants' negligent disposition of toxic petrochemicals, the jury found against plaintiffs on all claims; plaintiffs moved for a new trial on the grounds of juror misconduct and prejudice; and plaintiffs' motion was supported by juror affidavits that before final deliberations jurors had made statements that some of plaintiffs' symptoms were the result of medication side effects, that one plaintiff was ill with something other than contamination, that asthma and bronchitis could only be diagnosed by a chest x-ray contrary to plaintiffs' medical expert, that the department of health went to the neighborhood because of tuberculosis, regarding the sexual orientation and morals of two plaintiffs, and that the oil companies would pull out of town in the event of a pro-plaintiff verdict, the district court improperly considered the juror statements because they were permissible comments on the evidence and inadmissible under Rule 11-606

NMRA. *Acosta v. Shell W. Expl. & Prod., Inc.*, 2013-NMCA-009, 293 P.3d 917, cert. granted, 2012-NMCERT-012.

Juror statements indicating juror prejudice. — Where, in a toxic tort case, plaintiffs sued defendants for personal injuries resulting from defendants' negligent deposition of toxic petrochemicals that plaintiffs alleged caused plaintiffs' lupus and other autoimmune disorders; the jury found against plaintiffs on all claims; plaintiffs moved for a new trial on the grounds of juror prejudice; and plaintiffs' motion was supported by juror affidavits that after three days of a seventeen day trial, one juror stated "Why are we here? This is a waste of time" and "we know what the outcome is" and complained that the juror was tired of hearing the same evidence and wanted to go home, if the statements were evidence of a fixed predetermination of the final outcome of the trial, the district court could consider and evaluate the statement because the statement would violate UJI 13-110 NMRA and fall outside the protection of Rule 11-606 NMRA. *Acosta v. Shell W. Expl. & Prod., Inc.*, 2013-NMCA-009, 293 P.3d 917, cert. granted, 2012-NMCERT-012.

Presumption of prejudice from extraneous information no longer exists. — In a proceeding to challenge a verdict on the ground that extraneous material prejudiced the jury, the presumption of prejudice attaching to extraneous juror communications no longer exists under New Mexico law, because the moving party has the burden throughout the proceedings to prove that there is a reasonable probability that extraneous material affected the verdict or a typical juror. *Kilgore v. Fuji Heavy Industries, Ltd.*, 2010-NMSC-040, 148 N.M. 561, 240 P.3d 648, rev'g 2009-NMCA-078, 146 N.M. 698, 213 P.3d 1127.

Remedy for alleged prejudice from extraneous information. — Where a party alleges that extraneous information affected a verdict, an evidentiary hearing in which the moving party will have an opportunity to prove a reasonable probability of prejudice, rather than a new trial, typically is the appropriate remedy. *Kilgore v. Fuji Heavy Industries, Ltd.*, 2010-NMSC-040, 148 N.M. 561, 240 P.3d 648, rev'g 2009-NMCA-078, 146 N.M. 698, 213 P.3d 1127.

Burden of proof of prejudice from extraneous information. — A party who alleges that extraneous information affected a verdict bears the burden to prove that (1) material extraneous to the trial actually reached the jury, (2) the extraneous material relates to the case being tried, and (3) it is reasonably probable that the extraneous material affected the jury's verdict or a typical juror. *Kilgore v. Fuji Heavy Industries, Ltd.*, 2010-NMSC-040, 148 N.M. 561, 240 P.3d 648, rev'g 2009-NMCA-078, 146 N.M. 698, 213 P.3d 1127.

Factors considered in determining prejudice from extraneous information. — To determine whether a probability of prejudice exists when extraneous information has been brought to the attention of the jury, the trial court should consider the following relevant inquires: (1) the manner in which the extraneous material was received; (2) how long the extraneous material was available to the jury; (3) whether the jury received

the extraneous material before or after the verdict; (4) if received before the verdict, at what point in the deliberations was the material received; and (5) whether it is probable that the extraneous material affected the jury's verdict, given the overall strength of the opposing party's case. *Kilgore v. Fuji Heavy Industries, Ltd.*, 2010-NMSC-040, 148 N.M. 561, 240 P.3d 648, rev'g 2009-NMCA-078, 146 N.M. 698, 213 P.3d 1127.

Prejudice from extraneous information. — Where plaintiffs sued defendants for personal injury arising out of an alleged defective seatbelt in plaintiffs' Subaru automobile, plaintiffs tried the case on the theory that the buckle design of Subaru automobiles created a risk of accidental or inadvertent release; the jury found that the seatbelt system in plaintiffs' Subaru was not defective; plaintiffs filed a motion for a new trial based on the misconduct of a juror; and plaintiffs' motion was supported by the affidavit of the owner of a Subaru-specific repair shop who stated that the owner had told the juror that the owner had never heard of any incident where a Subaru seatbelt buckle had come open accidentally, the affidavit was sufficient to establish that material extraneous to the trial actually reached the jury and that the extraneous material was relevant to the case being tried and plaintiff was entitled to an evidentiary hearing regarding plaintiffs' claim of juror prejudice. *Kilgore v. Fuji Heavy Industries, Ltd.*, 2010-NMSC-040, 148 N.M. 561, 240 P.3d 648, rev'g 2009-NMCA-078, 146 N.M. 698, 213 P.3d 1127.

Jurors' affidavits that evidence a misunderstanding of instructions. — Jurors' affidavits that evidenced a misunderstanding of instructions or process in reaching a verdict that might have produced a different verdict did not evidence a clerical error in the verdict and were impermissibly considered under Rule 11-606(B) NMRA. *Shadoan v. Cities of Gold Casino*, 2010-NMCA-002, 147 N.M. 444, 224 P.3d 671.

Jurors' affidavits that evidence an intention to award a verdict different from the verdict form filed with the court. — Where plaintiff sued defendants for $448,500 in compensatory damages and $9,568 in medical expenses; the jury returned a verdict for plaintiff in the amount of $4,784 and found that defendants were 20% responsible for plaintiff's injuries; plaintiff filed a motion for a new trial based on the affidavits of three jurors which stated that the jury had intended to give plaintiff half of plaintiff's medical expenses and 20% of $448,500 and that the verdict form had been filled out incorrectly; the affidavits explained what the intentions of the jury were, but did not state that what was written on the verdict form was not what the jury agreed on; the record did not otherwise support the existence of an error in the verdict form; and the district court ordered a new trial based solely on the difference between the dollar amounts in the verdict form and the affidavits, the affidavits were precluded by Rule 11-606 NMRA and the district court erred in ordering a new trial. *Shadoan v. Cities of Gold Casino*, 2010-NMCA-002, 147 N.M. 444, 224 P.3d 671.

Insufficient evidence of prejudice from extraneous information. — Where plaintiff sued defendants for personal injury arising out of an alleged defective seatbelt in the plaintiff's Subaru automobile; plaintiff tried the case on the theory that the buckle design of Subaru automobiles created a risk of accidental or inadvertent release; the jury found

that the seatbelt system in plaintiff's Subaru was not defective; plaintiff filed a motion for a new trial based on a claim of misconduct by a single juror; the only evidence that plaintiff presented in support of the motion was the affidavit of the owner of a Subaru-specific repair shop where the juror's brother worked as a mechanic; in the affidavit, the owner stated that the juror told the owner that the juror was a juror in the Subaru case, the owner told the juror that the owner had never heard of an incident of a Subaru seatbelt buckle opening accidentally, and the juror indicated that the juror was not supposed to be talking with the owner about the case; the affidavit did not state who initiated the discussion, what motivated the owner or the juror to say what they said, or that the juror violated the court's instructions not to talk about the case; and there was no evidence that the extraneous information actually reached other members of the jury, plaintiff failed to meet the preliminary requirement that plaintiff show there was a reasonable likelihood that the extraneous information would have an effect on the verdict or on a typical juror. *Kilgore v. Fuji Heavy Industries, Ltd.*, 2009-NMCA-078, 146 N.M. 698, 213 P.3d 1127, cert. granted, 2009-NMCERT-007.

Interpreter. — Paragraph B of this rule provides a possible avenue for determining whether an interpreter exceeded her proper role. *State v. Pacheco*, 2006-NMCA-002, 138 N.M. 737, 126 P.3d 553, cert. granted, 2005-NMCERT-012.

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).

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).

In a murder case where a statement was erroneously introduced into evidence referring to defendant's participation in a prior, locally notorious murder, statements about the jury's use of defendant's prior murder conviction should not have been considered. *State v. Roybal*, 2002-NMSC-027, 132 N.M. 657, 54 P.3d 61.

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).

Jurors may not impeach their verdict by affidavit after they are discharged. *State v. Maestas*, 2005-NMCA-062, 137 N.M. 523, 113 P.3d 346, cert. granted, 2005-NMCERT-005.

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).

Where, following trial, a plaintiff alleged juror bias and prejudice and juror incompetency based on another juror's letter to the judge and affidavit, the trial court erred in granting the plaintiff's Rule 1-060(B) NMRA motion because there was no competent evidence to support the plaintiff's allegations of bias or prejudice or that the juror in question had responded untruthfully to questions on voir dire; Rule 11-606 NMRA specifically precludes impeachment of a verdict by the testimony or affidavit of a juror concerning statements made by a juror during jury deliberations. *Rios v. Danuser Mach. Co.*, 110 N.M. 87, 792 P.2d 419 (Ct. App. 1990).

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).

Juror's affidavit regarding predeliberation discussions of the case among the jurors was admissible under Paragraph B. *Goodloe v. Bookout*, 1999-NMCA-061, 127 N.M. 327, 980 P.2d 652.

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 is 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).

Foreman questioned as to jury votes. — Judge's questioning of the jury foreman regarding the votes in an announced verdict did not violate Paragraph B of this rule. *State v. Apodaca*, 1997-NMCA-051, 123 N.M. 372, 940 P.2d 478.

Limitation on contents of jurors' affidavits held proper. — Trial court's order striking jurors' affidavits in their entirety, except to the extent that the affidavits dealt with conversations between the jury and the bailiff, was consistent with Subsection B. *Hurst v. Citadel, Ltd.*, 111 N.M. 566, 807 P.2d 750 (Ct. App. 1991).

Jury's experiments regarding a noise on an audiotape to determine whether it was the sound of a police officer's gun being withdrawn from his holster were not improper, where the jury did not consider evidence or statements that were not presented to the court. *State v. Chamberlain*, 112 N.M. 723, 819 P.2d 673 (1991).

Juror's presentation of probability calculations to the jury regarding the chances of a child and a screwdriver falling in such a manner as to result in impalement conducted himself properly as his deliberations were based upon his professional and educational experience. *State v. Mann*, 2002-NMSC-001, 131 N.M. 459, 39 P.3d 124.

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 of evidence, 19 N.M.L. Rev. 679 (1990).

For note, "*State v. Mann*: Extraneous Prejudicial Information in the Jury Room: Beautiful Minds Allowed," see 34 N.M.L. Rev. 149 (2004).

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 § 280.

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.

Propriety of reassembling jury to amend, correct, clarify, or otherwise change verdict after discharge or separation at conclusion of civil case, 19 A.L.R.5th 622.

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 a witness.

Any party, including the party that called the witness, may attack the witness's credibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-607 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 607 of the Federal Rules of Evidence.

This rule, in conjunction with Rule 11-611 NMRA, 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.

Cross references. — For rule regarding attacking and supporting credibility of declarant of hearsay, *see* Rule 11-806 NMRA.

The 1993 amendment, effective December 1, 1993, substituted "the witness" for "him" at the end of the rule.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

I. GENERAL CONSIDERATION.

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 §§ 731, 734 to 736, 862, 863, 978, 983.

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).

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. A witness’s character for truthfulness or untruthfulness.

A. **Reputation or opinion evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for untruthfulness has been attacked by opinion or reputation evidence or otherwise.

B. **Specific instances of conduct.** Except for a criminal conviction under Rule 11-609 NMRA, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness of

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-608 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. New Mexico's rule, however, unlike the federal rule, retains the phrase "by opinion or reputation or otherwise" at the end of Paragraph A. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 608 of the Federal Rules of Evidence.

Cross references. — For rules regarding the admissibility of character evidence and methods of proving it, *see* Rules 11-404 and 11-405 NMRA.

The 1993 amendment, effective December 1, 1993, substituted "the witness's" for "his" in Paragraph B and Subparagraph B(1), and substituted "the accused's or the witness's" for "his" near the end of the rule.

The 2007 amendment, approved by Supreme Court Order 07-8300-35, effective February 1, 2008, amended Paragraph B in two places to change "credibility" to "character for truthfulness".

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

Many 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.

I. GENERAL CONSIDERATION.

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 NMRA and is admissible under Rule 11-402 NMRA, 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).

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).

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).

II. OPINION AND REPUTATION EVIDENCE.

Admission of testimony as to child's truthfulness was not plain error. — Where defendant was charged with criminal sexual penetration of a child under thirteen; at defendant's trial, witnesses were allowed to testify as to the truthfulness of the child; and defendant cross-examined the witnesses and advanced the theory that the child's testimony was not credible, the error in admitting the testimony that the child was truthful was not plain error. *State v. Dylan J.*, 2009-NMCA-027, 145 N.M. 719, 204 P.3d 44.

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).

Pursuant to Paragraph A, the credibility of a witness may be attacked by evidence in the form of an opinion or as to reputation, but only as it relates to the witness's character for truthfulness or untruthfulness and only after a proper foundation is laid. *Constr. Contracting & Mgt. v. McConnell*, 112 N.M. 371, 815 P.2d 1161 (1991).

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).

Laying of foundation for evidence. — Although both opinion and reputation testimony are admissible under this rule, they require different factual foundations. *Constr. Contracting & Mgt. v. McConnell*, 112 N.M. 371, 815 P.2d 1161 (1991).

Trial court erred in admitting an amalgam of opinion and reputation testimony without a proper foundation where, although a foundation was laid for a witness to testify as to his opinion of defendant's veracity (based upon his own repeated dealings with him and his impressions from other people), no foundation was laid for any reputation testimony. *Constr. Contracting & Mgt. v. McConnell*, 112 N.M. 371, 815 P.2d 1161 (1991).

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 Section 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).

Improper cross-examination by defendant. — In the cross-examination of a detective, defendant could not ask him whether he had written in his notes that witnesses he interviewed appeared to be exaggerating. *State v. La Madrid*, 1997-NMCA-057, 123 N.M. 463, 943 P.2d 110.

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 NMRA 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).

Privilege against self-incrimination regarding credibility matters. — Paragraph B provides that a witness, including the accused, may invoke the privilege against self-incrimination when questioned solely on matters of credibility. *State v. Delgado*, 112 N.M. 335, 815 P.2d 631 (Ct. App. 1991).

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).

Accusations of theft on part of witness. — In ruling that defense counsel could not inquire about accusations of theft on the part of the witness to attack the witness's credibility, the remoteness in time of the alleged conduct is one of the factors the trial court should consider in deciding whether or not to permit inquiry into the conduct. *State v. Lente*, 2005-NMCA-111, 138 N.M. 312, 119 P.3d 737, cert. denied, 2005-NMCERT-008.

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).

The court did not abuse its discretion in refusing to admit evidence of a witness' prior convictions, where the convictions were 25 and 29 years old and were not relevant to behavior at the time of the defendant's crime. *State v. Litteral*, 110 N.M. 138, 793 P.2d 268 (1990), appeal dismissed, 203 F.3d 835 (10th Cir. 2000).

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).

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).

The trial court did not err in prohibiting testimony on the allegations of forgery against a state's witness where no charges had been brought against the witness for the alleged forgeries. *State v. Lucero*, 1999-NMCA-102, 127 N.M. 672, 986 P.2d 468, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

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).

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).

This rule allows impeachment by questioning the witness concerning evidence of instances of specific conduct. *State v. Griego*, 2004-NMCA-107, 136 N.M. 272, 96 P.3d 1192.

Impeachment regarding specific acts of misconduct 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).

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.

Employment records showing dishonesty. — Where the defendant was a witness in the defendant's case, it was permissible for the prosecution to attack the defendant's credibility by questioning the defendant regarding disciplinary action taken by the defendant's employer against the defendant for cash register shortages, but the prosecution was not permitted to introduce any extrinsic evidence, such as documents showing that the defendant was disciplined for a cash shortage, to prove that the alleged acts had occurred. *State v. Casillas*, 2009-NMCA-034, 145 N.M. 783, 205 P.3d 830.

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).

Cross-examination of defendant's wife. — In a prosecution for embezzlement, the trial court did not err in allowing the prosecutor to suggest that defendant's wife had been fired from a job because she took money. *State v. Brooks*, 116 N.M. 309, 862 P.2d 57 (Ct. App. 1993), rev'd on other grounds, 117 N.M. 751, 877 P.2d 557 (1994).

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 NMRA. *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).

Extrinsic evidence of prior accusations of victim inadmissible. — In a prosecution for sexual misconduct, the trial court did not err in denying the defendant's request to call the victim's stepfather and the defendant's wife to testify that the victim had previously falsely accused the stepfather of sexual misconduct. Paragraph B prohibits the use of extrinsic evidence of specific instances of the conduct of a witness for the purpose of attacking the witness' credibility. *State v. Scott*, 113 N.M. 525, 828 P.2d 958 (Ct. App. 1991), cert. quashed, 113 N.M. 524, 828 P.2d 957 (1992).

For testimony offered for fabrication defense in prosecution for kidnapping, criminal sexual prosecution, and aggravated assault, *see Manlove v. Tansy*, 981 F.2d 473 (10th Cir. 1992).

Introduction of extrinsic evidence of crimes not charged violated Paragraph B. *State v. Vigil*, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985) (prosecution for criminal sexual contact of a minor).

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).

Officer's prior bad acts. — Defendants were not permitted to impeach a police officer with evidence that he had been charged with criminal sexual penetration committed under color of authority as a police officer and, as a result, had been suspended from duty. Although the defendants had wanted to show the officer was untruthful and that he misused his position to plant the gun in the patrol car, the trial court did not abuse its discretion in restricting cross-examination, and the officer's pending charge was not

admissible as a prior bad act. *State v. Padilla*, 118 N.M. 189, 879 P.2d 1208 (Ct. App. 1994).

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).

Whether state's witness had previously lied to police in connection with being a paid informant or committed crimes is certainly within the ambit of this rule. *State v. Griego*, 2004-NMCA-107, 136 N.M. 272, 96 P.3d 1192.

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), overruled on other grounds, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896.

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).

Termination of employment. — Although the rule would not preclude inquiry into the circumstances of the witness's termination in order to show the witness's character for untruthfulness; its admissibility was left to the sound discretion of the trial court. *Segura v. K-Mart Corp.*, 2003-NMCA-013, 133 N.M. 192, 62 P.3d 283.

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 § 371 et seq.; 81 Am. Jur. 2d Witnesses §§ 895, 896, 901 to 903.

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.

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 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.

Admissibility of impeached witness' prior consistent statement - modern state civil cases, 59 A.L.R.4th 1000.

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.

Propriety of questioning expert witness regarding specific incidents or allegations of expert's unprofessional conduct or professional negligence, 11 A.L.R.5th 1.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial, 37 A.L.R.5th 319.

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.

Impeachment of federal trial witness with respect to intoxication, 106 A.L.R. Fed. 371.

98 C.J.S. Witnesses §§ 491 to 496, 502 to 513.

11-609. Impeachment by evidence of a criminal conviction.

A. **In general.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one (1) year the evidence

(a) must be admitted, subject to Rule 11-403 NMRA, in a civil case or in a criminal case in which the witness is not a defendant, and

(b) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant, and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement.

B. **Limit on using the evidence after ten (10) years.** This paragraph applies if more than ten (10) years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect, and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

C. **Effect of a pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible if

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one (1) year, or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure, based on a finding of innocence.

D. **Juvenile adjudications.** Evidence of a juvenile adjudication is admissible under this rule only if

(1) it is offered in a criminal case,

(2) the adjudication was of a witness other than the defendant,

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility, and

(4) admitting the evidence is necessary to fairly determine guilt, or innocence.

E. **Pendency of an appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-609 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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.

Cross references. — For rules regarding admissibility of character evidence and methods of proving it, *see* Rules 11-404 and 11-405 NMRA.

For governor's power to pardon and reprieve, *see* N.M. Const., Art. V, § 6.

For effect of criminal conviction upon civil rights, and the governor's power to pardon, *see* Section 31-13-1 NMSA 1978.

The 1990 amendment, effective January 1, 1991, rewrote Paragraph A.

The 1993 amendment, effective December 1, 1993, substituted "court" for "judge" in two places in Paragraph C.

The 1996 amendment, effective February 1, 1996, added Paragraph C and redesignated former Paragraphs C and D as Paragraphs D and E.

The 2007 amendment, approved by Supreme Court Order 07-8300-35, effective February 1, 2008, amended Paragraph A to change "credibility" to "character for truthfulness" and to provide in Subparagraph (2) that evidence that a witness has been convicted of a crime may be admitted "if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness".

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

I. GENERAL CONSIDERATION.

Character. — Where, on direct examination, the defendant denied that he had ever been convicted of a crime, the defendant's prior juvenile adjudication was not admissible on cross-examination to rebut the false impression the defendant may have created that he was a law abiding person who had not committed a criminal act in the past. *State v. Sena*, 2008-NMCA-083, 144 N.M. 271, 186 P.3d 900, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

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 Section 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*, 109 N.M. 113, 782 P.2d 85 (1989).

Subparagraph A(1) evidence is always subject to possible exclusion under Rule 11-403 NMRA, relating to exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. *Lenz v. Chalamidas*, 109 N.M. 113, 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).

Showing a conviction includes eliciting the time of the conviction. *State v. Mares*, 112 N.M. 193, 812 P.2d 1341 (Ct. App. 1991).

"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).

Evidence of 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 § 413 et seq.; 81 Am. Jur. 2d Witnesses §§ 910 to 918, 920, 923, 970, 971.

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.

Requirement that defendant in state court testify in order to preserve alleged trial error in rulings on admissibility of prior conviction impeachment evidence under Uniform Rule of Evidence 609, or similar provisions or holding - post-Luce cases, 80 A.L.R.4th 1028.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial, 37 A.L.R.5th 319.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence or similar state rule? - general considerations, 82 A.L.R.5th 359.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence, 83 A.L.R.5th 277.

What constitutes crime involving "Dishonesty or False Statement" under Rule 609(a)(2) of the Uniform Rules of Evidence or similar state rule - nonviolent crimes, 84 A.L.R.5th 487.

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.

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.

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, 160 A.L.R. Fed. 201.

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).

Damage caused by questioning concerning defendant's past convictions of crimes 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).

Exceptions to general rule regarding evidence of offenses and crimes. — 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).

Failure to perform on-the-record balancing not reversible error. — The court's failure to articulate on the record its balancing test for admitting prior convictions, required by Subparagraph (1) of Paragraph A, of this rule was not reversible error where it was evident that there were reasons for and against the admission of the conviction and the court rejected defendant's argument, citing case law. State v. Trejo, 113 N.M. 342, 825 P.2d 1252 (Ct. App. 1991).

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).

Where underlying acts for prior conviction later in time. — The court did not err in admitting evidence of defendant's prior conviction for impeachment purposes where the underlying acts for the conviction took place after the acts for which he was on trial. State v. Trejo, 113 N.M. 342, 825 P.2d 1252 (Ct. App. 1991).

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).

Where the defendant was charged with contributing to the delinquency of a minor, and defendant denied being in an adult bookstore other than to repair the air conditioner, the state was entitled to impeach his testimony with evidence, using the defendant's nolo contendere plea to a different count of contributing to the delinquency of a minor, that he had been in that bookstore with the minor females. State v. Cawley, 110 N.M. 705, 799 P.2d 574 (1990).

Prior criminal convictions may be shown through cross-examination of accused. — 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).

Effect of defendant’s preemptive revelation of a prior conviction on appellate review. — The Court of Appeals may consider the admissibility of criminal convictions for impeachment purposes where the defendant, as a tactical matter, elects to preemptively introduce such evidence after having objected to its admissibility and obtaining a ruling from the district court. *State v. Allen*, 2014-NMCA-047, cert. denied, 2014-NMCERT-002.

Where defendant was charged with criminal sexual contact with several minors; in the first prosecution, defendant entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970); the district court accepted the plea, but declined to adjudicate guilt until resolution of the second case; in the second prosecution, the State filed a motion for

adjudication of guilt in the first prosecution and indicated that the State would inquire whether defendant was a convicted felon if defendant testified in the second prosecution; defendant objected to the motion; the district court entered an adjudication of guilt against defendant in the first prosecution and ruled that the conviction would be available for impeachment purposes in the second prosecution; and when defendant testified in the second prosecution, defense counsel asked if defendant had been convicted of a felony and defendant admitted defendant's prior felony conviction, by preemptively revealing the prior conviction in the second prosecution, defendant did not waive defendant's right to appeal the district court's adjudication of guilt in the first prosecution as it applied to the second prosecution. *State v. Allen*, 2014-NMCA-047, cert. denied, 2014-NMCERT-002.

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).

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.

Prior conviction based on *Alford* plea. — Where defendant was charged with criminal sexual contact with several minors; in the first prosecution, defendant entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970); the district court accepted the plea, but declined to adjudicate guilt until resolution of the second case; in the second prosecution, the State filed a motion for adjudication of guilt in the first prosecution and indicated that the State would inquire whether defendant was a convicted felon if defendant testified in the second prosecution; and the district court entered an adjudication of guilt against defendant in the first prosecution, the district court's adjudication of guilt based on defendant's *Alford* plea was available to the State as impeachment evidence in the second prosecution. *State v. Allen*, 2014-NMCA-047, cert. denied, 2014-NMCERT-002.

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).

State may establish name of particular felony or misdemeanor on cross-examination. — 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).

On cross-examination only the conviction and name thereof can be introduced. — 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).

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 regarding defendant's "habitual" status. — Prosecutor's improper questioning of defendant on cross-examination regarding defendant's unsolicited reference to his "habitual" status was not so prejudicial as to require a mistrial. State v. Reynolds, 111 N.M. 263, 804 P.2d 1082 (Ct. App. 1990).

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).

Cross-examination as to prior firearm conviction. — In a murder prosecution, the trial court did not abuse its discretion by allowing the state to cross-examine defendant on his prior conviction for possession of a stolen firearm. State v. Mora, 1997-NMSC-060, 124 N.M. 346, 950 P.2d 789.

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).

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).

Evidence of collateral offenses not admissible 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).

No abuse of discretion in admission of evidence of prior conviction. See State v. Trejo, 113 N.M. 342, 825 P.2d 1252 (Ct. App. 1991).

In a prosecution of defendant for criminal sexual penetration and abuse of a child by endangerment, the trial court properly ruled that defendant's prior California conviction for lewd acts on a child could be admitted for impeachment purposes. State v. Massengill, 2003-NMCA-024, 133 N.M. 263, 62 P.3d 354, cert. denied, 133 N.M. 126, 61 P.3d 835 (2003).

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 213 (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).

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).

Ten-year limit. — The court did not abuse its discretion in refusing to admit evidence of a witness' prior convictions, where the convictions were 25 and 29 years old and were not relevant to behavior at the time of the defendant's crime. State v. Litteral, 110 N.M. 138, 793 P.2d 268 (1990), appeal dismissed, 203 F.3d 835 (10th Cir. 2000).

Trial court abused its discretion in admitting evidence of defendant's prior conviction that was nearly ten years old since the case essentially turned on the jury's evaluation of the credibility of the defendant and of the victim. State v. Conn, 115 N.M. 101, 847 P.2d 746 (Ct. App. 1992).

III. JUVENILE ADJUDICATIONS.

Impeachment. — Where, on direct examination, the defendant denied that he had ever been convicted of a crime, the defendant’s prior juvenile adjudication was not admissible to impeach the defendant’s testimony on cross-examination. State v. Sena, 2008-NMCA-083, 144 N.M. 271, 186 P.3d 900, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

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).

Evidence of juvenile conviction inadmissible. — In a murder trial where the defendant alleged self-defense in shooting at an occupied vehicle but conceded that he did not know of his assailant's juvenile conviction for armed robbery, the trial court did not abuse its discretion in disallowing introduction of the evidence, especially when it is considered that the defendant fired at the vehicle while it was moving away. State v. Gonzales, 110 N.M. 166, 793 P.2d 848 (1990).

Where the trial court had two opportunities to exclude the evidence, i.e., under Rule 11-403 NMRA as applied to Paragraphs A(2) and D of this rule, and only the crime of concealing identity involved dishonesty of false statement, exclusion was not an abuse of discretion. State v. Lasner, 2000-NMSC-038, 129 N.M. 806, 14 P.3d 1282.

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 a witness’s religious beliefs or opinions is not admissible to attack or support the witness’s credibility.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-610 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 610 of the Federal Rules of Evidence.

The 1993 amendment, effective December 1, 1993, substituted "the witness's" for "his" near the end of the rule.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses § 955.

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 examining witnesses and presenting evidence.

A. **Control by the court; purposes.** The court should exercise reasonable control over the mode and order of questioning witnesses and presenting evidence so as to

(1) make those procedures effective for determining the truth,

(2) avoid wasting time, and

(3) protect witnesses from harassment or undue embarrassment.

B. **Scope of cross-examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting a witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

C. **Leading questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions

(1) on cross-examination, and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-611 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective

December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 611 of the Federal Rules of Evidence.

This rule, in conjunction with Rule 11-607 NMRA, 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.

Cross references. — For rule regarding applicability of the Rules of Evidence to the Rules of Criminal Procedure, *see* Rule 5-613 NMRA.

The 1993 amendment, effective December 1, 1993, substituted "court" for "judge" in the paragraph heading and near the beginning of Paragraph A and substituted "the witness's" for "his" in Paragraph C.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

I. GENERAL CONSIDERATION.

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).

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).

Leading questions by judge. — In a child sexual abuse case, where the court drew a stick figure to help the victim testify, the drawing was relevant, and the court's leading questions to the victim tended to clarify the evidence. *State v. Benny E.*, 110 N.M. 237, 794 P.2d 380 (Ct. App. 1990).

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).

For article, "Lawyers, Linguists, Story-Tellers, and Limited English-Speaking Witnesses," see 27 N.M.L. Rev. 77 (1997).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29 Am. Jur. 2d Evidence § 386 et seq.; 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 § 354 et seq.; 81 Am. Jur. 2d Witnesses §§ 717, 718, 731, 734 to 736, 754, 755, 818 to 820, 849, 852, 865.

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.

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.

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.

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).

Formerly scope of cross-examination 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).

Judge's exercise of control is not judicial bias. — The court established a procedure whereby objections would be stated concisely and any further argument would be elicited by the court only if necessary. Where counsel repeatedly attempted to circumvent this procedure and argue the merits of the objection in front of the jury, the judge admonished them. Judicial bias must be personal and cannot be predicated upon enforcement of the rules of criminal procedure. State v. Fernandez, 117 N.M. 673, 875 P.2d 1104 (Ct. App. 1994).

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).

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).

Testimony by child. — In a prosecution for criminal sexual penetration of a minor, the trial court did not err by allowing the victim to hold a teddy bear while giving testimony. State v. Marquez, 1998-NMCA-010, 124 N.M. 409, 951 P.2d 1070, cert. denied, 124 N.M. 311, 950 P.2d 284 (1998).

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).

The court can exercise reasonable control over cross-examination to more effectively seek the truth and to avoid needless consumption of time. Empire West Cos. v. Albuquerque Testing Labs, Inc., 110 N.M. 790, 800 P.2d 725 (1990).

Within discretion of trial court 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. Baldridge Lumber Co., 96 N.M. 761, 635 P.2d 316 (Ct. App. 1981).

Trial court could not be found to have abused its discretion in allowing leading questions, absent any specific analysis by the complaining party as to why the questions were improper. Richardson v. Rutherford, 109 N.M. 495, 787 P.2d 414 (1990).

Discretion of trial court 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. Baldridge 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).

Trial court's responsibility to properly limit extent of cross-examination. — 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).

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. Baldridge 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).

Where, after an investigating officer completed his testimony, the defendant failed to inform the trial court of any new matters brought out on redirect, and defendant waited until his case-in-chief to request the trial court to order the officer's presence for further cross-examination, the defendant waived any error in the trial court's refusal to order the officer to return for further cross-examination. State v. Gibbins, 110 N.M. 408, 796 P.2d 1104 (Ct. App. 1990).

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).

Formerly, extent of cross-examination 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).

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).

The scope and extent of cross-examination is a matter within the discretion of the trial court. The trial court's decision will not be disturbed absent an abuse of discretion.

Empire West Cos. v. Albuquerque Testing Labs, Inc., 110 N.M. 790, 800 P.2d 725 (1990).

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).

While evidence of silence at the time of arrest generally may not be very probative of a defendant's credibility, in circumstances where a defendant testifies to an exculpatory version of events and claims to have told the police the same version upon arrest, cross-examination was probative of the defendant's credibility and constituted acceptable impeachment. State v. Gutierrez, 2003-NMCA-077, 133 N.M. 797, 70 P.3d 787, cert. denied, 133 N.M. 771, 70 P.3d 761 (2003).

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).

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).

Trial court did not abuse its discretion in terminating cross-examination of a witness after several hours, where the court did not foreclose inquiry into any specific area, but allowed latitude to pursue various issues at length. Empire West Cos. v. Albuquerque Testing Labs, Inc., 110 N.M. 790, 800 P.2d 725 (1990).

11-612. Writing used to refresh a witness's memory.

A. **Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory

(1) while testifying, or

(2) before testifying, if the court decides that justice requires a party to have those options.

B. **Adverse party's options; deleting unrelated matter.** Unless otherwise provided by law in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

C. **Failure to produce or deliver the writing.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or – if justice so requires – declare a mistrial.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-612 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 612 of the Federal Rules of Evidence.

Cross references. — For rule that recorded recollection not included by hearsay rule, *see* Rule 11-803 NMRA.

The 1993 amendment, effective December 1, 1993, deleted "his" following "refresh" in the introductory language, substituted "the court" for "the judge" in three places, and substituted "its discretion" for "his discretion" near the end of the rule.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

Refreshing the recollection of a witness. — To refresh a witness's recollection with an exhibit, the attorney must first establish that the witness does not recall the matter. Next, the attorney must determine that the witness's memory will be refreshed by reference to a certain exhibit. If the witness does not agree that the exhibit will be helpful, then the attorney may not attempt to refresh the witness's memory by calling the witness's attention to the exhibit. If the witness testifies that the exhibit might refresh his or her memory, the witness reviews the exhibit without the jury viewing or listening to the exhibit. After the witness has considered the exhibit, the attorney must then ask the witness whether his or memory has been refreshed. If the answer is yes, the exhibit is removed from the witness and the witness continues his or her testimony. The testimony must come from the witness's restored memory, not from the exhibit and not from the questioning attorney. *State v. Macias*, 2009-NMSC-028, 146 N.M. 378, 210 P.3d 804.

Hearsay statements were not used to refresh the recollection of the witness. — Where the prosecutor asked the witness whether the witness remembered calling a friend of the defendant; the witness testified that the witness did not remember the telephone call and was uncertain what was discussed; the witness never acknowledged that a recording or transcript of the telephone call would refresh the witness's recollection; the prosecutor distributed a transcript to the jury and played the recording of the telephone call in its entirety; and the telephone call contained statements by the friend incriminating the defendant in the murder of the victim, the prosecutor did not follow the allowable procedure for refreshing recollection and the statements made by the friend constituted inadmissible hearsay. *State v. Macias*, 2009-NMSC-028, 146 N.M. 378, 210 P.3d 804.

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).

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 NMRA. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Reliability of writing used to revive memory 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. — 29A Am. Jur. 2d Evidence § 1258 et seq.; 81 Am. Jur. 2d Witnesses §§ 793 to 799.

Admissibility of hypnotic evidence at criminal trial, 92 A.L.R.3d 442, 77 A.L.R.4th 927.

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

Admissibility of hypnotically refreshed or enhanced testimony, 77 A.L.R.4th 927.

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. Witness’s prior statement.

A. **Showing or disclosing the statement during examination.** When examining a witness about the witness’s prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party’s attorney.

B. **Extrinsic evidence of a prior inconsistent statement.** Extrinsic evidence of a witness’s prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This paragraph does not apply to an opposing party’s statement under Rule 11-801(D)(2) NMRA.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-613 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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.

Cross references. — For contents of writings, recordings and photographs, *see* Rules 11-1001 to 11-1008 NMRA.

The 1993 amendment, effective December 1, 1993, substituted "the witness" for "him" in two places and "nor" for "or" in Paragraph A, and substituted "the witness" for "him" in Paragraph B.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

I. GENERAL CONSIDERATION.

Conflicting deposition testimony. — The court did not abuse its discretion in admitting a witness's testimony that differed from the witness's deposition testimony because the opposing party was afforded the remedy of impeaching the witness's credibility by using the witness's prior inconsistent statements. *Roark v. Farmers Group, Inc.*, 2007-NMCA-074, 142 N.M. 59, 162 P.3d 896, cert. denied, 2007-NMCERT-006.

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).

II. EXTRINSIC EVIDENCE OF PRIOR STATEMENT.

A. IN GENERAL.

Substantive inconsistencies required. — Under Paragraph B, the statement introduced into evidence must be inconsistent with trial testimony. *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

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).

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).

No abuse of discretion in admitting hearing transcript. — The court did not abuse its discretion in admitting the full transcript of the prior inconsistent testimony of a witness where the witness remained available for cross-examination and insisted that she could not recall the prior inconsistent statements. The proponent was not required to confront the witness with each statement; the court properly admitted the transcript in the interest of economy and after the prosecutor attempted to read the prior testimony to the witness without prompting recollection. *State v. Gonzales*, 113 N.M. 221, 824 P.2d 1023 (1992).

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).

B. LAYING FOUNDATION.

Manner of impeachment. — The trial court did not abuse its discretion by allowing the prosecution to read into evidence prior statements of the witness without first asking questions and then using the transcript to impeach. *State v. Dominguez*, 2007-NMSC-060, 142 N.M. 811, 171 P.3d 750.

Cross-examination no longer required. — This rule no longer requires that a witness be cross-examined on his inconsistent statements before the statements are admitted; however, the witness must be given an opportunity to explain or deny the statement. *State v. Southworth*, 2002-NMCA-091, 132 N.M. 615, 52 P.3d 987, cert. denied, 132 N.M. 551, 52 P.3d 411 (2002).

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).

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 by *State v. Turnbow*, 67 N.M. 241, 354 P.2d 533 (1960).

Cross-examination of defendant as to statements made 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).

Rule regarding laying foundation 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).

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.

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.

Admissibility of impeached witness' prior consistent statement - modern state criminal cases, 58 A.L.R.4th 1014.

Admissibility of impeached witness' prior consistent statement - modern state civil cases, 59 A.L.R.4th 1000.

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

Use of prior inconsistent statements for impeachment of testimony of witnesses under Rule 613, Federal Rules of Evidence, 152 A.L.R. Fed. 375.

98 C.J.S. Witnesses §§ 573 to 628.

11-614. Court’s calling or examining a witness.

A. **Calling.** The court may call a witness on its own or at a party’s request. Each party is entitled to cross-examine the witness.

B. **Examining.** The court may examine a witness regardless of who calls the witness.

C. **Objections.** A party may object to the court’s calling or examining a witness either at that time or at the next opportunity when the jury is not present.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-614 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 614 of the Federal Rules of Evidence.

The 1993 amendment, effective December 1, 1993, substituted "court" for "judge" in the rule heading and throughout the rule, substituted "its own" for "his own" in Paragraph A, substituted "itself or by a party" for "himself or a party" in Paragraph B, and substituted "by it" for "by him" in Paragraph C.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

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).

Parties must be allowed to cross-examine witness called by court. — 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).

Discretionary power of court to call witness 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. Nat'l Farmers Union Prop. & Cas. Co.*, 100 N.M. 568, 673 P.2d 1301 (1983).

Judge's questioning of witness affecting fairness of trial. — A judge abused the discretion allowed under this rule when she extensively questioned a witness concerning questions critical to the defendant's defense and made remarks which were improper. *State v. Paiz*, 1999-NMCA-104, 127 N.M. 776, 987 P.2d 1163.

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).

In a child sexual abuse case, where the court drew a stick figure to help the victim testify, the drawing was relevant, and the court's leading questions to the victim tended to clarify the evidence. *State v. Benny E.*, 110 N.M. 237, 794 P.2d 380 (Ct. App. 1990).

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 § 1 et seq.

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. Excluding witnesses.

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony, or the court may do so on its own. This rule does not authorize excluding

A. a party who is a natural person,

B. an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney,

C. a person whose presence a party shows to be essential to presenting the party's claim or defense, or

D. a person authorized by law to be present.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-615 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 615 of the Federal Rules of Evidence.

The 1993 amendment, effective December 1, 1993, in the introductory paragraph, substituted "court" for "judge" near the beginning, substituted "it may" for "he may" near the middle, and substituted "its own" for "his own" near the end; and substituted "the party's" for "his" in Paragraph C.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

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).

The purpose of the rule is to prevent witnesses from tailoring their testimony to that of another witness and to allow inconsistencies in the testimony to be exposed. *State v.*

Trevino, 113 N.M. 804, 833 P.2d 1170 (Ct. App.), aff'd sub nom. *State v. Orosco*, 113 N.M. 780, 833 P.2d 1146 (1992).

Prohibition against discussion among witnesses. — Although this rule does not specifically prohibit witnesses who have testified from discussing their testimony outside the courtroom with prospective witnesses, that prohibition is apparently part of the rule in New Mexico. *State v. Reynolds*, 111 N.M. 263, 804 P.2d 1082 (Ct. App. 1990).

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).

No abuse of discretion in excluding witness who had been present in courtroom during trial. — Since the matters about which a proffered witness would testify had been alluded to in the opening statement and in the testimony of other witnesses, it was within the discretion of the trial court to exclude the testimony of such witness because she had been present in the courtroom during the whole trial and had not been disclosed as a witness to the state. *State v. Ruiz*, 119 N.M. 515, 892 P.2d 962 (Ct. App. 1995).

Exclusion order not violative of due process. — In a proceeding for condemnation of property owned by a company, the trial court's order excluding all witnesses except for one representative designated by each party did not violate due process. *City of Albuquerque v. Westland Dev. Co.*, 121 N.M. 144, 909 P.2d 25 (Ct. App. 1995), cert. denied, 120 N.M. 828, 907 P.2d 1009 (1995), and cert. denied, 517 U.S. 1244, 116 S. Ct. 2499, 135 L. Ed. 2d 190 (1996).

Permitting testimony of witness who violated "discussion" instructions discretionary. — 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).

Allowing testimony of a witness present in the courtroom. — Where defendant, who was convicted of criminal sexual penetration, testified that defendant never had sex with the victim, but that defendant had sex with the victim's sibling; after defendant testified, the State called the sibling as a rebuttal witness; the sibling had been in the court room throughout the testimony despite defendant having invoked Rule 11-615 NMRA and was not named as a witness before trial; the sibling testified that the sibling never had sex with defendant, did not testify as to whether defendant has sex with the victim, and was cross-examined by defendant; and defendant had sufficient notice that the State might seek to rebut defendant's defense that defendant had sex with the sibling, but not with the victim and an adequate opportunity to interview the sibling,

defendant failed to demonstrate that defendant was prejudiced by the sibling's testimony. *State v. Perez*, 2014-NMCA-023, cert. denied, 2014-NMCERT-____.

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 exclusion 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).

Allowing testifying officer to remain in the courtroom. — Trial judge properly exercised his discretion to allow the officer to remain in the courtroom throughout the trial, where officer testified to a very narrow issue and was ordered not to talk to other

witnesses. *State v. Trevino*, 113 N.M. 804, 833 P.2d 1170 (Ct. App.), aff'd sub nom. *State v. Orosco*, 113 N.M. 780, 833 P.2d 1146 (1992).

Allowing testifying police investigator to remain in courtroom. — The trial court did not abuse its discretion in allowing police investigator to remain in courtroom because his testimony, if subject to any change, was impeachable through written investigative reports and testimony from the pretrial hearing. *State v. Hernandez*, 115 N.M. 6, 846 P.2d 312 (1993).

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).

Remedies available to court where witnesses discuss testimony. — When a violation of the rule prohibiting witnesses from discussing their testimony with prospective witnesses occurs, the choice of remedy is within the sound discretion of the trial court. Declaration of a mistrial is one possible remedy. Others that should be considered by the court are striking testimony, citing for contempt, instructing the jury, permitting examination of the witnesses by counsel concerning how their testimony may have been tainted, and permitting argument by counsel. *State v. Reynolds*, 111 N.M. 263, 804 P.2d 1082 (Ct. App. 1990).

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. *State v. Lopez*, 96 N.M. 456, 631 P.2d 1324 (Ct. App. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75 Am. Jur. 2d Trial § 240 et seq.

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.

Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case, 74 A.L.R.4th 705.

Exclusion of witnesses under Rule 615 of Federal Rules of Evidence, 48 A.L.R. Fed. 484.

Exclusion of witnesses under Rule 615 of Federal Rules of Evidence, 181 A.L.R. Fed. 549.

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 a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is

A. rationally based on the witness's perception,

B. helpful to clearly understanding the witness's testimony or to determining a fact in issue, and

C. not based on scientific, technical, or other specialized knowledge within the scope of Rule 11-702 NMRA.

[Approved, effective July 1, 1973; as amended, effective December 1, 1993; as amended by Supreme Court Order 06-8300-25, effective December 18, 2006; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-701 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

The committee deleted all references to an "inference" on the grounds that the deletion made the rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

The addition of Paragraph C in 2006 brought this rule into alignment with federal rule 701. This amendment was made to the federal rule in 2000 to avoid the misuse of the lay witness opinion rule as a guise for offering testimony that in reality is based on some form of claimed expertise of the witness. The amendment reflects New Mexico and federal case law. The amendment was a non-substantive change designed to clarify that lay witness testimony under this rule should not be based on "scientific, technical or other specialized knowledge". If the witness testifies to such scientific, technical or other specialized knowledge, then the admissibility of such testimony must be analyzed under Rule 11-702 NMRA for expert testimony.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 701 of the Federal Rules of Evidence.

The 1993 amendment, effective December 1, 1993, substituted "the witness's" for "his" in two places.

The 2006 amendment, approved by Supreme Court Order 06-8300-25, effective December 18, 2006, added Paragraph C.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes, including the deletion of references to "inference".

I. GENERAL CONSIDERATION.

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).

II. SPECIFIC APPLICATIONS.

Authentication of substance as cocaine by lay testimony. — Where defendant was charged with trafficking and the lesser included offense of possession of cocaine; the state failed to present a laboratory analysis authenticating the substance found in defendant’s vehicle as crack cocaine; when arrested, defendant raised the inference that the substance was an illegal narcotic by telling the arresting police officers that defendant was the user and that the substance was for defendant’s personal use; three officers testified that the substance field tested for the presence of cocaine; one officer testified that the result of the test was positive; and two officers testified that based on their experience and training, the substance had the appearance of crack cocaine, the officers’ opinions, combined with the actions and statements of defendant, provided sufficient evidence to support the admissibility of the crack cocaine into evidence. *State v. Godoy*, 2012-NMCA-084, 284 P.3d 410, cert. denied, 2012-NMCERT-007.

Contents of computer hard drive. — A lay witness may testify about what he observed on a computer hard drive and "Zip" disks that came into evidence. *Rapid Temps, Inc. v. Lamon*, 2008-NMCA-122, 144 N.M. 804, 192 P.3d 799.

Grooming evidence. — Where grooming evidence was offered to show the defendant's sexual intent, not to show that the defendant had groomed the child for sexual activity, the evidence was within the realm of lay testimony. *State v. Sena*, 2008-NMSC-053, 144 N.M. 821, 191 P.3d 1198.

Blood alcohol concentration. — If an expert can determine a defendant's likely blood alcohol concentration at the time of driving from a blood alcohol concentration, of whatever measurement, taken a significant time after driving, and if the trial court finds that the expert's methodology satisfies the requirements of this rule, then nothing requires exclusion of that expert's testimony. *State v. Jensen*, 2005-NMCA-113, 138 N.M. 254, 118 P.3d 762, cert. quashed, 2005-NMCERT-011.

Helicopters. — Persons affected by the noise of helicopters are not giving expert opinions in testimony regarding the relationship between distance and noise and annoyance, but are simply stating their admissible observations regarding the noise. *KOB-TV, LLC v. City of Albuquerque*, 2005-NMCA-049, 137 N.M. 388, 111 P.3d 708.

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 opinionate on complexities of trial practice. — A lay witness does not have the experience, knowledge and wisdom to opinionate 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).

Where a nurse practitioner had specialized in diagnosing child sexual abuse from 1982 to 1988; had extensively read journals and other materials dealing with the subject; had attended a criminal justice program on sex abuse; and had been qualified to testify 23 times previously as an expert in child sexual abuse, she was a child sexual abuse expert based on her experience, training, and education, and it was proper to admit her testimony on the voluntariness of the victim's statement implicating the perpetrator. *State v. Benny E.*, 110 N.M. 237, 794 P.2d 380 (Ct. App. 1990).

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).

Effect of chlorine established by worker's testimony. — In a worker's compensation case, the worker's testimony regarding his reaction to chlorine used to clean equipment, stating that the chlorine caused him to become dizzy, that this dizziness continued, causing his fall a few minutes later in the locker room, was sufficient to explain the cause of his fall and the judge reasonably determined from this evidence that the worker's fall arose from a risk related to his employment. Although the effect of chlorine upon an individual is a matter that may properly be presented by expert testimony, the judge did not err in permitting the worker to testify concerning his own personal reaction following his use of chlorine during his work. *Garcia v. Borden, Inc.*, 115 N.M. 486, 853 P.2d 737 (Ct. App. 1993).

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).

Opinion of 17-year-old as to driver's sobriety admissible. — The testimony of a 17-year-old teenager as to a driver's level of sobriety was admissible where the opinion he

expressed was based on his perceptions and experience with intoxicated persons, and was helpful to determine the issue of liability. *Sanchez v. Wiley*, 1997-NMCA-105, 124 N.M. 47, 946 P.2d 650.

Testimony of lay witness as to driving times. — In a prosecution for murder, a lay witness could testify as to the driving times between the scene of the murder and locations the defendant admitted to being on the evening of the murder, based on first-hand knowledge he gained from personally driving the routes. *State v. Woodward*, 121 N.M. 1, 908 P.2d 231 (1995).

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).

Owner of real property may testify as to property's value. — 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).

Opinion testimony of police officers as to defendant's depraved mind and lack of regard for human life was rationally based on the witnesses' perceptions and was helpful to the jury's determination. *State v. Landgraf*, 1996-NMCA-024, 121 N.M. 445, 913 P.2d 252.

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).

Expert should have been allowed to comment on validity of lay opinion. — 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' 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).

Apparent mental state of defendant. — In a prosecution for retaliation against a witness, it was not error to admit an officer's testimony that defendant appeared to be serious when he made the threatening statement. *State v. Warsop*, 1998-NMCA-033, 124 N.M. 683, 954 P.2d 748, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

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).

Questioning detective concerning witnesses' veracity improper. — In the cross-examination of a detective, defendant could not ask him whether he had written in his notes that witnesses he interviewed appeared to be exaggerating. *State v. La Madrid*, 1997-NMCA-057, 123 N.M. 463, 943 P.2d 110.

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).

Computer diagram generated by investigating officer. Where an investigating officer made measurements at a crime scene and entered the measurements into a computer that used the measurements to draw a diagram of the scene showing the path of the defendant's car, the point of impact with the victim's body, the point at which the body came to rest, and the location of other physical evidence at the scene, the trial court did not abuse its discretion in admitting the officer's testimony and the diagram. *State v. Wildgrube*, 2003-NMCA-108, 134 N.M. 262, 75 P.3d 862, cert. denied, 134 N.M. 179, 74 P.3d 1071 (2003).

Improperly elicited testimony. — Where defendant was convicted of driving under the influence of intoxicating liquor; defendant was stopped for speeding; defendant promptly and properly stopped the car, was cooperative and behaved appropriately in encounters with police officers, displayed no signs of impairment getting out of the car or walking, performed field sobriety tests with only minor errors, emitted the odor of an alcoholic beverage, had slurred speech and blood shot and watery eyes, and admitted to having one beer; defendant's breath test scores were .06 and .05; the prosecutor repeatedly asked questions, over the objections of defendant, intended to elicit the officer's unqualified and inadmissible opinions regarding the amount of alcohol defendant must have consumed to produce breath scores of .06 and .05; on one occasion the officer answered that the breath scores were not consistent with defendant's admission of having one beer; and there was no evidence to establish whether defendant's breath scores were indicative of impairment, defendant was entitled to a new trial because the inadmissible evidence was intentionally elicited by the prosecution and there was a reasonable probability that the jury's verdict was induced by the officer's improperly induced testimony. *State v. Armijo*, 2014-NMCA-013, cert. granted, 2013-NMCERT-012.

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.

Admissibility of lay witness interpretation of surveillance photograph or videotape, 74 A.L.R.5th 643.

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.

Reliability of scientific technique and its acceptance within scientific community as affecting admissibility, at federal trial, of expert testimony as to result of test or study based on such technique - modern cases, 105 A.L.R. Fed. 299.

23 C.J.S. Criminal Law §§ 1050 to 1058; 32 C.J.S. Evidence §§ 509 et seq., 528 et seq., 614 et seq.; 32A C.J.S. Evidence §§ 1214 et seq., 1271 et seq., 1298.

11-702. Testimony by expert witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-702 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

New Mexico has not adopted the changes made to the federal rule in 2000 to incorporate the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in light of the differences between federal law and New Mexico law regarding whether *Daubert* applies to nonscientific testimony.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 702 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

I. GENERAL CONSIDERATION.

Accountant malpractice claim based on accountant's conflict of interest. — In a professional malpractice case based on an accountant's purported conflict of interest, expert testimony is necessary to establish the applicable standard of conduct, unless exceptional circumstances make the alleged breach so obvious that it falls within the common knowledge of an average person. *Buke, LLC v. Cross Country Auto Sales, LLC*, 2014-NMCA-078, cert. denied, 2014-NMCERT-007.

Where the accountant was hired by plaintiff's manager to prepare tax returns and review financial statements for plaintiff; the accountant had prepared tax returns for the defendant dealerships and was a member of a business in which the manager was a member; the manager used plaintiff's GM credentials and GMAC credit line to purchase vehicles for the defendant dealerships; the accountant determined that plaintiff's GM credit line exceeded the value of plaintiff's inventory of vehicles on its car lot floor and that one defendant dealership had vehicles for which it had not paid plaintiff; and plaintiff sued the accountant for breach of professional duty on the ground that the accountant had a conflict of interest between plaintiff's interests and the defendant dealership's interests, expert testimony was necessary to establish the applicable standards of conduct regarding the accountant's conflict of interest, because an average person would not know whether or how a conflict of interest might arise when an accountant prepares tax returns or reviews financial statements. *Buke, LLC v. Cross Country Auto Sales, LLC*, 2014-NMCA-078, cert. denied, 2014-NMCERT-007.

Distinction between personal use and trafficking drugs. — Where a police officer worked for a sheriff's department for eight years, received training in basic narcotics recognition and interdiction, and investigated hundreds of drug-related offenses; as a narcotics detective, the officer received substantial advanced narcotics training, did undercover work, worked on a task force with federal agencies, and was an instructor at the police academy, citizens groups and the district attorney's office; at the police academy, the officer taught narcotics investigation courses on the distinction between trafficking amounts of drugs and personal amounts and recognition of trafficking evidence; the officer performed a thousand drug investigations during which the officer learned about narcotics use and sales from people the officer had arrested; and the officer presented at drug trafficking conferences, the officer was qualified, based on knowledge and experience, to testify as an expert in distinguishing between personal use and trafficking amounts in terms of crack cocaine. *State v. Rael-Gallegos*, 2013-NMCA-092, cert. denied, 2013-NMCERT-009.

Acceptance of witness as an expert witness. — Where defendant's vehicle rear-ended another vehicle; defendant fled the scene of the accident; defendant's counsel objected to the arresting officer offering an opinion regarding the cause of the accident on the ground that the officer was not an expert; the officer testified that the officer worked in the traffic division of the police force, attended schools to become a traffic crash reconstructionist, held certificates as a traffic crash reconstructionist, and worked primarily in investigating traffic collisions; and the trial court overruled defense counsel's continued objection, there was sufficient notice to the parties that the trial court was accepting the officer as an expert witness and did not abuse its discretion by allowing

the officer to offer an opinion as to the cause of the accident. *State v. Bullcoming*, 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1.

Police officer. — Where a police officer's primary duty was investigating traffic accidents; the officer had training in basic accident reconstruction and traffic crash reconstruction; the officer was certified as a traffic crash reconstructionist; and the officer did not witness the accident, the officer was qualified to testify about the cause of the accident. *State v. Bullcoming*, 2008-NMCA-097, 144 N.M. 546, 189 P.3d 679, affirmed in part by State v. Bullcoming, 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1.

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 preclude 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).

In a prosecution for criminal sexual penetration, testimony of a clinical psychologist was helpful to the jury in understanding how Down's Syndrome affected the victim's mental capacity and why her biological age was not an accurate guide to her understanding of the nature and consequences of the sexual acts to which she was subjected by defendant. *State v. Hueglin*, 2000-NMCA-106, 130 N.M. 54, 16 P.3d 1113.

Expert testimony was not required to support charges that a dentist submitted a false claim for reimbursement and that he was guilty of unprofessional conduct and failed to practice dentistry in a professionally competent manner. Where the agency conducting the hearing is itself composed of experts qualified to make a judgment as to the licensee's adherence to standards of professional conduct, there is no need for the kind of assistance an expert provides in the form of an opinion. *Weiss v. N.M. Bd. of Dentistry*, 110 N.M. 574, 798 P.2d 175 (1990).

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).

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).

Testimony as to basis of opinion required. — An expert witness must satisfactorily explain steps followed in reaching a conclusion and give reasons for his opinion. *Shamalon Bird Farm, Ltd. v. U.S. Fid. & Guar. Co.*, 111 N.M. 713, 809 P.2d 627 (1991).

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).

Facts not relied upon by expert. The trial court did not err in disallowing the defendant's cross-examination of pathologist regarding the victim's blood alcohol content, where the pathologist testified that she had arrived at her conclusions and completed the victim's death certificate without waiting for a toxicology report. *State v. Wildgrube*, 2003-NMCA-108, 134 N.M. 262, 75 P.3d 862, cert. denied, 134 N.M. 179, 74 P.3d 1071 (2003).

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).

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).

Surprise testimony properly excluded. — Exclusion of an expert witness's testimony was justified, where his testimony was surprise testimony because his opinions and the factual basis for the opinions were virtually unknown on the eve of trial and, in light of his total unfamiliarity with the record, it was likely that his opinion would not add anything outside the experience of a layperson. *Shamalon Bird Farm, Ltd. v. U.S. Fid. & Guar. Co.*, 111 N.M. 713, 809 P.2d 627 (1991).

Registered engineer's testimony not barred because not licensed private investigator. — Testimony by a registered professional engineer under the Engineering Practice Act (Chapter 61, Article 23 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 (former 61-27-1 to 61-27-49 NMSA 1978, *see now* Chapter 61, Article 27B 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 NMRA). *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 NMRA 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).

II. QUALIFICATIONS.

Gang culture and behavior. — Where a police officer had 13 years of experience as a police officer working with gangs; at the time of the defendant’s trial, the officer was an investigating officer with the Bernalillo County sheriff’s department gang unit with responsibility for certifying gangs as criminal, identifying members of gangs, and collecting intelligence on and conducting investigations of gangs and individuals; the officer spent approximately 2,000 hours instructing other law enforcement officers about gang culture and investigation and wrote the Albuquerque, Bernalillo County street gang manual; the officer was certified by the New Mexico gang task force, the Bernalillo County sheriff’s department and a private entity that certifies officers upon completion of

the entity's gang specialization course; the officer's certification was valid with the FBI and the federal bureau of alcohol, tobacco, firearms and explosives; the officer authored training programs on gang-related law enforcement and was certified as an instructor with the New Mexico law enforcement training academy; the officer became familiar with Taos area gangs where the alleged murder occurred; the officer did not have a college degree; the officer had not testified as an expert before a jury prior to the defendant's trial; and the officer had never worked underground in a gang unit, the officer was qualified to testify on the subject of gang-related law enforcement and gang culture. *State v. Torrez*, 2009-NMSC-029, 146 N.M. 331, 210 P.3d 228.

Drug Recognition Evaluator. – Where the state has established the scientific reliability of the 12-Step Protocol, a Drug Recognition Evaluator may testify as an expert witness regarding the administration and results of the Protocol as it is applied to a particular defendant. *State v. Aleman* 2008-NMCA-137, 145 N.M. 79, 194 P.3d 110.

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. Univ. of Cal.*, 105 N.M. 613, 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).

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).

The trial court has wide discretion to determine whether a witness is qualified to give testimony as an expert and its determination will not be disturbed unless there has been an abuse of discretion. *Shamalon Bird Farm, Ltd. v. U.S. Fid. & Guar. Co.*, 111 N.M. 713, 809 P.2d 627 (1991).

The trial court acts as a gatekeeper and determines if the particular expert tendered has the qualifications to testify in the particular case. *Lopez v. Reddy*, 2005-NMCA-054, 137 N.M. 554, 113 P.3d 377.

Absent an abuse of discretion under this rule, the trial court's determination will stand. *Lopez v. Reddy*, 2005-NMCA-054, 137 N.M. 554, 113 P.3d 377.

Court's determination 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).

Jury deference ignored. — It is the duty of the courts to determine initially whether expert testimony is competent under this rule, not whether the jury will defer to it, as it is not within the province of the courts to assume that juries will accord undue weight to expert opinion testimony as a pretext for excluding it. *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993).

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).

Scope of expert's qualifications. — In an action contesting municipal water and sewer rates, a witness who otherwise qualified as an expert in the water services field was not

required to have an accounting or finance background. *Fleming v. Town of Silver City*, 1999-NMCA-149, 128 N.M. 295, 992 P.2d 308, cert. denied, 128 N.M. 148, 990 P.2d 822 (1999).

Trial court did not err in admitting expert testimony under this rule in an employee's product liability action against a manufacturer because the testimony was relevant and helpful to the jury; furthermore, although the expert was not an engineer, the trial court could have reasonably concluded that the expert's expertise in evaluating product designs and conveyor belts for safety hazards qualified the expert to offer opinions on the subject. *Couch v. Astec Indus., Inc.*, 2002-NMCA-084, 132 N.M. 631, 53 P.3d 398, cert. denied, 132 N.M. 551, 52 P.3d 411 (2002).

Exclusion of expert on a ground that was not at issue. — Where the decedent, who presented symptoms of influenza, was admitted to the emergency room at defendant's medical center; the treating doctor did not test the decedent for influenza, but provided a treatment to address the decedent's symptoms; decedent died several days later due to an influenza infection; at issue was the standard of care for diagnosing and treating influenza, specifically plaintiff's contention that the treating doctor should have given the decedent Tamiflu to prevent the replication of the influenza virus; plaintiff's expert witness was a physician who was an infectious disease specialist, who had taught about and specialized in treating infectious diseases for twenty-nine years at a university, and who had considerable experience in prescribing Tamiflu and in observing its effects on influenza, but who had not recently practiced and had not specialized in emergency medicine; and the district court excluded the expert witness' testimony on the ground that the witness was not qualified to render opinions on the standard of care in emergency medicine, the district court erred in excluding the witness' testimony, because the standard for diagnosing and treating influenza was not particular to emergency medicine and because the district court failed to consider the witness' experience in prescribing Tamiflu. *Holzem v. Presbyterian Healthcare Servs.*, 2013-NMCA-100, cert. denied, 2013-NMCERT-009.

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); State v. Macias, 110 N.M. 246, 794 P.2d 389 (Ct. App. 1990).

Where a nurse practitioner had specialized in diagnosing child sexual abuse from 1982 to 1988; had extensively read journals and other materials dealing with the subject; had attended a criminal justice program on sex abuse; and had been qualified to testify 23 times previously as an expert in child sexual abuse, she was a child sexual abuse expert based on her experience, training, and education, and it was proper to admit her testimony on the voluntariness of the victim's statement implicating the perpetrator. *State v. Benny E.*, 110 N.M. 237, 794 P.2d 380 (Ct. App. 1990).

In an action against a county race track by a jockey who was injured when his horse veered causing him to fall and strike a post and track rail, a witness who had both doctorate and master of science degrees in veterinary medicine and surgery and had specialized in animal behavior was properly determined to be qualified to state her opinion concerning the reasons for the horse's behavior at the time of the accident. *Yardman v. San Juan Downs, Inc.*, 120 N.M. 751, 906 P.2d 742 (Ct. App. 1995).

Qualifications of DNA expert. — DNA expert witness, who held a bachelor of science degree in biology and was the DNA analyst for the New Mexico Department of Public Safety, and whose training included specialized courses in molecular biology and a course in DNA analysis with the FBI, could not be said to be unqualified to testify; the jury was free to consider his qualifications when deciding what weight to give his testimony. *State v. McDonald*, 1998-NMSC-034, 126 N.M. 44, 966 P.2d 752.

General acceptance within field not sole criteria. — The Frye test is not a legitimate means for determining what is scientific knowledge and should be rejected as an independent controlling standard of admissibility. Thus, the court's focus should not be solely on whether the scientific technique has gained general acceptance within its particular field, but on the validity and the soundness of the scientific method used to generate the evidence. *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993).

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. Univ. of Cal.*, 105 N.M. 613, 737 P.2d 74 (1987).

Even though the expert, a biomechanical engineer, was not licensed as an engineer, the trial court did not abuse its discretion by qualifying him to testify as an expert witness regarding causation of temporomandibular joint injuries. *Baerwald v. Flores*, 1997-NMCA-002, 122 N.M. 679, 930 P.2d 816.

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).

Expert’s opinion was reliable. — Where plaintiff, who hired defendant to build a dairy, sued defendant for losses in milk production that occurred as a result of the defective wiring of the dairy; plaintiff’s expert witness testified that stray voltage affects cow’s behavior, causing the cows to let down less than all of their milk and that the threshold amount of stray voltage necessary to adversely affect dairy animals was two to four volts; the evidence showed that there was stray voltage in the dairy before the defective wiring was corrected, that before the wiring was corrected, the cows were reluctant to enter the milking barn and milking time took longer, and that after the wiring was corrected, milk production improved dramatically; plaintiff did not offer any objective

evidence of the amount of stray voltage in the dairy meeting the threshold amount that would affect milk production; and based on the expert's knowledge, experience, and training on the effects of stray voltage on dairy cows and the facts of the case, the expert testified that plaintiff's cows were exposed to a sufficient amount of stray voltage to adversely affect their milk production, the expert's opinion was sufficiently reliable to be admissible and the absence of measurable stray voltage meeting the threshold of two to four volts went to the weight the jury might give the opinion and did not make the opinion inadmissible. *Loper v. JMAR*, 2013-NMCA-098, cert. denied, 2013-NMCERT-008.

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).

Where a witness in a case involving a new home loan was called to testify as an expert on whether the plaintiff's bank had engaged in predatory lending practices and the witness had worked as a loan officer, but had limited experience with the type of loan at issue; had worked only as a loan officer under a broker's supervision; had only occasionally performed Home Loan Protection Act calculations; had no certifications or specific training or classes related to the issues of the case; and had never testified as an expert, substantial evidence supported the district court's discretion to exclude the witness' testimony and opinions. *Bank of N.Y. v. Romero*, 2011-NMCA-110, 150 N.M. 769, 266 P.3d 638, cert. granted, 2011-NMCERT-010.

Trace evidence analyst. — Since the evidence introduced at trial demonstrated that analyst had in excess of 16 years of job experience performing trace evidence analysis, including hair analysis, the trial court did not abuse its discretion in qualifying analyst as an expert witness. *State v. Hernandez*, 115 N.M. 6, 846 P.2d 312 (1993).

III. ADMISSIBILITY.

Gang behavior. — Where a police officer, who was qualified to testify on the subject of gang-related law enforcement and gang culture, testified from his personal experience with gangs that gang members retaliate in violent ways when disrespected and that being disrespected can occur in any number of ways, some of which could have been applicable in the defendant's situation if sufficient evidence of the defendant's gang affiliation had been presented to the jury, the trial court did not err in concluding that the officer's testimony regarding the motives of gang members was based on specialized

knowledge, was reliable, and proved what it was offered to prove. *State v. Torrez*, 2009-NMSC-029, 146 N.M. 331, 210 P.3d 228.

Where the defense hinged its case on the assertion that the child was coerced into making statements by his mother, due process required the district court to allow the defense to make its case with expert evidence, not concerning whether the specific act of abuse did or did not occur or that the child's mother did not did not coach the child to give his statements, but concerning the suggestibility of children and the percentages of false allegations in cases of sexual abuse involving children. *State v. Campbell*, 2007-NMCA-051, 141 N.M. 543, 157 P.3d 722, cert. granted, 2007-NMCERT-004.

Blood splatter analysis is a discipline recognizable and admissible under this rule. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

Where the trial court relied on the testimony establishing that blood splatter analysis can be and has been tested, has been subjected to peer review and publication, is conducted under a set of standards that are maintained in order to control the technique's operation, is generally accepted in the particular scientific field, is based on well established scientific principles, and is capable of producing opinions based on reasonable probability rather than speculation or conjecture, defendant failed to demonstrate an abuse of discretion in its admission by the trial court. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

Polygraph examination results are sufficiently reliable to be admitted under this rule, provided expert is qualified and examination was conducted in accordance with Rule 11-707 NMRA. *Lee v. Martinez*, 2004-NMSC-027, 136 N.M. 166, 96 P.3d 291.

Where there is no jury trial, evidence of expert is admissible within the sound discretion of the judge. *State ex rel. State Hwy. Comm'n v. Pelletier*, 76 N.M. 555, 417 P.2d 46 (1966) (decided prior to the adoption of this rule).

DNA evidence admissible. — The probative value of the DNA typing evidence outweighs its prejudicial effect. This evidence and the testimony will be probative because it links defendant to the crimes for which he has been charged. Any debate over the resulting probabilities that the "match" is random goes to the weight of the evidence and is properly left for the jury to determine. *State v. Duran*, 118 N.M. 303, 881 P.2d 48 (1994).

Determining validity and reliability of DNA testing. — The trial court may only examine whether the principles and methodology used in DNA testing are scientifically valid and generally accepted. The assessment of the validity and reliability of the conclusions drawn by DNA experts, however, is a jury question. *State v. Anderson*, 118 N.M. 284, 881 P.2d 29 (1994); State v. Duran, 118 N.M. 303, 881 P.2d 48 (1994).

PCR analysis of DNA admissible. — The results of analysis of DNA using the polymer chain reaction (PCR) technique are sufficiently reliable to be admissible under this rule. *State v. Stills*, 1998-NMSC-009, 125 N.M. 66, 957 P.2d 51.

Computer generated evidence. — When an expert witness uses a computer to develop an opinion on an issue, the opinion is based in part on the computer-generated evidence. In that situation, the proponent of the evidence must be prepared to show that the computer-generated evidence was generated in a way that is scientifically valid. *State v. Tollardo*, 2003-NMCA-122, 134 N.M. 430, 77 P.3d 1023, cert. denied, No. 28,282.

Where a crime scene reconstruction expert used a computer to help him supply missing information based on the physical evidence available, the resulting computer-generated images were not merely visual aids used to illustrate an opinion developed by other means, but rather they were used to develop the opinion to which the expert testified. Therefore, the Daubert/Alberico standard applied to their admissibility. *State v. Tollardo*, 2003-NMCA-122, 134 N.M. 430, 77 P.3d 1023, cert. denied, No. 28,282.

Computer-generated images are properly characterized as technical rather than scientific. As such, the critical inquiry is whether the method used to generate the images is a valid application of the principles of computer technology. *State v. Tollardo*, 2003-NMCA-122, 134 N.M. 430, 77 P.3d 1023, cert. denied, No. 28,282.

Where an expert testified that he had used computer aided design (CAD) programs for many years, and that he had found some discrepancies in some facets of a computer animation program and as a result cross-checked the animation images against the CAD images, this was all that was necessary to establish the validity of the method used to generate the images. *State v. Tollardo*, 2003-NMCA-122, 134 N.M. 430, 77 P.3d 1023, cert. denied, No. 28,282.

Where an investigating officer made measurements at a crime scene and entered the measurements into a computer that used the measurements to draw a diagram of the scene showing the path of the defendant’s car, the point of impact with the victim’s body, the point at which the body came to rest, and the location of other physical evidence at the scene, the trial court did not abuse its discretion in admitting the officer’s testimony and the diagram. *State v. Wildgrube*, 2003-NMCA-108, 134 N.M. 262, 75 P.3d 862, cert. denied, 134 N.M. 179, 74 P.3d 1071 (2003).

Horizontal gaze nystagmus test. — Because a horizontal gaze nystagmus test is scientific evidence, its admissibility is subject to the evidentiary reliability standard adopted in *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1991), and explained in *State v. Anderson*, 118 N.M. 284, 881 P.2d 29 (1994), and *State v. Stills*, 1998-NMSC-009, 125 N.M. 66, 957 P.2d 51. *State v. Torres*, 1999-NMSC-010, 127 N.M. 20, 976 P.2d 20.

Hedonic damages. — Trial court did not err in admitting expert testimony regarding hedonic damages under this rule in an employee's product liability action against a

manufacturer, because the testimony concerning general statistical life studies and values was helpful to the jury in evaluating the employee's claim for damages, and the expert did not improperly intrude into the jury's domain. *Couch v. Astec Indus., Inc.*, 2002-NMCA-084, 132 N.M. 631, 53 P.3d 398, cert. denied, 132 N.M. 551, 52 P.3d 411 (2002).

Validity of "scientific knowledge". — Several factors may be considered by a trial court in assessing the validity of a particular technique to determine if it is "scientific knowledge" under this rule, including the technique's relationship with established scientific analysis, the availability of specialized literature addressing the validity of the technique and whether the technique is generally accepted. *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993).

Admission of child abuse expert opinion on credibility error. — The trial court erred in admitting child sexual abuse expert's testimony as to the complainant's credibility, as it is not scientifically valid that a psychologist can determine that a crime "in fact" occurred. *State v. Fairweather*, 116 N.M. 456, 863 P.2d 1077 (1993).

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).

This rule imposes a "gate-keeping" function on a trial court judge as to the admissibility of an expert's opinion. *Lopez v. Reddy*, 2005-NMCA-054, 137 N.M. 554, 113 P.3d 377.

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).

Expert testimony assisted the jury. — Where plaintiff’s decedent died in a rollover accident because the roof of the vehicle in which the decedent was a passenger collapsed, causing the decedent to die of positional asphyxia; plaintiff’s expert witness inspected the vehicle, inspected the bare structural elements of the vehicle to assess

how the elements performed in the crash, reviewed materials on the vehicle produced by defendant during discovery, including defendant's velocity analysis, and performed several independent analyses of the vehicle; the witness's testimony specifically related to the witness's investigation of the performance of the vehicle in the accident and was based on a review of defendant's rollover testing on the vehicle and the witness's testing of another vehicle with a rollover cage; and the witness explained the witness's understanding of vehicle design from specialized knowledge gained through education and employment, the district court did not abuse it discretion in permitting the expert to testify. *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090, 149 N.M. 1, 243 P.3d 440, cert. granted, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

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).

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 a medical expert testified concerning the decedent’s chance of survival from fatal injuries after being struck by an automobile; the medical expert reviewed reports of the Office of the Medical Investigator and an ambulance supervisor concerning the external injuries suffered by the decedent and statements of decedent’s friend about the decedent’s condition following the accident; there was no internal autopsy or x-rays of the decedent; the medical expert did not have specific knowledge as to the cause of decedent’s death or the conditions that led to death; and the medical expert was required to assume certain medical information to reach an opinion of decedent’s chance of survival, the court did not abuse its discretion by declining the medical expert’s testimony because it was speculative or conjectural. *Zia Trust, Inc. v. Aragon*, 2011-NMCA-076, 150 N.M. 354, 258 P.3d 1146, cert. denied, 2011-NMCERT-006.

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).

Retrograde extrapolation evidence to determine a person's blood alcohol at an earlier time held not admissible under *Alberico*. *State v. Hughey*, 2005-NMCA-114, 138 N.M. 308, 119 P.3d 188, cert. granted, 2005-NMCERT-008.

Reliability of scientific knowledge. — Currently, New Mexico law requires only that the trial court establish the reliability of scientific knowledge, and does not apply the *Daubert-Alberico* standard to all expert testimony. *State v. Lente*, 2005-NMCA-111, 138 N.M. 312, 119 P.3d 737, cert. denied, 2005-NMCERT-008.

Scientific evidence was not relevant to show causation. — Where, in a toxic tort case, plaintiffs sued defendants for personal injuries resulting from defendants' negligent disposition of toxic petrochemicals in the ground where plaintiffs' houses were subsequently built; plaintiffs offered the opinion testimony of an expert to establish that a mixture of three specific chemicals involved in plaintiffs' case can generally cause lupus and other autoimmune disorders; the expert's opinion was based on the expert's epidemiological study and upon other animal and human studies; the epidemiological study compared the differences in the incidence of certain medical ailments between plaintiffs and an unexposed group of California residents and determined that there was a potential association between the specific petrochemicals involved in plaintiffs' case and lupus; the epidemiological study did not show whether and at what levels the specific petrochemicals involved in plaintiffs' case would cause lupus or other autoimmune disorders; the witness failed to show why the results of the animal studies were meaningful to establish the effects the specific petrochemicals involved in plaintiffs' case would have on humans; none of the human studies dealt with the specific petrochemicals involved in plaintiffs' case; and the expert failed to provide information as to how and why the exposures in the human studies translated to plaintiffs, the district court did not abuse its discretion when it determined that, regardless of the reliability of the studies' methodology, the studies were not relevant to the expert's opinion as to general causation and that the expert could not base general causation opinions on the studies, because the studies did not establish the necessary casual nexus between the specific petrochemicals involved in plaintiffs' case and lupus and other autoimmune disorders. *Acosta v. Shell W. Expl. & Prod., Inc.*, 2013-NMCA-009, 293 P.3d 917, cert. granted, 2012-NMCERT-012.

Scientific knowledge was not reliable. — Where decedent's estate sued defendants for a toxic tort arising out of decedent's exposure to gasoline supplied or manufactured by defendants; plaintiff alleged that benzene in the gasoline caused decedent's death; decedent used gasoline for a period of 24 years to operate, clean and maintain equipment; the calculation of decedent's dermal absorption of benzene depended on the amount of time decedent's hands were immersed in gasoline; plaintiff's expert witness determined that decedent's hands were immersed in gasoline for 2.5 hours per week, 48 weeks per year during the 24 year period; defendants' expert witness calculated the dermal absorption of other compounds that are present in gasoline at greater concentrations than benzene and that are absorbed faster than benzene, and determined that based on the exposure to gasoline assumed by plaintiff's expert witness, decedent would have died from acute central nervous system toxicity due to the dermal absorption of the other toxic compounds in gasoline; and plaintiff did not discredit or explain the evidence of defendants' expert witness, the analysis of plaintiff's expert witness was unreliable and inadmissible. *Andrews v. U.S. Steel Corp.*, 2011-NMCA-032, 149 N.M. 461, 250 P.3d 887.

Opinion as to lost chance was not based on scientific knowledge. — Where plaintiff, who was a diabetic, stepped on a nail and went to the hospital's emergency room; the physician who treated defendant determined that antibiotics were not necessary; plaintiff's foot became infected, which resulted in the amputation of plaintiff's foot; plaintiff sued defendants for negligently failing to prescribe antibiotics; plaintiff's expert witness, who qualified to testify as to the standard of care required of an emergency room physician, testified that antibiotics should have been initiated in the initial course of treatment to reduce the potential for infection; and defendants argued that the witness' opinion on the efficacy of prophylactic antibiotics was unreliable because it had no support in science or medicine, the witness' causation opinion did not constitute scientific knowledge and was not subject to the *Daubert-Alberico* analysis because the witness' opinion was directed to whether the physician's failure to administer antibiotics in the emergency room reduced plaintiff's chance of a better recovery, not whether the administration of antibiotics would have prevented the subsequent infection. *Quintana v. Acosta*, 2014-NMCA-015, cert. denied, 2013-NMCERT-012.

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).

Expert opinion as to sexual harassment policy. — Where employer in sexual harassment action raised defense that it had an adequate sexual harassment policy in place, expert's testimony as to how an employer should enforce such a policy was relevant and admissible. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

Mother's testimony as to symptoms of post-traumatic stress admissible. — In a prosecution for sexual penetration of a child, testimony of the child's mother that the child did not suffer symptoms typical of victims of sexual abuse provided an adequate foundation to support the relevance and helpfulness of an expert's testimony concerning common manifestations of post-traumatic stress disorder. *State v. White*, 1997-NMCA-059, 123 N.M. 510, 943 P.2d 544.

Child abuse expert's testimony inadmissible. — Psychologist's testimony was extremely prejudicial and went beyond the permissible boundaries of Post Traumatic Stress Disorder testimony outlined in *State v. Alberico,* 116 N.M. 156, 861 P.2d 192 (1993), since the expert improperly commented upon the credibility of the complainant; the expert's naming of the perpetrator was tantamount to saying that complainant was telling the truth; and the expert testified that the victim's PTSD symptoms were in fact caused by sexual abuse. *State v. Lucero*, 116 N.M. 450, 863 P.2d 1071 (1993).

Retrograde extrapolation of blood alcohol content. — A challenge to expert testimony about retrograde extrapolation as a means for calculating defendant’s blood alcohol content at the time of driving based on defendant’s blood alcohol content measured six hours after defendant ceased driving on the grounds that the expert did not account for variables that potentially impact absorption, goes to the weight of the expert’s testimony rather than to its admissibility. *State v. Downey*, 2007-NMCA-046, 141 N.M. 455, 157 P.3d 20, cert. granted, 2007-NMCERT-004.

Guiding principles. — The trial court's function is confined to an assessment of the reliability of the scientific technique underlying an expert's opinion, not the validity of the conclusions drawn by an expert employing that technique; any deficiencies of infirmities in the actual performance of a scientific test go to the weight of the evidence, not to its admissibility; and doubt regarding the admissibility of scientific evidence should be resolved in favor of admissibility. *State v. Downey*, 2007-NMCA-046, 141 N.M. 455, 157 P.3d 20, cert. granted, 2007-NMCERT-004.

IV. MEDICAL EXPERTS.

Use of medical testimony alone to support a criminal conviction. — Medical testimony to support causation in a criminal proceeding, as a matter of evidentiary foundation, should describe in detail the methodology utilized first to "rule-in" possible causes and then to "rule-out" all but one. Based on that process of elimination, described in detail to the jury, a doctor then should be able to offer an opinion on causation to a reasonable degree of medical probability which satisfies a minimum standard for admissibility. In a criminal trial, to meet a standard of proof beyond a reasonable doubt, prosecutors point to additional, non-opinion evidence, so that when considered cumulatively all the evidence is sufficient to support a verdict beyond a reasonable doubt. If, however, the prosecution is relying solely on medical opinion, it must go beyond the mere probable causation required for admissibility. The medical testimony should establish why the expert opinions are sufficient in themselves to establish guilt beyond a reasonable doubt. *State v. Consaul*, 2014-NMSC-030.

Insufficient evidence of intentional child abuse based on medical testimony as to a "likely" cause. — Where defendant, who was responsible for watching the child and who was frustrated and irritated by the child's crying, bundled the child in a blanket tighter than usual and put the child face down on a pillow in the crib; the child became ill, was taken to a hospital, and died from an injury to the brain caused by lack of oxygen to the brain; the State's theory was that defendant intentionally suffocated the child; the expert medical testimony provided the only evidence that the child may have been suffocated and that the child had not been injured by other, noncriminal causes; and the State's medical experts testified that they suspected child abuse, that they could not rule out child abuse, and that they could not think of other explanations for the child's injuries, that child abuse was a likely cause, and that the child was likely suffocated, the evidence was insufficient to establish beyond a reasonable doubt that defendant intentionally suffocated the child. *State v. Consaul*, 2014-NMSC-030.

Testimony as to external cause of disease. — The determination of a disease that is the cause of a patient's symptoms, which might be determined by applying a differential diagnosis, is distinct from the determination of the external cause of the disease itself, which requires a rigorous scientific analysis of the various external agents that might have caused the disease. Although a treating physician is qualified to give an opinion regarding the physician's diagnosis of the disease causing the patient's symptoms, the treating physician is not automatically qualified to testify as to the external agent that caused the patient's disease. *Parkhill v. Alderman-Cave Milling & Grain Co. of N.M.*,

2010-NMCA-110, 149 N.M. 140, 245 P.3d 585, cert. granted, 2010-NMCERT-012, 150 N.M. 492, 263 P.3d 269.

Where plaintiffs purchased horse feed that contained monensin, an antibiotic that is toxic to horses; plaintiffs alleged that they became ill as a result of being exposed to the feed; and plaintiffs' treating physician had no specific training in toxicology, was not an expert in toxicology, had not heard of monensin prior to meeting plaintiffs, did not know what constituted a minimum harmful dose for a human being or an animal, did not consult with any experts on the subject of monensin, and offered an opinion exclusively on the physician's examination of plaintiffs and the physician's own research, the trial court did not abuse its discretion in ruling that testimony as to the external causation of plaintiffs' symptoms required specific scientific knowledge and that the treating physician was not qualified to render a reliable opinion as to whether monensin was the external cause of plaintiffs' symptoms. *Parkhill v. Alderman-Cave Milling & Grain Co. of N.M.*, 2010-NMCA-110, 149 N.M. 140, 245 P.3d 585, cert. granted, 2010-NMCERT-012, 150 N.M. 492, 263 P.3d 269.

Where plaintiffs purchased horse feed that contained monensin, an antibiotic that is toxic to horses; plaintiffs alleged that they became ill as a result of being exposed to the feed; and plaintiffs' medical expert, who specialized in internal medicine, was not familiar with monensin and the manner in which it is used and handled in the industry, stated that the dosage received by plaintiffs was critical in determining whether exposure to monensin could have caused plaintiffs' symptoms, did not attempt to quantify the dose of monensin received by plaintiffs, and did not state that it was not possible to quantify the dose to which plaintiffs had been exposed, the district court did not abuse its discretion when it excluded the expert's testimony as unreliable under the standard for scientific evidence. *Parkhill v. Alderman-Cave Milling & Grain Co. of N.M.*, 2010-NMCA-110, 149 N.M. 140, 245 P.3d 585, cert. granted, 2010-NMCERT-012, 150 N.M. 492, 263 P.3d 269.

Opinion as to cause of death. — Where defendant was charged with first-degree abuse of a child resulting in death; the child died without any physical signs of trauma; defendant confessed to suffocating the child with a blanket; a medical expert testified that the cause of the child's death was consistent with smothering; and the medical expert consulted the child's medical record, the autopsy report, defendant's confession, and the police report, the trial court did not abuse its discretion when it determined that the medical expert's opinion was relevant, reliable, and helpful to the jury. *State v. Wilson*, 2011-NMSC-001, 149 N.M. 273, 248 P.3d 315.

Post-traumatic stress disorder. — Where state's experts gave opinions that minor victims of sexual abuse suffered from post-traumatic stress disorder diagnoses and testified that the basis for the diagnoses were consistent with the standard American Psychiatric Association's "Diagnostic & Statistical Manual of Mental Disorders" criteria for post-traumatic stress disorder and were consistent with sexual abuse, the testimony was admissible even though the opinions were formed for therapeutic, clinical and treatment diagnosis in which the standard method of psychological evaluation requires

a degree of reliance upon self-reporting as well as a professional assumption that the victims responded truthfully to clinical inquires. *State v. Paiz*, 2006-NMCA-144, 140 N.M. 815, 149 P.3d 579, cert. denied, 2006-NMCERT-011.

Qualifications of medical expert are dependent on the type of negligence claimed and the medical complexity involved. *Lopez v. Reddy*, 2005-NMCA-054, 137 N.M. 554, 113 P.3d 377.

Breast biopsy. — Where medical expert's qualifications would allow him to testify on a number of subjects, there is no abuse of discretion in determining that he lacked the qualifications to testify as to the standard of care applicable to physician in performing a breast biopsy where expert's experience with biopsies were based on his residency more than 30 years ago and his training concerning the standard of care for biopsies is therefore three decades old, defendant presented evidence that medical science and surgical techniques have changed since that time, and expert presented no evidence showing that he has kept up with these advances or that advances in the area of biopsies had not subsequently changed that standard of care and expert's expertise is in internal medicine, hematology, and oncology, and his review of surgical procedures is limited to those performed by surgeons on his cancer patients and plaintiff was not a cancer patient, and there was no evidence that the tissue removed was cancerous. *Lopez v. Reddy*, 2005-NMCA-054, 137 N.M. 554, 113 P.3d 377.

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).

Opinion of treating physician as to negligence of another treating physician. — Where decedent died when decedent developed a heart arrhythmia during surgery in 2005; the heart arrhythmia was caused by an undiagnosed condition called pheochromocytoma; prior to surgery, decedent’s consulting surgeon ordered lab tests that would have disclosed the pheochromocytoma; the consulting surgeon scheduled surgery to be conducted by the operating surgeon; the operating surgeon conducted the surgery before the lab results had been received and despite decedent’s high potassium levels that posed a chance of death during surgery; and plaintiff sought to elicit opinions from the consulting surgeon as to which acts of the operating surgeon were negligent; the district court did not abuse its discretion in excluding the consulting surgeon’s opinions as to the operating surgeon’s negligence. *Richter v. Presbyterian Healthcare Servs.*, 2014-NMCA-056, cert. denied, 2014-NMCERT-005.

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 weight, 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).

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).

Psychologist's testimony admissible. — It was not plain error under this rule to admit a psychologist's testimony, based on a statement attributed to defendant by a witness to whom he confessed his crimes, about the relationship between dissociative experiences and the capacity to form a deliberate intent. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

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).

Testimony concerning the general characteristics of sexually abused children is not limited to testimony from a psychologist or psychiatrist. *State v. Newman*, 109 N.M. 263, 784 P.2d 1006 (Ct. App. 1989).

Child therapist who held no certification in any state and had never been qualified to testify in any court of any jurisdiction, although she had testified at administrative hearings, could testify on the general characteristics observed in child abuse victims, where her academic credentials included a bachelor's degree in sociology and master's degree in guidance and counseling, and she had worked approximately four years as a counselor and therapist in sexual abuse and other cases. *State v. Newman*, 109 N.M. 263, 784 P.2d 1006 (Ct. App. 1989).

Findings by physician which were consistent with victim's report does not constitute the type of expert opinion based on scientific, technical, or other expert knowledge that triggers a reliability hearing. *State v. Lente*, 2005-NMCA-111, 138 N.M. 312, 119 P.3d 737, cert. denied, 2005-NMCERT-008.

Workers' compensation cases. — The Alberico/Daubert standard for the admissibility of expert testimony does not apply to the testimony of a health care provider pursuant to Section 52-1-28(B) or 52-3-32 NMSA 1978. *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014.

A treating physician's testimony is based more on "experience and training" than on the kind of scientific knowledge to which New Mexico courts apply the *Daubert/Alberico* standard. *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014.

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).

For note, "New Mexico Accepts Forensic DNA Evidence Under Rule of Evidence 11-702: *State v. Anderson*," see 25 N.M.L. Rev. 283 (1995).

For note, "The Admission of Polymerase Chain Reaction DNA Evidence in New Mexico - State v. Sills," see 29 N.M.L. Rev. 429 (1999).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 751; 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, 66 A.L.R.4th 213.

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 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.

Admissibility of hypnotically refreshed or enhanced testimony, 77 A.L.R.4th 927.

Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute - state cases, 83 A.L.R.4th 629.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Admissibility, in criminal prosecution, of expert opinion evidence as to "blood splatter" interpretation, 9 A.L.R.5th 369.

Propriety of questioning expert witness regarding specific incidents or allegations of expert's unprofessional conduct or professional negligence, 11 A.L.R.5th 1.

Cautionary instructions to jury as to reliability of, or factors to be considered in evaluating, voice identification testimony, 17 A.L.R.5th 851.

Necessity of expert testimony on issue of permanence of injury and future pain and suffering, 20 A.L.R.5th 1.

Admissibility of evidence of voice identification of defendant as affected by allegedly suggestive voice lineup peocedures, 55 A.L.R.5th 423.

Admissibility of expert testimony concerning domestic-violence syndromes to assist jury in evaluating victim's testimony or behavior, 57 A.L.R. 5th 315.

Admissibility of expert testimony regarding questions of domestic law, 66 A.L.R.5th 135.

Admissibility of expert testimony as to susceptibility of defendant to inducement for purpose of establishing entrapment defense, 70 A.L.R.5th 491.

Admissibility of expert testimony regarding credibility of confession, 73 A.L.R.5th 581.

Admissibility of results of presumptive tests indicating presence of blood on object, 82 A.L.R.5th 67.

Admissibility of expert testimony regarding reliability of accused's confession where accused allegedly suffered from mental disorder or defect at time of confession, 82 A.L.R.5th 591.

Admissibility of expert and opinion evidence as to cause or origin of fire - modern civil cases, 84 A.L.R.5th 69.

Admissibility of expert and opinion evidence as to cause or origin of fire in criminal prosecution for arson or related offense - modern cases, 85 A.L.R.5th 187.

Admissibility of expert testimony on child sexual abuse accommodation syndrome (CSAAS) in criminal case, 85 A.L.R.5th 595.

Admissibility of expert testimony as to proper techniques for interviewing children or evaluating techniques employed in particular case, 87 A.L.R.5th 693.

Post-Daubert standards for admissibility of scientific and other expert evidence in state courts, 90 A.L.R.5th 453.

Admissibility and weight of voice spectrographic analysis evidence, 95 A.L.R.5th 471.

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.

Use of expert evidence and analytic dissection in determining substantial similarity between computer programs in copyright infringement litigation, 119 A.L.R. Fed. 489.

Admissibility of expert or opinion evidence - Supreme court cases, 177 A.L.R. Fed. 77.

23 C.J.S. Criminal Law § 1050 et seq.; 32 C.J.S. Evidence §§ 513, 528 et seq.

11-703. Bases of an expert’s opinion testimony.

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

[Approved, effective July 1, 1973; as amended, effective December 1, 1993; as amended by Supreme Court Order 06-8300-25, effective December 18, 2006; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-703 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

The committee deleted all reference to an "inference" on the grounds that the deletion made the rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

The 2006 amendment added clarifying language consistent with New Mexico and federal case law identical to language added to federal Rule 703 in 2000. It is intended to strike a balance between an expert's need to rely upon sources of information used in the expert's field in arriving at decisions, but at the same time to avoid using the expert witness as a conduit for inadmissible evidence to be transmitted to the jury and improperly used as substantive evidence. When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted for such a limited purpose under this balancing test, a limiting instruction under Rule 11-105 NMRA would be appropriate.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 703 of the Federal Rules of Evidence.

The 1993 amendment, effective December 1, 1993, substituted "the expert" for "him" near the end of the first sentence.

The 2006 amendment, approved by Supreme Court Order 06-8300-25, effective December 18, 2006, amended the second sentence and added the last sentence of the rule.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes, including the deletion of references to "inference".

Failure of expert witness to state independent opinion. — Where the autopsy report of the infant victim was admitted into evidence based on the testimony of the former supervisor of the medical examiner who prepared the autopsy report, and the supervisor testified that the supervisor was testifying for the medical examiner and did not state the supervisor's own independent opinions, the district court abused its discretion in admitting the autopsy report into evidence. *State v. Jaramillo*, 2012-NMCA-029, 272 P.3d 682, cert. denied, 2012-NMCERT-002.

Sufficiency of objection that science underlying testimony is unreliable. — Where the science underlying an expert's testimony may properly be taken for granted because the reliability of the science has long been accepted, a defendant must make an affirmative showing that there is some reason to doubt the reliability of that science before a trial court is obligated to hold a reliability hearing. *State v. Fuentes*, 2010-NMCA-027, 147 N.M. 761, 228 P.3d 1181.

Firearm forensic and tool mark analysis admissible. — Where a forensics scientist testified that a gun found in defendant's vehicle was the gun used to shoot the victim to the exclusion of all other guns based on markings on test-fired projectile casings and projectile casings recovered from the scene of the crime; the trial court ruled that the firearm forensics and tool mark analysis techniques employed by the scientist were reliable based solely on the trial court's finding that this type of science has generally been accepted; no evidence was submitted concerning the testability of the science, whether the science has been subjected to peer review and publication, and whether there was a known rate of error associated with using the science; and defendant merely asserted that the science underlying the techniques was unreliable without any basis to support defendant's claim, the trial court did not abuse its discretion in denying defendant's request for a reliability hearing. *State v. Fuentes*, 2010-NMCA-027, 147 N.M. 761, 228 P.3d 1181.

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).

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).

Hearsay itself not admissible though relied upon by expert. — 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).

Applicability to worker's compensation cases. — Although Rule 92.3.2 of the Workers' Compensation Administration Rules, Oct. 1992, addresses the procedures for admitting medical records, this rule still applies in workers' compensation cases because it governs the basis for expert opinion testimony. *Lopez v. City of Albuquerque*, 118 N.M. 682, 884 P.2d 838 (Ct. App. 1994).

DNA evidence admissible. — The probative value of the DNA typing evidence outweighs its prejudicial effect. This evidence and the testimony will be probative because it links defendant to the crimes for which he has been charged. Any debate over the resulting probabilities that the "match" is random goes to the weight of the evidence and is properly left for the jury to determine. *State v. Duran*, 118 N.M. 303, 881 P.2d 48 (1994).

DNA experts must base opinion on scientifically valid and generally accepted procedures. — Because the FBI's theory and procedures for DNA testing are

"scientifically valid" and "generally accepted" in the pertinent scientific community, pursuant to Rule 702 NMRA the experts testified about scientific knowledge based on sound methodology. The experts also based their opinions on data and facts reasonably relied upon by experts in molecular biology and population genetics. Therefore, the DNA typing evidence met the standard for admissibility. *State v. Anderson*, 118 N.M. 284, 881 P.2d 29 (1994); *State v. Duran*, 118 N.M. 303, 881 P.2d 48 (1994).

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).

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).

Testimony about the victim’s death based on an autopsy report prepared by a non-testifying medical examiner. — Allowing an expert to testify based on information in the autopsy report of another analyst, assuming the autopsy report itself is not introduced into evidence is not a *per se* violation of the Confrontation Clause. Until the expert testimony crosses the line from the formation of an independent opinion based on underlying raw data to a reliance on the conclusions and opinions of the author of the autopsy report or a mere parroting of the report’s findings, the testimony is admissible subject to the rules of evidence. *State v. Gonzales*, 2012-NMCA-034, 274 P.3d 151.

Where the state called an expert witness to testify about the circumstances of the victim’s death; the witness did not perform the autopsy on the victim or prepare the autopsy report; and the state told the court that the state did not intend to offer the autopsy report into evidence, that the witness would not rely on the conclusions or opinions of the forensic pathologist who prepared the autopsy report, and that the witness would rely on the witness’s review of photographs of the body and other raw data, if the witness offered the witness’ own opinions and conclusion as an expert witness and avoided parroting the testimonial statements of the forensic pathologist who

prepared the autopsy report, then the witness' testimony would not run afoul of defendant's right to confrontation. *State v. Gonzales*, 2012-NMCA-034, 274 P.3d 151.

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).

Discussion of article admissible. — A biomechanical engineer who qualified as an expert witness could discuss a medical article related to his testimony on the causation of temporomandibular injuries. *Baerwald v. Flores*, 1997-NMCA-002, 122 N.M. 679, 930 P.2d 816.

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 NMRA. *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.

Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute - state cases, 83 A.L.R.4th 629.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Admissibility of testimony of expert as to basis of his opinion, to matters otherwise excludible as hearsay - State cases, 89 A.L.R.4th 456.

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 §§ 513, 528 et seq.

11-704. Opinion on an ultimate issue.

An opinion is not objectionable just because it embraces an ultimate issue.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-704 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility. New Mexico's rule differs from the federal rule in that it does not create an exception prohibiting expert witnesses in criminal cases from testifying about the accused's mental state.

The committee deleted all reference to an "inference" on the grounds that the deletion made the rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 704 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes, including the deletion of references to "inference".

Use of medical testimony alone to support a criminal conviction. — Medical testimony to support causation in a criminal proceeding, as a matter of evidentiary foundation, should describe in detail the methodology utilized first to "rule-in" possible causes and then to "rule-out" all but one. Based on that process of elimination, described in detail to the jury, a doctor then should be able to offer an opinion on causation to a reasonable degree of medical probability which satisfies a minimum standard for admissibility. In a criminal trial, to meet a standard of proof beyond a reasonable doubt, prosecutors point to additional, non-opinion evidence, so that when considered cumulatively all the evidence is sufficient to support a verdict beyond a reasonable doubt. If, however, the prosecution is relying solely on medical opinion, it must go beyond the mere probable causation required for admissibility. The medical testimony should establish why the expert opinions are sufficient in themselves to establish guilt beyond a reasonable doubt. *State v. Consaul*, 2014-NMSC-030.

Insufficient evidence of intentional child abuse based on medical testimony as to a "likely" cause. — Where defendant, who was responsible for watching the child and who was frustrated and irritated by the child's crying, bundled the child in a blanket tighter than usual and put the child face down on a pillow in the crib; the child became ill, was taken to a hospital, and died from an injury to the brain caused by lack of oxygen to the brain; the State's theory was that defendant intentionally suffocated the child; the expert medical testimony provided the only evidence that the child may have been suffocated and that the child had not been injured by other, noncriminal causes; and the State's medical experts testified that they suspected child abuse, that they could not rule out child abuse, and that they could not think of other explanations for the child's injuries, that child abuse was a likely cause, and that the child was likely suffocated, the evidence was insufficient to establish beyond a reasonable doubt that defendant intentionally suffocated the child. *State v. Consaul*, 2014-NMSC-030.

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).

Expert’s testimony did not exceed bounds of allowable expert testimony. — Where defendant was charged with trafficking, by possession with intent to distribute cocaine; a police officer, who testified as an expert in distinguishing between personal use and trafficking amounts in terms of crack cocaine; the officer’s testimony was based on the officer’s field experience and related to the decisions the officer would have made as an arresting officer based on the number of “rocks” of cocaine possessed by arrestees and the circumstances, including interviews with arrestees, that led the officer to believe that trafficking was the appropriate charge; and the officer did not relate those cases to defendant’s case or offer an opinion as to whether defendant was trafficking cocaine, the witness’s testimony was within the bounds of allowable expert testimony and to the extent the officer’s testimony embraced the ultimate issue by educating the jury in regard to the factors that in the officer’s experience warranted a trafficking charge, the testimony was admissible. *State v. Rael-Gallegos*, 2013-NMCA-092, cert. denied, 2013-NMCERT-009.

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.

Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute - state cases, 83 A.L.R.4th 629.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

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 §§ 509, 511, 513.

11-705. Disclosing the facts or data underlying an expert's opinion.

Unless the court orders otherwise, an expert may state an opinion – and give the reasons for it – without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-705 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

The committee deleted all reference to an "inference" on the grounds that the deletion made the rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 705 of the Federal Rules of Evidence.

The 1993 amendment, effective December 1, 1993, in the first sentence, substituted "give reasons" for "give his reasons" near the beginning, substituted "first testifying to" for "prior disclosure of" near the middle, and substituted "court" for "judge" near the end.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes, including the deletion of references to "inference".

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).

Facts not relied upon by expert. — The trial court did not err in disallowing the defendant's cross-examination of pathologist regarding the victim's blood alcohol content, where the pathologist testified that she had arrived at her conclusions and completed the victim's death certificate without waiting for a toxicology report. *State v. Wildgrube*, 2003-NMCA-108, 134 N.M. 262, 75 P.3d 862, cert. denied, 134 N.M. 179, 74 P.3d 1071 (2003).

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 Cnty. Prop. 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 destroy 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 Cnty. Prop. 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).

As a general rule, hypothetical questions must be based on facts in evidence or upon evidence which the propounding attorney assures the court will be admitted into evidence. *Sutherlin v. Fenenga*, 111 N.M. 767, 810 P.2d 353 (Ct. App. 1991).

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).

Preservation of error. — If an attorney does not present evidence to support a hypothetical question, the opposing party must move to strike the answer in order to preserve the error for review. *Sutherlin v. Fenenga*, 111 N.M. 767, 810 P.2d 353 (Ct. App. 1991).

Issue waived for appeal. — Where defendant's expert witness relied on defendant's custodial statement in forming his opinion and, without objecting, defendant conceded that the state could cross-examine his expert witness with the custodial statement and defendant did not object when the state proceeded with the cross examination as previously agreed, and defendant relied on portions of the statement in cross-examining the state's expert witness, defendant waived this issue for purposes of appeal. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008.

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.

Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute - state cases, 83 A.L.R.4th 629.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

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 §§ 528 et seq., 696.

11-706. Court-appointed expert witnesses.

A. **Appointment process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert witness that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

B. **Expert's role.** The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert

(1) must advise the parties of any findings the expert makes,

(2) may be deposed by any party,

(3) may be called to testify by the court or any party, and

(4) may be cross-examined by any party, including the party that called the expert.

C. **Compensation.** The expert is entitled to a reasonable compensation as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment and Article II, Section 2 of the New Mexico Constitution, from any funds that are provided by law; and

(2) in any other civil case, by the parties in proportion and at the time that the court directs – and the compensation is then charged like other costs.

D. **Disclosing the appointment to the jury.** The court may authorize disclosure to the jury that the court appointed the expert.

E. **Parties' choice of their own experts.** This rule does not limit a party in calling its own experts.

[As amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-706 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 706 of the Federal Rules of Evidence.

The 1993 amendment, effective December 1, 1993, substituted "court" for "judge" and made gender neutral changes throughout the rule.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

Nonparty participant in a mediation may be a witness at trial. — Where two of the parties made separate loans to another party to the litigation; the loans were secured by stock in the defendant corporation; at a settlement conference, the lender parties agreed to hire an expert to prepare a valuation of the defendant corporation to assist them evaluate a settlement offer; and the appraiser's valuation report was a confidential mediation communication under Section 44-7B-4 NMSA 1978 that could not be

disclosed or used at trial, the district court did not abuse its discretion in appointing the appraiser as a Rule 11-706 expert witness and although the appraiser was prohibited from testifying about the valuation report, the appraiser could testify about documents underling the valuation report and could prepare a new valuation report. *Warner v. Calvert*, 2011-NMCA-028, 150 N.M. 333, 258 P.3d 1125.

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).

Power to enforce order to pay expert. — The district court has inherent authority to sua sponte issue an order to show cause why a party should not be held in civil contempt for failing to comply with a court order to pay the fees of a Rule 11-706 NMRA expert and to hold a party in contempt for failure to pay the fees. *Papatheofanis v. Allen*, 2009-NMCA-084, 146 N.M. 840, 215 P.3d 778.

Where the district court appointed an expert in a domestic relations case and ordered the parties to each pay one-half of the expert's fees, the district court had the authority to sua sponte issue an order to show cause why the parties should not be held in contempt for violating the order to pay the expert's fees and to hold the parties in contempt for failure to pay the fees. *Papatheofanis v. Allen*, 2009-NMCA-084, 146 N.M. 840, 215 P.3d 778

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. N.M. 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 (now the department of health), 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. N.M. Health & Env't Dep't*, 108 N.M. 434, 773 P.2d 1241 (Ct. App. 1989).

Costs of court-appointed expert. — Although the court, in appropriate instances, may direct that petitioners and human services department both share the costs of an expert witness appointed by the court, absent a showing that the petitioners are unable to pay a portion of the expert witness fee, the court erred in directing that human services

department be required to pay the entire cost of the court-appointed expert witness. *In re Stailey*, 117 N.M. 199, 870 P.2d 161 (Ct. App. 1994).

In a domestic relations suit, the trial court had authority to void notice of attorneys' charging lien recorded on the parties' residence and to allocate the proceeds, giving priority to the claims of court-appointed experts if the facts and circumstances justified it. *Philipbar v. Philipbar*, 1999-NMCA-063, 127 N.M. 341, 980 P.2d 1075.

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.

Right of indigent defendant in state criminal case to assistance of expert in social attitudes, 74 A.L.R.4th 330.

Right of indigent defendant in state criminal case to assistance of chemist, toxicologist, technician, narcotics expert, or similar nonmedical specialist in substance analysis, 74 A.L.R.4th 388.

Right of indigent defendant in state criminal prosecution to ex parte in camera hearing on request for state-funded expert witness, 83 A.L.R.5th 541.

11-707. Polygraph examinations.

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

(1) "chart" 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.** A polygraph examiner must have the following minimum qualifications:

(1) at least five (5) years' experience in administration or interpretation of polygraph examinations or equivalent academic training; and

(2) successful completion of at least twenty (20) hours of continuing education in the field of polygraph examinations during the twelve (12) month period immediately prior to administering or interpreting the polygraph examination.

C. **Admissibility of results.** A polygraph examiner's opinion as to the truthfulness of a person's answers in a polygraph examination may be admitted if:

(1) the polygraph examination was administered by a qualified polygraph examiner;

(2) the polygraph examination was quantitatively scored in a manner that is generally accepted as reliable by polygraph experts;

(3) the polygraph examiner was informed as to the examinee's background, health, education, and other relevant information prior to conducting the polygraph examination;

(4) at least two (2) relevant questions were asked during the examination;

(5) at least three (3) charts were taken of the examinee; and

(6) the entire examination was recorded in full on an audio or video recording device, including the pretest interview and, if conducted, the post-test interview.

D. **Notice of examination.** A party who wishes to use polygraph evidence at trial must provide written notice no less than thirty (30) days before trial or within such other time as the district court may direct. Such notice must include these reports:

(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 entire examination, including the pretest interview, and, if conducted, the post-test interview; and

(4) a list of any other 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. **Determination of admissibility.** The court shall make any determination as to the admissibility of a polygraph examination outside the presence of the jury.

F. **Compelled polygraph examinations.** No witness shall be compelled to take a polygraph examination. If notice to use a polygraph examination of a witness has been given under Paragraph D by one party, the court may, for good cause shown, compel a second polygraph examination of that witness by the other party. The results of the second polygraph examination may be admitted if the second polygraph examination is conducted as required under this rule. Should the witness refuse to take a second polygraph examination, then the results of the first polygraph are inadmissible.

[Adopted, effective June 1, 1983; as amended, effective July 1, 1990; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The changes made to this rule in 2012 are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility. However, in the process of making stylistic changes to the rule the committee felt it was important to clarify what needed to be recorded as part of the examination. It also addressed a criticism of the existing rule to require disclosure of all other polygraph examinations, and not just examinations made prior to the one being submitted.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

The 1990 amendment, effective on and after July 1, 1990, in Paragraph A, substituted " 'chart' " for " 'charts' " in Subparagraph (1); substituted "these rules" for "this rule" near the beginning of Paragraph C; in the first sentence of Paragraph D, substituted "thirty (30) days" for "ten (10) days" and "written notice of such party's intention" for "notice in writing of his intention"; and in Paragraph G, substituted "has given notice" for "has been given notice" near the middle of the second sentence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, made stylistic changes; required that post-test interviews be recorded on a recording device; required proof of notice of intent to use polygraph evidence; required disclosure of other polygraph examinations; in Paragraph B, at the beginning of the introductory sentence, deleted "To be qualified

as an expert witness on the truthfulness of a witness, a" and added the article "A" and after "must have", deleted "at least"; deleted former Subparagraph (2), which required the examiner to conduct or review the examination as provide in the rule, and in Subparagraph (2), after "immediately prior to", deleted "the date of" and added "administering or interpreting" and after "interpreting the", added "polygraph"; in Paragraph C, deleted the introductory sentence, which granted the trial judge discretion to admit evidence of a witness if an examination was performed by a qualified expert polygraph examiner pursuant to the rule, and added the current introductory sentence, in Subparagraph (1), after "examination was", deleted "conducted in accordance with the provisions of this rule" and added "administered by a qualified polygraph examiner", in Subparagraph (3), at the beginning of the sentence, deleted "prior to conducting the polygraph examination" and added the deleted phrase at the end of the sentence, and added Subparagraph (6); in Paragraph D, in the introductory sentence, after "evidence at trial", deleted "shall not" and added "must provide written notice", and after "district court may direct", deleted "serve upon the opposing party a written notice of such party's intention to use such evidence. The following reports shall be served with the notice" and added "Such notice must include these reports", in Subparagraph (3), after "video recording of the", added "entire examination, including the", after "pretest interview", deleted "actual testing", and after "pretest interview and", added "if conducted", and in Subparagraph (4), after "a list of any", deleted "prior" and added "other"; deleted former Paragraph E, which required the pretest interview and actual testing to be recorded on an audio or video recording device; and in Paragraph F, in the first sentence, after "polygraph examination" deleted "over objection", deleted the former first and second sentences, which authorized the court to compel a witness to take a second polygraph examination if a party has given notice of intent to use the original polygraph examination at trial and which provided that the opinions of other polygraph examiners were inadmissible if the witness refused to submit to a second polygraph examination, and added the second and third sentences.

Error during opening statement. — The prosecutor committed error when he inappropriately mentioned defendant's refusal to submit to a polygraph examination during his opening statement in prosecution under Section 30-3A-3.1 NMSA 1978. *State v. Gutierrez*, 2005-NMCA-093, 138 N.M. 147, 117 P.3d 953, cert. granted, 2005-NMCERT-007.

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).

Even though the state did not comply with the notice requirements of Subsection D, where defendant initially received notice of the state's intention to use polygraph evidence before the trial, and the trial court specifically found that he had an adequate opportunity to prepare rebuttal, the court did not abuse its discretion in admitting the evidence because the ruling was properly founded on the purposes of the rule and defendant suffered no undue surprise or prejudice. *State v. Gonzales*, 2000-NMSC-028, 129 N.M. 556, 11 P.3d 131.

Prerequisites to admission of polygraph evidence. *State v. Sanders*, 117 N.M. 452, 872 P.2d 870 (1994).

Polygraph examination results are sufficiently reliable to be admitted under Rule 11-702 NMRA, provided the expert is qualified and the examination was conducted in accordance with this rule. *Lee v. Martinez*, 2004-NMSC-027, 136 N.M. 166, 96 P.3d 291.

Examiner's qualifications. — This rule does not require that a polygrapher hold a medical degree or other advanced degree. *State v. Harrison*, 2000-NMSC-022, 129 N.M. 328, 7 P.3d 478.

Examinee's background, health, education, etc. — Polygraph examiner's testimony was admissible where he had informed himself as to the examinee's background, health, and other relevant information, and he addressed defendant's assertions regarding the effect of physical conditions and medications on the examinee. *State v. Harrison*, 2000-NMSC-022, 129 N.M. 328, 7 P.3d 478.

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).

Polygraph examiner's testimony improperly excluded. — The trial court abused its discretion by not reviewing the pre-test interview or permitting defendant to make an offer of proof before excluding his polygraph's expert's testimony on the polygraph examination. *State v. Aragon*, 116 N.M. 291, 861 P.2d 972 (Ct. App. 1993).

The exclusion of polygraph results for failure of the defendant to follow the notice requirements of this rule was error since the state administered the exam, knew of the results and that the defendant would call the polygraph administrator as a witness, and since the state had all the information that must be delivered with the written notice. *State v. Baca*, 120 N.M. 383, 902 P.2d 65 (1995).

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

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29A Am. Jur. 2d Evidence § 1007 et seq.; 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.

Admissibility of lie detector test results, or of offer or refusal to take test, in attorney disciplinary proceeding, 79 A.L.R.4th 576.

Employee's action in tort against party administering polygraph, drug, or similar test at request of actual or prospective employer, 89 A.L.R.4th 527.

97 C.J.S. Witnesses §§ 3, 14.

ARTICLE 8
Hearsay

11-801. Definitions that apply to this article; exclusions from hearsay.

A. **Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

B. **Declarant.** "Declarant" means the person who made the statement.

C. **Hearsay.** Means a statement that

(1) the declarant does not make while testifying at the current trial or hearing, and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

D. **Statements that are not hearsay.** A statement that meets the following conditions is not hearsay:

(1) **A declarant-witness's prior statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement

(a) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding, or in a deposition,

(b) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying, or

(c) identifies a person as someone the declarant perceived earlier.

(2) **An opposing party's statement.** The statement is offered against an opposing party and

(a) was made by the party in an individual or representative capacity,

(b) is one that the party manifested that it adopted or believed to be true,

(c) was made by a person whom the party authorized to make a statement on the subject,

(d) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed, or

(e) was made by the party's co-conspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under Paragraph D(2)(c) of this rule, the existence or scope of the relationship

under Paragraph D(2)(d) of this rule, or the existence of the conspiracy or participation in it under Paragraph D(2)(e) of this rule.

[Approved, effective July 1, 1973; as amended, effective December 1, 1993; January 1, 1995; as amended by Supreme Court Order 06-8300-25, effective December 18, 2006; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-801 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

Statements falling under the hearsay exclusion provided by Rule 11-801(D)(2) NMRA are no longer referred to as "admissions" in the title to the paragraph. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense – a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 11-804(B)(3) NMRA exception for declarations against interest. No change in application of the exclusion is intended.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 801 of the Federal Rules of Evidence.

The 1993 amendment, effective December 1, 1993, made gender neutral changes throughout the rule.

The 1995 amendment, effective January 1, 1995, added "and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" in Subparagraph D(1)(a).

The 2006 amendment, approved by Supreme Court Order 06-8300-25 effective December 18, 2006, added the last paragraph of the rule.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

I. GENERAL CONSIDERATION.

Verbal acts. — Where defendant made an issue of the minor victim's failure to report sexual abuse, statements made by the victim to her mother that "I think I've had sex" and "I think I've been raped" were admissible as verbal acts to prove that the victim made the statements. *State v. Ruiz*, 2007-NMCA-014, 141 N.M. 53, 150 P.3d 1003, cert. denied, 2007-NMCERT-001.

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).

Failure to preserve objection for appeal. — When plaintiff's testimony on direct examination appeared to be a nonhearsay statement of personal knowledge but was subsequently revealed on cross-examination to be based on hearsay, defense counsel waived his right to appeal the admission of the statement by not renewing his objection on cross-examination or moving to strike plaintiff's original statement. *Gutierrez v. Albertsons, Inc.*, 113 N.M. 256, 824 P.2d 1058 (Ct. App. 1991).

II. HEARSAY.

Experts and their opinions are not fungible and when the testifying expert has not formed an independent conclusion from the underlying facts or data, but merely restates the hearsay opinion of a non-testifying expert, the testifying expert's testimony is inadmissible hearsay. *State v. Aragon*, 2010-NMSC-008, 147 N.M. 474, 225 P.3d 1280, overruling *State v. Christian*, 119 N.M. 776, 895 P.2d 676 (Ct. App. 1995).

Testimony about a non-testifying analyst's chemical forensic report was inadmissible hearsay. — Where an analyst at a public laboratory prepared a chemical forensic report of the analyst's analysis of a white, crystal-like substance at the request of police officers who had found the substance in defendant's possession; the analyst who performed the analysis and prepared the report was not present to testify at defendant's trial; the report was admitted into evidence through the testimony of a separate testifying analyst who did not perform the analysis or prepare the report; the testifying analyst's testimony was a restatement of the non-testifying analyst's conclusory opinion regarding the narcotic content of the substance, its weight, and its purity as stated in the non-testifying analyst's report; and the testifying analyst did not express an opinion based on the data in the report, the report was inadmissible

testimonial hearsay and the admission of the report into evidence violated defendant's right of confrontation. *State v. Aragon*, 2010-NMSC-008, 147 N.M. 474, 225 P.3d 1280, overruling *State v. Christian*, 119 N.M. 776, 895 P.2d 676 (Ct. App. 1995).

Statement that defendant was driving automobile deemed hearsay. — Where defendant was convicted of aggravated DWI; defendant's vehicle rear-ended another vehicle; defendant fled the scene of the accident; the arresting officer testified that defendant's brother told the officer that defendant had been driving the vehicle; and the admission of the brother's statement had no other purpose than to prove that defendant was the driver of the vehicle, the brother's statement was hearsay and inadmissible. *State v. Bullcoming*, 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1, rev'g in part 2008-NMCA-097, 144 N.M. 546, 189 P.3d 679.

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).

Documents offered as truth of assertions deemed hearsay. — In an action for breach of warranty in the sale of a trailer park, an engineer's report and an appraisal offered as evidence of the truth of assertions that a sewage plant needed repair or replacement and that the park had a certain value at a particular time were hearsay. *Camino Real Mobile Home Park Partnership v. Wolfe*, 119 N.M. 436, 891 P.2d 1190 (1995).

Handwritten note containing a name and address was hearsay. — Where defendant was charged with possession of methamphetamine based on evidence found in the home of defendant's parent; during the search of a bedroom, police officers found a handwritten note that contained defendant's name and the address of the home of defendant's parent; the note did not contain any indicia of authorship, ownership, association or purpose; and the State offered a photograph of the note as evidence to show that defendant exercised control over the bedroom where methamphetamine was found during the search, the note was hearsay because, standing alone, the note was insufficient to establish that it was the personal property of defendant or otherwise had a legitimate independent purpose or probative effect that extended beyond the truth of the matters asserted in the note. *State v. Sedillo*, 2014-NMCA-039, cert. denied, 2014-NMCERT-003.

Statement that defendant said he was driving automobile deemed hearsay. — In a prosecution for driving under the influence, it was reversible error to admit, as a statement of identification, a police officer's testimony that defendant's wife told him on the night of the accident that defendant had been driving the vehicle. *State v. Lopez*, 1997-NMCA-075, 123 N.M. 599, 943 P.2d 1052.

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).

Statements not hearsay when not offered for truth. — In a suit for temporary total disability benefits, claimant's testimony regarding statements made by defendant's employees, offered to establish that defendant refused to make light duty work available, was not hearsay, as the testimony was not offered for the truth of the out-of-court statements, but rather to prove that they were made, and any hearsay contained therein could nonetheless be admitted as proof of admissions by agents of a party opponent made in the course and scope of employment. *Sanchez v. Molycorp, Inc.*, 113 N.M. 375, 826 P.2d 971 (Ct. App. 1992).

Testimony of a witness as to a statement made by a murder victim to the witness over the telephone was not hearsay since it was not offered to prove its assertions. *State v. Ross*, 1996-NMSC-031, 122 N.M. 15, 919 P.2d 1080.

Out of court statements by co-defendants were not hearsay because the statements were not being offered into evidence to prove the truth of the matter; rather, the statements were admitting to show that the statements were untrue. *State v. Reyes*, 2002-NMSC-024, 132 N.M. 576, 52 P.3d 948.

Documents offered for non-hearsay purpose. — Where defendant was charged with possession of methamphetamine based on evidence found in the home of defendant’s parent; during the search of a bedroom, police officers found two correspondence documents relating to telephone service; one document was part of a telephone bill that did not include any name or telephone number and which informed the customer that the customer had to pay forty dollars to avoid cancellation of telephone service; the other document stated “Congratulations Lawrence Sedillo! You are done! Turn off your headset and turn it back on . . . Information below. You can print this page to keep as a record of this transaction” and which provided instructions for activating a handset; and the State offered the photographs in evidence to show that defendant exercised control over the bedroom where methamphetamine was found during the search, the telephone correspondence documents were relevant for a legitimate independent purpose that did not rely on the truth of the statements contained in the documents and were not hearsay. *State v. Sedillo*, 2014-NMCA-039, cert. denied, 2014-NMCERT-003.

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).

Out of court identification. — Testimony sought by defense counsel that the victim's brother, a witness to the offense, picked someone other than the defendant from a photo array, was plainly hearsay. *State v. Mora*, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237 (2003).

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 or commands. — 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).

Defendant's statement to an out-of-court declarant was not hearsay, where the statement was a directive or a command and was offered not for its truth but for the fact that it was made. *State v. Toney*, 2002-NMSC-003, 131 N.M. 558, 40 P.3d 1002.

Statements which are mere directions or commands. — Where defendant's primary co-conspirator beat, drugged, and tied the victim to a bed in defendant's residence; while the primary co-conspirator was absent from the residence for a lengthy period of time, defendant watched the victim; and a secondary co-conspirator testified that the primary co-conspirator requested defendant to watch the victim and ensure that the victim was silent while the primary co-conspirator was absent from the residence, the primary co-conspirator's statement was a direction or command rather than an assertion

from which truth or falsity could be discerned and was not hearsay. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

Statements of co-conspirator. — Where defendant's primary co-conspirator beat, drugged, and tied the victim to a bed in defendant's residence; defendant purchased charcoal lighter fluid at the direction of the primary co-conspirator; defendant's co-conspirators later placed the victim in the trunk of the victims' car and burned the car; and a secondary co-conspirator testified that the primary co-conspirator, in defendant's presence, stated that the primary co-conspirator was going to torch the victim's car, the statement was offered, not to prove the veracity of the primary co-conspirator's intent to commit arson, but to demonstrate defendant's knowledge of the primary co-conspirator's plans for the purpose of establishing defendant's motive for purchasing the lighter fluid and, as a statement in furtherance of the conspiracy, the statement was not hearsay. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

In self-defense or defense-of-others cases, evidence of the victim's character may be admissible to show either defendant's reasonable fear and response under the circumstances, or that the victim was the aggressor. The hearsay rule is no bar to the introduction of such testimony, at least where the testimony is offered not for the truth of the matter asserted, but to show the defendant's state of mind. *State v. Salgado*, 112 N.M. 793, 819 P.2d 1351 (Ct. App. 1991).

Testimony as to statement of co-conspirator. — Trial court improperly admitted a landlady's testimony about an alleged co-conspirator statement offered to prove defendant was a co-tenant, where the trial court stated several times that it did not believe that the statement itself advanced an alleged narcotics conspiracy. *State v. Calderon*, 112 N.M. 400, 815 P.2d 1190 (Ct. App. 1991).

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.

Heirship recitals in deed 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 NMRA.

Heirship recitals 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).

Earlier jury verdict hearsay. — The use of a judgment as evidence of a fact determined by the judgment constitutes hearsay evidence if it is offered to prove the truth of the matter asserted. *State v. O'Kelley*, 118 N.M. 52, 878 P.2d 1001 (Ct. App. 1994).

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), overruled on other grounds, *Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244 (1981).

Conduct of unwitting informant not "assertion". — Although, under the *Aguilar-Spinelli* test, an affidavit based on an informant's hearsay will constitute probable cause for a search warrant only if the affidavit establishes both the credibility and the basis of

knowledge of the informant, a detective's personal observations of an unwitting informant buying cocaine constituted sufficient facts and circumstance to satisfy probable cause for the issuance of the warrant. The *Aguilar-Spinelli* analysis applies only to hearsay. The unwitting informant, who did not realize that he or she was buying cocaine for a law enforcement officer, did not intend his or her conduct as an "assertion"; consequently, that conduct was not hearsay. *State v. Lovato*, 117 N.M. 68, 868 P.2d 1293 (Ct. App. 1993).

Videotaped interviews. — Videotaped interview of six year old sexual contact victim was inadmissible since, to the extent she testified as to any substantive events at trial, there were several obvious inconsistencies between the trial testimony and her videotaped police interview; more importantly, she did not answer, or answered inconclusively, many of the prosecutor's critical questions at trial. *State v. Sandate*, 119 N.M. 235, 889 P.2d 843 (Ct. App. 1994).

III. PRIOR STATEMENT BY WITNESS.

Impeachment. — To impeach a witness by prior inconsistent statements, the attorney must first elicit in-court testimony about a matter. If the testimony is inconsistent with a witness's prior statement, the attorney confronts the witness with the prior statement. The attorney must provide the witness with an opportunity to explain and the opposite party an opportunity to examine on the statement. *State v. Macias*, 2009-NMSC-028, 146 N.M. 378, 210 P.3d 804.

Hearsay statements not used for impeachment purposes. — Where the prosecutor asked the witness whether the witness remembered calling a friend of the defendant; when the witness testified that the witness did not remember the telephone call and was uncertain about what was discussed, the prosecutor distributed a transcript to the jury and played the recording of the telephone call in its entirety; the prosecutor then proceeded to have the witness attempt to interpret the friend's statements; and the telephone call contained statements by the friend incriminating the defendant in the murder of the victim, the prosecutor did not use the friend's statements to impeach the witness because the witness testified about a lack of memory and did not make a statement that could be impeached by the statements made in the telephone call and the statements made by the friend constituted inadmissible hearsay. *State v. Macias*, 2009-NMSC-028, 146 N.M. 378, 210 P.3d 804.

Prior consistent statement exception not applicable. — Where defense counsel attempted to impeach a witness with the minor inconsistencies between the witness's in-court testimony and the witness's videotaped statement to police officers and where the videotaped statement was made after the police had contacted the witness about evidence that implicated the witness in the murder of the victim, the videotaped statement was not admissible as a prior consistent statement. *State v. Barr*, 2009-NMSC-024, 146 N.M. 301, 210 P.3d 198.

Police officer's statement was not hearsay where the conversation was not introduced to support its truth, but only to demonstrate that such a conversation had occurred for the purposes of establishing probable cause. *S. Farm Bureau Cas. Co. v. Hiner*, 2005-NMCA-104, 138 N.M. 154, 117 P.3d 960, cert. denied, 2005-NMCERT-008.

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).

Use of prior statement to fill in memory gaps. — The use of a prior out-of-court statement to fill in the gaps left by the faulty memory of a witness who actually testifies at trial is precluded. *State v. Sandate*, 119 N.M. 235, 889 P.2d 843 (Ct. App. 1994).

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).

Where prosecutor introduced a hearsay statement that served not only to impeach, but offered an admission by defendant on whether or not he fired a gun, the State improperly introduced hearsay evidence and defendant was entitled to a new trial. *State v. McClaugherty*, 2003-NMSC-006, 133 N.M. 459, 64 P.3d 486.

Prior statement substantive evidence. — The language of Paragraph D(1)(a) of this rule omits the restrictive limitations imposed by its federal rule counterpart on the use of a witness's prior inconsistent statements offered as substantive evidence; unless excluded on other grounds, a prior inconsistent statement may be introduced as substantive evidence. *State v. Lancaster*, 116 N.M. 41, 859 P.2d 1068 (Ct. App. 1993).

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).

Determination of relevancy and probativeness. — If there is a charge of recent fabrication or improper influence or motive, only those statements made before the motive originated are nonhearsay and therefore admissible. *State v. Casaus*, 1996-NMCA-031, 121 N.M. 481, 913 P.2d 669.

When prior inconsistent statement is uncorroborated. — Prior inconsistent statements of a witness are, of course, admissible as substantive evidence. However, where the trustworthiness of the prior statements is uncorroborated, they may, as a matter of due process, be insufficient as the sole basis for a conviction. *State v. Orosco*, 113 N.M. 780, 833 P.2d 1146 (1992).

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).

Extrajudicial inconsistent statement by a witness concerning an admission made by the defendant is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is inconsistent with the testimony of the declarant at trial. *State v. Vigil*, 110 N.M. 254, 794 P.2d 728 (1990); *State v. Woodward*, 121 N.M. 1, 908 P.2d 231 (1995).

A statement of the codefendant made to other prisoners while he was in jail that he had gotten away with a prior murder and would get away with this one as well should have been admitted as a prior inconsistent statement under the former version of Subparagraph D(1)(a); further, the former version of the rule would apply to the case on remand. *State v. Baca*, 120 N.M. 383, 902 P.2d 65 (1995).

Tape recording of accomplice's statement to police. — Where the court specifically instructed the jury that the tape recording of accomplice's statement to police was only being played as a prior inconsistent statement going to the accomplice's credibility, as the prior statement is not substantive evidence, it cannot be used to support defendant's conviction. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

Prior consistent statements. — In order for a prior consistent statement to be admitted, the prior statement must be consistent with testimony given by the declarant

at trial and the statement must be admitted to rebut an express or implied charge of recent fabrication or improper influence or motive. *State v. Sandate*, 119 N.M. 235, 889 P.2d 843 (Ct. App. 1994).

Paragraph D(1)(b) should apply only when there is some suggestion, if only slight, that the witness consciously altered his present testimony after making the inconsistent statement by which he has been impeached. *State v. Sandate*, 119 N.M. 235, 889 P.2d 843 (Ct. App. 1994).

In a prosecution for murder, the trial court did not err in admitting videotaped statements of boys who were riding in the victim's vehicle at the time of the shooting as prior consistent statements offered to rebut a charge of recent fabrication or improper influence. *State v. Salazar*, 1997-NMSC-044, 123 N.M. 778, 945 P.2d 996.

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).

Trial court did not abuse its discretion in admitting prior statements regarding oral sexual contact that were "substantially similar" to victim's trial testimony as it is not necessary that the statements be consistent as to every detail. *State v. Nichols*, 2006-NMCA-017, 139 N.M. 72, 128 P.3d 500.

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).

Prior consistent statement by witness was admissible, where defendant had attacked the witness' credibility at trial by suggesting that the witness' testimony was inconsistent with his prior statements. *State v. Brown*, 1998-NMSC-037, 126 N.M. 338, 969 P.2d 313; State v. Harrison, 2000-NMSC-022, 129 N.M. 328, 7 P.3d 478.

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).

Defendant waived any claim he had that witnesses were not subject to cross-examination about their prior statements, where he raised no specific objection that Subparagraph (1)(b) of Paragraph D was not satisfied because of the failure of the witnesses to be examined at their depositions concerning their prior statements. *State v. Altgilbers*, 109 N.M. 453, 786 P.2d 680 (Ct. App. 1989).

Introduction of prior inconsistent statements not harmless error. — In a prosecution for negligent use of a firearm, the introduction of witnesses' prior inconsistent statements suggesting that defendant had been in possession of and had fired the weapon could not be said to be harmless error, where the statements were the only substantive evidence of defendant's guilt. *State v. Gutierrez*, 1998-NMCA-172, 126 N.M. 366, 969 P.2d 970.

IV. ADMISSION BY PARTY-OPPONENT.

Statements about past events and present thoughts were not admissible. — Where defendant was charged with first-degree murder; defendant claimed the defendant was acting in self-defense; to support its theory of deliberate murder, the state introduced the victim's diary into evidence to show that defendant was increasingly violent and controlling towards the victim, including specific acts of domestic violence against the victim; the diary contained the statement that "he said when he hit me he was thinking bout David and Leroy an thought I was cheating on him but he said he dident mean 2 do dat", the statement was not admissible as a statement by a party opponent. *State v. Leyba*, 2012-NMSC-037, 289 P.3d 1215.

Letters written in jail. — Where defendant was charged with murdering the victim and the court admitted into evidence three letters that defendant wrote while in custody in which defendant admitted attacking and killing the victim without remorse, the letters were admissible as admissions of a party-opponent. *State v. Guerra,* 2012-NMSC-014, 278 P.3d 1031.

Recordings of telephone calls from jail. — Where defendant made telephone calls from jail requesting that defendant's friends be present at defendant's trial ostensibly to influence the testimony of the state's witnesses; and when a call was placed at the jail, a digital message informed both parties to the call that the call may be recorded and monitored, the statements of defendant in the recording of the call were admissible as non-hearsay statements of a party opponent. *State v. Johnson*, 2010-NMSC-016, 148 N.M. 50, 229 P.3d 523.

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).

Sum total of writing required to be admitted 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 former 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), overruled on other grounds, *Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244 (1981); *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).

The foundational requirement of proof of a conspiracy by independent evidence does not need to be shown when the state offers a co-conspirator's testimony; instead, the court may rule "conditionally." Also, the statements themselves can establish a prima facie case of conspiracy. *State v. Olguin*, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994), aff'd in part, 120 N.M. 740, 906 P.2d 731 (1995).

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).

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).

Defendant's statements in a tape recorded conversation made by him in an effort to have evidence implicating a coconspirator were admissible since whatever he said during the conversation was admissible as an admission by a party-opponent. *State v. Castillo-Sanchez*, 1999-NMCA-085, 127 N.M. 540, 984 P.2d 787, cert. denied, 127 N.M. 390, 981 P.2d 1208 (1999).

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. *State v. Martinez*, 102 N.M. 94, 691 P.2d 887 (Ct. App. 1984); *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); *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).

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).

For annual survey of New Mexico law of evidence, 19 N.M.L. Rev. 679 (1990).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29 Am. Jur. 2d Evidence § 658 et seq.; 29A Am. Jur. 2d Evidence §§ 754 et seq., 831 et seq.

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.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 23 A.L.R.5th 672.

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.

Admissibility as "not hearsay" of statement by party's attorney under Federal Rules of Evidence 801(d)(2)(C) or 801(d)(2)(D), 117 A.L.R. Fed. 599.

Interpreter or translator as party's agent for purposes of "admission by party-opponent" exception to hearsay rule (Federal Rules of Evidence, Rules 801(d)(2)(C), 801(d)(2)(D)), 121 A.L.R. Fed. 611.

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 adoption or belief in its truth, 156 A.L.R. Fed. 217.

23 C.J.S. Criminal Law § 856 et seq.; 31A C.J.S. Evidence § 259.

11-802. The rule against hearsay.

Hearsay is not admissible except as provided by these rules or by other rules adopted by the Supreme Court or by statute.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The title of this rule was amended in 2012 to be consistent with other amendments made at that time to Article 8 of these rules.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 802 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule to make stylistic changes.

I. GENERAL CONSIDERATION.

Hearsay rule and the Confrontation Clause. — The hearsay rule and the Confrontation Clause are not co-extensive. The hearsay rule is intended to ensure that the jury is not exposed to unreliable evidence, even when the declarant testifies at trial and is subject to cross-examination. The Confrontation Clause guarantees the accused in a criminal trial the right to be confronted with the witnesses against the accused, regardless of how trustworthy the out-of-court statement may appear to be. *State v. Mendez*, 2010-NMSC-044, 148 N.M. 761, 242 P.3d 328, rev'g 2009-NMCA-060, 146 N.M. 409, 211 P.3d 206, and overruling in part *State v. Ortega*, 2008-NMCA-001, 143 N.M. 261, 175 P.3d 929.

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).

Rule not applicable to judicial review hearings. — The trial court did not err by basing its findings in a judicial review hearing on the termination of parental rights on hearsay evidence. *State ex rel. Children, Youth & Families Dep't v. Vanessa C.*, 2000-NMCA-025, 128 N.M. 701, 997 P.2d 833, cert. denied, 128 N.M. 690, 997 P.2d 822 (2000).

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).

The hearsay rule is not a best-evidence rule stating that only the declarant should be permitted to testify as to what the declarant said; other real or testimonial evidence can be used to establish that fact. *State v. Glen Slaughter & Assocs.*, 119 N.M. 219, 889 P.2d 254 (Ct. App. 1994).

Harmful error. — Where defendant was charged with first-degree murder; defendant claimed the defendant was acting in self-defense; to support its theory of deliberate murder, the state introduced the victim's diary into evidence to show that defendant was increasingly violent and controlling towards the victim, including specific acts of domestic violence against the victim; the diary was inadmissible hearsay; the state's theory of deliberate murder depended on the diary; the state emphasized the diary in the presentation of its case, cross-examined defendant about the diary, and relied on the diary in its closing argument; and without the diary, the state could offer only weak circumstantial evidence to create an inference of willful deliberation, the admission of the diary into evidence was harmful error. *State v. Leyba*, 2012-NMSC-037, 289 P.3d 1215.

II. ADMISSIBILITY.

Improper admission for impeachment purposes. — Where, for purposes of impeaching the defendant's credibility, the prosecutor questioned the defendant about statements made by out-of-court declarants that the defendant was their source for drugs, the questions were prejudicial to the defendant because they implied that the state had evidence that the defendant had distributed drugs on prior occasions. *State v. Montes*, 2007-NMCA-083, 142 N.M. 221, 164 P.3d 102.

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).

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).

Rule that out-of-court utterance admissible to prove utterance made 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. However, the state of mind which ensued as a result of the 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 its 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).

Objection not waived 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).

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. — 29 Am. Jur. 2d Evidence § 658 et seq.

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.

Validity, construction, and application of child hearsay statutes, 71 A.L.R.5th 637.

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 § 259.

11-803. Exceptions to the rule against hearsay – regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it;

(2) **Excited utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress or excitement that it caused;

(3) **Then-existing mental, emotional, or physical condition.** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) **Statement made for medical diagnosis or treatment.** A statement that

(a) is made for – and is reasonably pertinent to – medical diagnosis or treatment, and

(b) describes medical history, past or present symptoms, pain, or sensations, their inception, or their general cause.

(5) **Recorded recollection.** A record that

(a) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately,

(b) was made or adopted by the witness when the matter was fresh in the witness's memory, and

(c) accurately reflects the witness's knowledge.

If admitted the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) **Records of a regularly conducted activity.** A record of an act, event, condition, opinion, or diagnosis if

(a) the record was made at or near the time by – or from information transmitted by – someone with knowledge,

(b) the record was kept in the course of a regularly conducted activity of a business, institution, organization, occupation, or calling, whether or not for profit,

(c) making the record was a regular practice of that activity, and

(d) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Paragraph 11 of Rule 11-902 NMRA or Paragraph 12 of Rule 11-902 NMRA or with a statute permitting certification. This exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a record of a regularly conducted activity.** Evidence that a matter is not included in a record described in Paragraph 6 if

(a) the evidence is admitted to prove that the matter did not occur or exist [and]

(b) a record was regularly kept for a matter of that kind.

This exception does not apply if the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) **Public records.** A record or statement of a public office if

(a) it sets out

(i) the office's activities,

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel, or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation.

This exception does not apply if the source of information or other circumstances indicate a lack of trustworthiness.

(9) **Public records of vital statistics.** Records or data compilations of births, deaths, or marriages, if reported to a public office in accordance with a legal duty.

(10) **Absence of a public record.** Testimony – or a certification under Rule 11-902 NMRA – that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that

(a) the record or statement does not exist or

(b) a matter did not occur or exist, even though a public office regularly kept a record or statement for a matter of that kind.

(11) **Records of religious organizations concerning personal or family history.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of marriage, baptism, and similar ceremonies.** A statement of fact contained in a certificate

(a) made by a person who is authorized by a religious organization or by law to perform the act certified,

(b) attesting that the person performed a marriage or similar ceremony or administered a sacrament, and

(c) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of documents that affect an interest in property.** The record of a document that purports to establish or affect an interest in property if

(a) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it,

(b) the record is kept in a public office, and

(c) a statute authorizes recording documents of that kind in that office.

(15) **Statements in documents that affect and interest in property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose – unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents.** A statement in a document that is at least twenty (20) years old and whose authenticity is established.

(17) **Market reports and similar commercial publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in learned treatises, periodicals, or pamphlets.** A statement contained in a treatise, periodical, or pamphlet, if

(a) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination, and

(b) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation concerning personal or family history.** A reputation among a person's family by blood, adoption, or marriage – or among a person's associates or in the community – concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation concerning boundaries or general history.** A reputation in a community – arising before the controversy – concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation concerning character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a previous conviction.** Evidence of a final judgment of conviction if

(a) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea,

(b) the judgment was for a crime punishable by death or by imprisonment for more than a year,

(c) the evidence is admitted to prove any fact essential to the judgment, and

(d) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgments involving personal, family, or general history, or a boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter

(a) was essential to the judgment, and

(b) could be proved by evidence of reputation.

[Adopted effective July 1, 1973; as amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order 07-8300-23, effective November 1, 2007; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-803 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility. The internal numbering of the rule was also changed to conform to the numbering of the federal rule.

In 2007, the committee added language to former Paragraph F, now renumbered as Paragraph 6, taken from a similar change made in 2000 to federal Rule 803(6) of the Federal Rules of Evidence. The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming but non-substantive foundation witnesses. Corresponding changes have been made to Rule 11-902 NMRA.

Eliminating the identical "catch-all" exception in Paragraph X of this rule and Subparagraph (5) of Paragraph B of Rule 11-804 NMRA and combining them in new rule 11-807 NMRA, with no intended change in meaning, tracks the 2000 amendments to the corresponding federal rules.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Cross references. — For rules relating to authentication and identification of documents, *see* Rules 11-901 to 11-903 NMRA.

For rules relating to admissibility, explanation and contradiction of abstracts of title, *see* Section 38-7-3 NMSA 1978.

The 1993 amendment, effective December 1, 1993, substituted "exceptions" for "evidence" in the rule heading, substituted "the witness's" for "his" in Paragraph E, substituted "member of the clergy" for "clergyman" in Paragraph L, deleted "by him" preceding "in direct" in Paragraph R, substituted "a person's" for "his" in two places in Paragraph S, deleted "his" following "among" in Paragraph U, inserted "after a trial or" and added the last sentence in Paragraph V, and substituted "the proponent's" for "his" in Subparagraph X(3).

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

I. GENERAL CONSIDERATION.

Categorical exclusion of statements made during a SANE examination was error. — Where a nine-year old child was examined by a SANE nurse who suspected that the

child had been sexually abused, and in response to a direct question by the SANE nurse the child named defendant as the child's abuser, the trial court erred when it applied the primary-purpose-of-the-encounter approach to determine the admissibility of the child's statements and categorically excluded all statements made during the SANE examination on the ground that the primary purpose of a SANE examination is to gather evidence. *State v. Mendez*, 2010-NMSC-044, 148 N.M. 761, 242 P.3d 328, rev'g 2009-NMCA-060, 146 N.M. 409, 211 P.3d 206, and overruling in part *State v. Ortega*, 2008-NMCA-001, 143 N.M. 261, 175 P.3d 929.

Statements made during a SANE examination can be admissible. — Statements made to a SANE nurse may be admissible for purposes of medical diagnosis or treatment, but trial courts must carefully parse each statement made to a SANE nurse to determine whether the statement is sufficiently trustworthy, focusing on the declarant's motivation to seek medical care and whether a medical provider could have reasonably relied on the statement for diagnosing or treating the declarant. *State v. Mendez*, 2010-NMSC-044, 148 N.M. 761, 242 P.3d 328, rev'g 2009-NMCA-060, 146 N.M. 409, 211 P.3d 206 and overruling in part *State v. Ortega*, 2008-NMCA-001, 143 N.M. 261, 175 P.3d 929.

SANE examination. — When the primary purpose of a Sexual Assault Nurse Examiner examination is to prepare, collect, evaluate and dispose of evidence relevant to later criminal prosecution and not for the diagnosis and treatment of the child, statements made by a child victim of criminal sexual penetration to a Sexual Assault Nurse Examiner are testimonial in nature. *State v. Ortega*, 2008-NMCA-001, 143 N.M. 261, 175 P.3d 929.

Statements that meet requirements of hearsay exceptions are not excluded by the hearsay rule, even though the declarant is available as a witness. *State v. Frank G.*, 2005-NMCA-026, 137 N.M. 137, 108 P.3d 534, cert. granted, 2005-NMCERT-002.

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).

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).

When a hearsay declarant is not present for cross-examination at trial, a showing that he or she is unavailable is required, and, even then, the declarant's statement is admissible only if it bears adequate indicia of reliability. *State v. Lopez*, 1996-NMCA-101, 122 N.M. 459, 926 P.2d 784.

Finding of violation of right to confrontation 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).

Foundation for testimony of child sexual abuse victim. — The state established that the identity of the perpetrator was "reasonably pertinent" to a pediatrician for purposes of medical diagnosis or treatment and the pediatrician's testimony was, therefore, admissible under Paragraph D but the state failed to establish such a foundation for the admission of hearsay testimony by a psychologist and a social worker. *State ex rel. Children, Youth & Families Dep't v. Esperanza M.*, 1998-NMCA-039, 124 N.M. 735, 955 P.2d 204.

Where the licensed program therapist testified to the importance of the identity of the perpetrator, and stated that the purpose of her therapy sessions with the child was for diagnosis and treatment and that, in order to properly treat a child abuse victim, it was essential to know the identity of the abuser, and the child's statements about the sexual abuse were of the type upon which medical personnel reasonably rely in treatment or diagnosis and meet the standards for admission set forth in Paragraph D of this rule, the children's court did not abuse its discretion in admitting the child's statements to the program therapist. *State v. Frank G.*, 2005-NMCA-026, 137 N.M. 137, 108 P.3d 534, cert. granted, 2005-NMCERT-002.

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).

Highly prejudicial hearsay admitted 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).

Statements made to psychological expert. — Even though possibly admissible under paragraph D, allowing expert during direct examination to repeat to the jury the complainant's statements, made to the expert during her evaluation, was too prejudicial since it amounted to an indirect comment on the alleged victim's credibility. *State v. Lucero*, 116 N.M. 450, 863 P.2d 1071 (1993).

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).

Paragraph D does not require inquiry into the motive of the declarant. *State v. Altgilbers*, 109 N.M. 453, 786 P.2d 680 (Ct. App. 1989).

Hearsay statements made by child sexual abuse victims to a pediatrician and psychologist were properly admitted pursuant to Paragraph D, as statements made for purpose of diagnosis or treatment. *State v. Altgilbers*, 109 N.M. 453, 786 P.2d 680 (Ct. App. 1989).

Victim's history. — Where the history physician obtained from victim had been obtained for the purposes of diagnosis or treatment, such testimony is admissible under Paragraph D of this rule. *State v. Lente*, 2005-NMCA-111, 138 N.M. 312, 119 P.3d 737, cert. denied, 2005-NMCERT-008.

Admission of civil judgment in criminal action. — It is a long-standing rule that a judgment in a civil action ordinarily cannot be admitted in a criminal action as proof of

the facts determined by the judgment. *State v. Hoeffel*, 112 N.M. 358, 815 P.2d 654 (Ct. App. 1991).

II. PRESENT SENSE IMPRESSION OR EXCITED UTTERANCE.

Statements about past events and present thoughts were not admissible. — Where defendant was charged with first-degree murder; defendant claimed the defendant was acting in self-defense; and to support its theory of deliberate murder, the state introduced the victim's diary into evidence to show that defendant was increasingly violent and controlling towards the victim, including specific acts of domestic violence against the victim, diary entries such as "my boyfriend hit me cuz we were argueing so he gave me a fat lip and a black eye an a big bruzed on my check bone", "da 17th was the scaryest day of my life", and "I still don't know if I should be wit him Im scared 2 even see him" were not admissible to show the victim's present sense impression because the entries described past events and not the victim's present thoughts and feelings. *State v. Leyba*, 2012-NMSC-037, 289 P.3d 1215.

Excited utterance. — Where the victim was shot multiple times at close range outside a friend's home; immediately after being shot, the victim told a police officer that defendant was the shooter; and at defendant's trial, the victim testified that defendant did not shoot the victim, the statement to the police officer was admissible as substantive evidence under the excited utterance exception, not just as a prior inconsistent statement. *State v. Fuentes*, 2010-NMCA-027, 147 N.M. 761, 228 P.3d 1181.

Victim's spontaneous declaration. — Where defendant was charged with the first degree murder of the victim; defendant was embittered by the victim's rejection of defendant and the breakup of the troubled relationship between defendant and the victim; the victim moved from Nevada to the victim's home town in New Mexico; several days before defendant murdered the victim, the victim's mother was driving the victim to work, defendant pulled up alongside the victim's car, the victim looked at the person who was driving the adjacent car and spontaneously stated "There's Joseph" while appearing to be very agitated and scared; the victim's mother looked at the person in the adjacent car; and the victim's mother later identified defendant in court as the person whom the victim's mother had seen driving the adjacent car, the victim's declaration identifying defendant was admissible under the present sense impression exception to the hearsay rule. *State v. Flores*, 2010-NMSC-002, 147 N.M. 542, 226 P.3d 641.

Statements made in a telephone call between witnesses. — Where the prosecutor distributed a transcript to the jury and played the recording of a telephone call between a witness and a friend of the defendant; the telephone call contained statements by the friend incriminating the defendant in the murder of the victim; the telephone call occurred on the day following the murder; and the state did not contend that neither the witness nor the friend were involved in the shooting of the victim, the statements of the

friend were not present sense impressions or excited utterances. *State v. Macias*, 2009-NMSC-028, 146 N.M. 378, 210 P.3d 804.

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).

A statement qualifies as an excited utterance if: (1) a startling event has occurred, (2) the statement was made while the declarant was under the stress or excitement caused by that event, and (3) the statement relates to the startling event. *Cole v. Tansy*, 926 F.2d 955 (10th Cir. 1991).

A trial court must consider a variety of factors in determining whether a statement is an excited utterance so as to fall within the hearsay exception of Subsection B; these factors include, but are not limited to, the amount of time passed since the event, the opportunity for reflection or fabrication, the degree of pain, nervousness or other emotional stress on the part of declarant, whether the statement was self-serving, and whether it was made spontaneously or in response to an inquiry. *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

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).

Although time definitely is a factor to be considered, admissibility under the excited utterance exception depends more on circumstances than on time, and each case must depend on its own circumstances; since the four-year old's statements were being offered by the mother in a criminal sexual contact case and it was difficult to determine the exact date of the alleged touching, but it was clear that it preceded the declaration by the victim identifying respondent as the wrongdoer, this in itself did not preclude the victim's near-hysterical recitation from being within the excited utterance exception. *In re Troy P.*, 114 N.M. 525, 842 P.2d 742 (Ct. App. 1992).

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).

Witness' statements told to 911 operator were present sense impressions. — Where the victim was shot when the victim and a friend went outside the victim's house to see who was sitting in a car in front of the house; within five minutes of the shooting, the victim's spouse called 911 and in response to questions asked by the 911 operator, the spouse told the 911 operator what the friend had told the spouse about the description of the shooter, the car in which the shooter left the scene, and the direction the shooter fled; defendant was subsequently apprehended and convicted of the murder of the victim; at trial, the friend's statements were introduced through the testimony of the spouse; and the friend, who was incarcerated in another state, did not testify and was not previously subject to cross-examination, the friend's statement's were admissible under the present sense impression exception to the hearsay rule. *State v. Sisneros*, 2013-NMSC-049.

Greater relation to emotional state than to timing. — The court did not err in admitting hearsay evidence through the victim's recount of the criminal incident to her friend, several hours after the incident. The victim was in an obvious state of severe distress when she made her declaration. The excited utterance doctrine is not so much limited in time as it is to the emotional state of the declarant when making the out-of-court declaration. *State v. Mares*, 112 N.M. 193, 812 P.2d 1341 (Ct. App. 1991).

Spontaneous, emotional statement. — Where the declarant, who was sixteen years of age, witnessed defendant murder the victim; shortly after the murder, without prompting, the declarant told the state's witnesses that the declarant saw defendant shoot the victim; and the declarant was scared, nervous, upset, and talked quickly while standing and walking, the declarant's statement was admissible as an excited utterance. *State v. Telles*, 2011-NMCA-083, 150 N.M. 465, 261 P.3d 1097, cert. denied, 2011-NMCERT-007.

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).

There must be sufficient factual predicate to admit victim's statement into evidence as an excited utterance. *State v. Balderama*, 2004-NMSC-008, 135 N.M. 329, 88 P.3d 845.

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).

Statements made by victim of domestic violence and a witness to a police officer were properly admitted as excited utterances. *State v. Lopez*, 1996-NMCA-101, 122 N.M. 459, 926 P.2d 784.

The trial court did not err in permitting police officers to testify about what the victim told them when they questioned her 20 to 30 minutes after her 911 call. *State v. Hernandez*, 1999-NMCA-105, 127 N.M. 769, 987 P.2d 1156, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

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. *State v. Zinn*, 106 N.M. 544, 746 P.2d 650 (1987).

Victim's words of greeting to defendant uttered just prior to shooting were admissible under the present sense impression exception. *State v. Salgado*, 1999-NMSC-008, 126 N.M. 691, 974 P.2d 661.

Shooting victim's statement, "[defendant] shot me," offered through the testimony of a police officer and another witness, was admissible as an excited utterance. *State v. Salgado*, 1999-NMSC-008, 126 N.M. 691, 974 P.2d 661.

Statement admissible under Paragraphs B and C. *State v. Martinez*, 102 N.M. 94, 691 P.2d 887 (Ct. App. 1984); *State v. Woodward*, 121 N.M. 1, 908 P.2d 231 (1995).

III. EXISTING EMOTIONAL OR PHYSICAL CONDITION.

Statements about past events were not admissible. — Where defendant was charged with first-degree murder; defendant claimed the defendant was acting in self-defense; and to support its theory of deliberate murder, the state introduced the victim’s diary into evidence to show that defendant was increasingly violent and controlling towards the victim, including specific acts of domestic violence against the victim, diary entries such as "Im scared", "Im so mad an sad an confused", and "my boyfriend hit me cuz we were argueing so he gave me a fat lip and a black eye an a big bruzed on my check bone", were not admissible to show the victim’s then-existing mental state because the entries described past events, not the victim’s present state of mind. *State v. Leyba*, 2012-NMSC-037, 289 P.3d 1215.

Statement addressed victim's state of mind. — Where police officer testified that he was dispatched on a domestic violence call to defendant's residence nearly two months prior to the present incident, and because it was defendant's home and defendant indicated he wanted the victim to leave, officer escorted the victim off the premises, and as she was leaving, the victim stated "next time you guys see me you're going to find

me dead", the statement addressed the victim's state of mind and was allowed under Paragraph C of this rule. *State v. Torres*, 2005-NMCA-070, 137 N.M. 607, 113 P.3d 877, cert. denied, 2005-NMCERT-005.

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).

Evidence explaining why declarant held particular state of mind not admissible. — The statement of the victim of attempted murder, made in relation to her fear of dogs because a dog allegedly bit her "at the house where they killed me," was inadmissible because, although Paragraph C allows hearsay statements that show the declarant's the existing mental condition, it does not permit evidence explaining why the declarant held a particular state of mind. *State v. Baca*, 120 N.M. 383, 902 P.2d 65 (1995).

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).

Statements of murder victim during psychological treatment. — In a prosecution of the defendant for the murder of his wife, testimony of a psychologist as to statements made by the victim which were essential to treatment of the victim for situational depression were admissible since it was limited to evidence of abuse, threats, and spying. *State v. Woodward*, 121 N.M. 1, 908 P.2d 231 (1995).

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).

Evidence of state of mind must be relevant. — The statement of fear of her father (the defendant) made by the victim of attempted murder was inadmissible under Paragraph C either because it was irrelevant as an attempt to demonstrate a fact of consequence other than the declarant's state of mind, or because it was unfairly prejudicial. *State v. Baca*, 120 N.M. 383, 902 P.2d 65 (1995).

IV. RECORDED RECOLLECTION.

Statements made in a telephone call between witnesses. — Where the prosecutor distributed a transcript to the jury and played the recording of a telephone call placed at the county jail by the witness to a friend of the defendant; the telephone call was recorded by the county jail; the telephone call contained statements by the friend incriminating the defendant in the murder of the victim; the telephone call occurred on the day following the murder; and neither the witness nor the friend testified that they had made the recording when the matter was fresh in their memory or that the recording correctly reflected their knowledge, the recorded telephone call was not a recorded recollection. *State v. Macias*, 2009-NMSC-028, 146 N.M. 378, 210 P.3d 804.

Indicia of reliability. — The trial court did not abuse its discretion by admitting the audio tape and transcript of the statement of a witness to a shooting under Paragraph E and, under Paragraph X, based on its finding "that the circumstances of the original statement, the proximity in time to the shooting itself, all are indicia of reliability in that statement." *State v. Allison*, 2000-NMSC-027, 129 N.M. 566, 11 P.3d 141.

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).

Police report may be read into evidence. — Rule 11-803(8)(a)(ii) NMRA does not bar an officer from reading aloud at trial the recorded recollection contained in a police report provided that a proper foundation is laid pursuant to Rule 11-803(5) NMRA. *State v. Vigil*, 2014-NMCA-096, cert. granted, 2014-NMCERT-____.

Where defendant was arrested for driving while intoxicated, first offense; at defendant's trial, the investigating officer could not recall portions of the officer's DWI investigation; the metropolitan court judge allowed the officer to read from the officer's police report what the officer had recorded concerning those portions of the field sobriety test the officer could not recall; the officer's testimony provided a sufficient foundation to allow the officer to read from the police report; and defendant claimed that the police report

should have been excluded under the public record exception of Rule 11-803(8)(a)(ii) NMRA, the metropolitan court did not err in allowing the officer to read portions of the police report into the record pursuant to Rule 11-803(5) NMRA. *State v. Vigil*, 2014-NMCA-096, cert. granted, 2014-NMCERT-____.

Reading of witnesses' statements. — After witnesses testified that they once had knowledge they no longer possessed but which they had accurately conveyed to the officer at the time of the incident, and the officer testified how the statements given to him were transcribed verbatim and how he attested to them, the officer was then permitted to read from and testify regarding parts of the statements which he took from the witnesses. *State v. Padilla*, 118 N.M. 189, 879 P.2d 1208 (Ct. App. 1994).

V. PUBLIC AND REGULARLY CONDUCTED ACTIVITY RECORDS.

A. IN GENERAL.

Business records exception requires documentation. — The business records exception requires that a physical document, record, or report be admitted into evidence. Testimony about the contents of a record that has not been admitted into evidence is not admissible under the business records exception. *State v. Cofer*, 2011-NMCA-085, 150 N.M. 483, 261 P.3d 1115, cert. denied, 2011-NMCERT-007.

Where defendant was charged with shoplifting over $500 for taking a television; the manager of the store testified as to the value of the television based on the manager's research of inventory reports on the store's intranet database; the manager had no independent knowledge of the value of the television; and the reports that formed the basis of the manager's testimony were not admitted into evidence, the witness's testimony was hearsay that did not qualify under the business records exception. *State v. Cofer*, 2011-NMCA-085, 150 N.M. 483, 261 P.3d 1115, cert. denied, 2011-NMCERT-007.

Factors determining trustworthiness. — Four factors that help determine trustworthiness in an investigative report: (1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation. *Gonzales v. Surgidev Corp.*, 120 N.M. 133, 899 P.2d 576 (1995).

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), overruled on other grounds, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

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), overruled on other grounds, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

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), overruled on other grounds, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

Trustworthiness of statement not shown. — Statement in a report by the youth diagnostic development center from the commitment of a minor to the New Mexico boys school, offered to prove character of the victim through opinion evidence, lacked trustworthiness because of the unreliability of the source of information contained therein. Therefore, the statement was inadmissible. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

Investigatory reports. — Portions of investigatory reports otherwise admissible under this rule are not inadmissible merely because they state a conclusion or opinion; as long as the conclusion is based on a factual investigation and satisfies the requirement of trustworthiness, it should be admissible. *Gonzales v. Surgidev Corp.*, 120 N.M. 133, 899 P.2d 576 (1995).

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).

Records inadmissible without proper foundation. — In an action by a bank's successor to recover on a promissory note, since there was no testimony at all about the origin of the bank's record of the debt, except that it came from the bank, and an employee of the successor admitted that she had no personal knowledge of the procedures used by the bank in creating and maintaining its records and did not know if the successor received all of the bank's records, the trial court did not abuse its discretion in excluding the evidence of the records. *Cadle Co. v. Phillips*, 120 N.M. 748, 906 P.2d 739 (Ct. App. 1995).

Foundation for admitting blood alcohol test results. — Rule 7-607A(2) NMRA of the Rules of Criminal Procedure for the Metropolitan Courts establish the proper foundation for calibration of blood alcohol testing devices; its requirements may be met through live testimony, affidavit or certification, or calibration testing records. *Bransford v. State Taxation & Revenue Dep't*, 1998-NMCA-077, 125 N.M. 285, 960 P.2d 827.

Calibration logs of breath-alcohol device. — Calibration logs and a printout from a breath-alcohol device were admissible as business records in a prosecution for careless driving and driving while intoxicated. *State v. Ruiz*, 120 N.M. 534, 903 P.2d 845 (Ct. App. 1995).

B. COURSE OF BUSINESS.

Testimony concerning a forensic laboratory report. — Where the court admitted a forensic laboratory report that a substance was cocaine; the report was admitted into evidence through the testimony of a forensic chemist who did not conduct the tests underlying the report; the witness's testimony was an explanation regarding how the test was performed and the witness's approval of the testing chemist's results; there was nothing in the witness's testimony indicating that the witness relied on the witness's own analysis to arrive at the witness's own conclusions; the only other evidence that the substance was cocaine was the testimony of a police officer who performed a field test on the substance; and the state failed to prove the scientific reliability of the field test, the admission of the laboratory report and the witness's testimony regarding the testing chemist's opinion was error, the error was not harmless, and the error violated defendant's right of confrontation. *State v. Delgado*, 2010-NMCA-078, 148 N.M. 870, 242 P.3d 437, cert. denied, 2010-NMCERT-007, on remand of 2009-NMCA-061, 146 N.M. 402, 210 P.3d 828, 2009-NMCERT-006.

Blood draw results. — Where the State Laboratory Department toxicologist who testified at trial was not the analyst who performed the analysis of a blood sample and did not prepare the blood analysis report but who testified that the report was used and kept in the ordinary course of the Laboratory's business and testified about the procedure used in preparing the report, the report could be admitted into evidence as a business record without violating the Confrontation Clause because, even though the

report was a testimonial statement, the testimony of the analyst who performed the test was not required given that the analyst was a mere scrivner who was not required to interpret the results of the test, exercise independent judgment, or employ any particular methodology in transcribing the results from the testing machine to the lab report. *State v. Bullcoming*, 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1, overruling *State v. Dedman*, 2004-NMSC-037, 136 N.M. 561, 102 P.3d 628.

Statements made in a telephone call between witnesses. — Where the prosecutor distributed a transcript to the jury and played the recording of a telephone call placed at the county jail by the witness to a friend of the defendant; telephone call was recorded by the county jail; the telephone call contained statements by the friend incriminating the defendant in the murder of the victim; the telephone call occurred on the day following the murder; and the state did not contend that neither the witness nor the friend witnessed or were involved in the shooting of the victim, the recorded call was not a business record. *State v. Macias*, 2009-NMSC-028, 146 N.M. 378, 210 P.3d 804.

Foundation for admission of computer record. — The admission of a computer-generated record of defendant's mailing of insurance cancellation notices into evidence was not an abuse of discretion where defendant's witness, who was the person who created the record, testified that he had personal knowledge about the workings of the computer system used by defendant and that the record was the result of defendant's regularly conducted business activity. *Roark v. Farmers Group, Inc.*, 2007-NMCA-074, 142 N.M. 59, 162 P.3d 896, cert. denied, 2007-NMCERT-006.

A computer generated record is admissible as a business record. *Roark v. Farmers Group, Inc.*, 2007-NMCA-074, 142 N.M. 59, 162 P.3d 896, cert. denied, 2007-NMCERT-006.

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).

Customer did not lay a foundation for admitting medical bills as records of regularly conducted activity; as such, the amounts billed by the medical treatment providers were offered for their truth and therefore constituted hearsay because the customer relied on them in establishing his damages. *Segura v. K-Mart Corp.*, 2003-NMCA-013, 133 N.M. 192, 62 P.3d 283.

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), overruled on other grounds, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

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).

Ledger book held to be best evidence of business revenues. *Central Sec. & Alarm Co. v. Mehler*, 1996-NMCA-060, 121 N.M. 840, 918 P.2d 1340.

Records kept under direction and with knowledge of defendant admissible. — 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. Elec. 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 Cnty. 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).

Sales receipt admissible. — Court did not err in admitting sales receipt concerning defendant's gun. *State v. Rivera*, 115 N.M. 424, 853 P.2d 126 (Ct. App. 1993).

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 seller's 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).

Medical bills were hearsay when offered to prove the expenses reflected by them and were properly excluded since the plaintiff did not create a predicate to argue their admissibility as business records nor give notice of intent to argue the catch-all

exception to the hearsay rule. *Padilla v. Hay*, 120 N.M. 220, 900 P.2d 969 (Ct. App. 1995).

C. PUBLIC.

Breath test results. — Where the officer who administered a breath test to the defendant testified that "the certification for the machine was adhered to it", the State satisfied the foundational requirement for admission of the breath test. *State v. Granillo-Marcias*, 2008-NMCA-021, 143 N.M 455, 176 P.3d 1187.

Computer printout of driving record. — Where defendant admitted that his driver's license was revoked at the time of his arrest and the arresting officer testified that the computer check he ran at the time of arrest indicated that the defendant's license was revoked, the trial court did not abuse its discretion in admitting a computer printout of the defendant's driving record for the limited purpose of showing the date the revocation or suspension of the defendant's driver's license began. *State v. Soto*, 2007-NMCA-077, 142 N.M. 32, 162 P.3d 187, cert. denied, 2007-NMCERT-006.

Blood alcohol report, prepared by scientific laboratory division, qualifies as a "public record". *State v. Dedman*, 2004-NMSC-037, 136 N.M. 561, 102 P.3d 628.

Not applicable to jury verdicts in criminal case. — Subparagraph (3) of Paragraph H does not apply to evidence offered by the state in a criminal case. As for Subparagraphs (1) and (2), Subparagraph (1) would apply only to the jury's report of its own activities and Subparagraph (2) would apply only to matters directly observed by the jury. Indeed, the fact that Subparagraph (3) specifically addresses findings made through investigations shows that Subparagraphs (1) and (2) do not cover that topic; that is, they do not apply to matters determined only through inquiries. *State v. O'Kelley*, 118 N.M. 52, 878 P.2d 1001 (Ct. App. 1994).

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), overruled on other grounds, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

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), overruled on other grounds, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

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), overruled on other grounds, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

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).

Foundation testimony not required. — 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).

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), overruled on other grounds, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

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 NMRA.

Except admissible when deed ancient and accompanied by possession. — *See* same catchline in notes to Rule 11-801 NMRA.

And become competent evidence when admitted by stipulation. — *See* same catchline in notes to Rule 11-801 NMRA.

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 trustworty, 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. LEARNED TREATISES.

Admissibility of testimony based on qualifications of witness. — A biomechanical engineer who qualified as an expert witness could discuss a medical article related to his testimony on the causation of temporomandibular injuries. *Baerwald v. Flores*, 1997-NMCA-002, 122 N.M. 679, 930 P.2d 816.

IX. JUDGMENT OF PREVIOUS CONVICTION.

Final judgment on guilty plea required. — A judgment in a criminal case falls within the exception only if it was entered upon a plea of guilty and following a "final judgment." Since no judgment was entered on the jury verdict in the first trial until the defendant's second trial was concluded, the exception did not apply. *State v. O'Kelley*, 118 N.M. 52, 878 P.2d 1001 (Ct. App. 1994) (decided prior to 1993 amendment).

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)(decided prior to 1993 amendment).

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) NMRA, 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).

X. OTHER EXCEPTIONS.

Medical diagnosis. — Where defendant was charged with criminal sexual penetration of a minor; the child was taken to a doctor because the child was experiencing vaginal pain; a doctor performed a SANE examination of the child to diagnose the child and treat the child’s physical complaints; during the examination, the child told the doctor that defendant had inserted defendant’s fingers into the child’s vagina and anus, performed cunnilingus on the child, and made the child perform fellatio; and the doctor performed a physical examination of the child which revealed injuries to the child’s vagina that were consistent with penetration by a finger or other object, the doctor’s testimony about the child’s statements concerning the nature and scope of the abuse were admissible pursuant to Paragraph D. *State v. Skinner*, 2011-NMCA-070, 150 N.M. 6, 256 P.3d 969, cert. denied, 2011-NMCERT-005.

Where defendant was charged with criminal sexual penetration of a minor who was defendant’s six year old granddaughter; defendant served as a caregiver for the child;

the child was taken to a doctor because the child was experiencing vaginal pain; a doctor performed a SANE examination of the child; the doctor testified that the child identified defendant as the perpetrator who had inserted defendant's fingers into the child's vagina; and the treatment of the child involved separating the child from defendant to prevent further harm, the doctor's testimony that the child identified defendant as the perpetrator was admissible pursuant to Paragraph D. *State v. Skinner*, 2011-NMCA-070, 150 N.M. 6, 256 P.3d 969, cert. denied, 2011-NMCERT-005.

Where defendant was convicted of first degree criminal sexual penetration of a minor and third degree criminal sexual contact of a minor; a nurse who examined the victim testified that the victim told the nurse that defendant touched the victim with defendant's private, that defendant touched the victim's butt with defendant's private, and that defendant made the victim touch defendants' private with the victim's hands; the nurse was a family nurse practitioner who did mostly what a primary care doctor does; the nurse was trained to assess, diagnose and treat acute and chronic illnesses; the nurse worked at a pediatric specialty clinic which saw children and adolescents who were brought in because of concerns about sexual abuse; and there was no evidence that the victim had already had a pediatric examination prior to the victim's examination by the nurse, that law enforcement was involved in the victim's examination, that the nurse performed a rape kit, or that the nurse provided evidence to the police, the nurse's testimony about the victim's statements was admissible under the medical diagnosis exception to the hearsay rule. *State v. Tafoya*, 2010-NMCA-010, 147 N.M. 602, 227 P.3d 92.

Evidence not relevant to medical diagnosis. — Where defendant was charged with criminal sexual penetration of a minor; the doctor who performed a SANE examination of the child testified that during the examination, the child asked to draw a drawing which the child stated was a drawing of defendant's penis; there was nothing in the record to show how the child's assertion with regard to the drawing might assist the doctor diagnose or treat the child's injuries; there was substantial evidence other than the doctor's statement regarding the drawing to support defendant's conviction; the doctor's testimony regarding the drawing was minuscule and insignificant in comparison to admissible evidence; and there was no conflicting evidence to discredit the testimony presented by the state, there was no reasonable probability that the admission of the doctor's testimony regarding the child's statement about the drawing affected the verdict and the admission of the drawing into evidence was harmless error. *State v. Skinner*, 2011-NMCA-070, 150 N.M. 6, 256 P.3d 969, cert. denied, 2011-NMCERT-005.

Admission of child's hearsay statements identifying defendant as the perpetrator of sexual abuse was not plain error. — Where defendant was charged with criminal sexual penetration of a child under thirteen; a counselor for sexually abused children testified once on direct examination that the victim stated to the counselor that defendant told the victim to hold defendant's penis, that the victim was made to perform oral sex with defendant, and that defendant made the victim promise to keep the abuse secret; and the statements were made at the end of the victim's treatment and were not necessary for the counselor's diagnosis or to explain the basis of the counselor's expert

opinion, the error in admitting the victim's statements that defendant was the perpetrator of the sexual abuse was not plain error. *State v. Dylan J.*, 2009-NMCA-027, 145 N.M. 719, 204 P.3d 44.

Notice required. — Paragraph X of this rule and Rule 11-804 B(5) NMRA, the two catchall exceptions to the hearsay rule, require prior notice to an adverse party. *State v. Frank G.*, 2005-NMCA-026, 137 N.M. 137, 108 P.3d 534, cert. granted, 2005-NMCERT-002.

Admission of child's hearsay statements proper. — The children's court admission of the child's hearsay statements under Paragraph X of this rule regarding sexual abuse were proper where in admitting the statements, the children's court considered the content of the statements and the circumstances in which they were made, and the court found that the statements were inherently reliable, noting in particular the age of the child, the manner in which the issue was raised, the nature of the utterances, and the consistency of her statements. *State v. Frank G.*, 2005-NMCA-026, 137 N.M. 137, 108 P.3d 534, cert. granted, 2005-NMCERT-002.

Where the child's hearsay statements under Paragraph X of this rule regarding sexual abuse are supported by guarantees of trustworthiness equivalent to those which sustain the other enumerated exceptions to the hearsay rule, the children's court did not abuse its discretion in admitting the child's hearsay statements through the testimony of the foster mother, the children, youth & families department social worker, a clinical forensic interviewer, and a licensed program therapist. *State v. Frank G.*, 2005-NMCA-026, 137 N.M. 137, 108 P.3d 534, cert. granted, 2005-NMCERT-002.

Admission of child's hearsay statements in abuse and neglect proceeding. — Where child's statements were spontaneous, consistent and unambiguous in both the description of the abuse and the identity of the abuser, the terms used by the child to describe the abuse were consistent with her age, the child's behavior was consistent with sexual abuse, and the child's therapist testified that it would be hurtful, not helpful, to have child testify, trial court properly determined that circumstances surrounding the child's statements made them trustworthy. *In the Matter of Pamela R.D.G.*, 2006-NMSC-019, 139 N.M. 459, 134 P.3d 745.

Construction of "other exceptions" provision. — Paragraph X of this rule and Rule 11-804 NMRA, 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 NMRA 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), overruled on other grounds, *State v. Olguin*, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Evidence admissible because of reliability and importance. — Taped statement was admissible where it was reliable and important for the jury to consider, as it went to the identity of the shooters in the defendant's murder trial. *State v. Trujillo*, 2002-NMSC-005, 131 N.M. 709, 42 P.3d 814.

In a prosecution of defendant for criminal sexual penetration of a child, because the child victim's statements to her parents were sufficiently trustworthy in light of the particular circumstances of the case, the admission of these statements into evidence under the catch-all exception to the hearsay rule did not violate defendant's constitutional rights under the Confrontation Clause. *State v. Massengill*, 2003-NMCA-024, 133 N.M. 263, 62 P.3d 354, cert. denied, 133 N.M. 126, 61 P.3d 835 (2003).

Hearsay testimony of child-victim of criminal sexual contact properly admitted under Paragraph X. *State v. Doe*, 94 N.M. 637, 614 P.2d 1086 (Ct. App. 1980).

The best interests of a child do not subsume the safeguards of the rules of evidence and hearsay testimony may not be admitted by the children's court unless the guarantees of trustworthiness and reliability are shown. *State ex rel. Children, Youth & Families Dep't v. Esperanza M.*, 1998-NMCA-039, 124 N.M. 735, 955 P.2d 204.

Medical diagnosis. — Trial court must determine whether the medical diagnosis or treatment hearsay exception requires an inquiry into the patient's treatment-seeking motive, as well as the physician's reliance, in order to be considered a firmly-rooted hearsay exception for Confrontation Clause purposes. *State v. Massengill*, 2003-NMCA-024, 133 N.M. 263, 62 P.3d 354, cert. denied, 133 N.M. 126, 61 P.3d 835 (2003).

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).

For annual survey of New Mexico law of evidence, 19 N.M.L. Rev. 679 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29 Am. Jur. 2d Evidence § 679 et seq.; 29A Am. Jur. 2d Evidence §§ 754 et seq., 860 et seq.; 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.

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.

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.

Admissibility under state law of hospital record relating to intoxication or sobriety of patient, 80 A.L.R.3d 456.

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 evidence of reputation as to land boundaries or customs affecting land, under Rule 803(20) of Uniform Rules of Evidence and similar formulations, 79 A.L.R.4th 1044.

Admissibility of tape recording or transcript of "911" emergency telephone call, 3 A.L.R.5th 784.

Admissibility of government factfinding in products liability actions, 29 A.L.R.5th 534.

Admissibility of statements made for purposes of medical diagnosis or treatment as hearsay exception under Rule 803(4) of the Uniform Rules of Evidence, 38 A.L.R.5th 433.

Admissibility of evidence of declarant's then-existing mental, emotional, or physical condition, under rule 803(3) of uniform rules of evidence and similar formulations, 57 A.L.R.5th 141.

Admissibility of ancient documents as hearsay exception under Rule 803(16) of the Uniform Rules of Evidence, 63 A.L.R.5th 331.

Admissibility in state court proceedings of police reports as business records, 111 A.L.R.5th 1.

Admissibility in state court proceedings of police reports under official record exception to hearsay rule, 112 A.L.R.5th 621.

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.

Requirements, under Federal Rule of Evidence 807 (Fed. Rules Evid. Rule 807, 28 USCA), of notice to adverse party for admission of evidence under residual exception to hearsay rule, where availability of declarant is immaterial, 155 A.L.R. Fed. 409.

When is hearsay statement 'excited utterance' admissible under Rule 803(2) of Federal Rules of Evidence, 155 A.L.R. Fed. 583.

When is hearsay statement "present sense impression" admissible under Rule 803(1) of Federal Rules of Evidence, 165 A.L.R. Fed. 491.

Admissibility, under Rule 803(8)(c) of Federal Rules of Evidence, of "factual findings resulting from investigation made pursuant to authority granted by law", 180 A.L.R. Fed. 61.

23 C.J.S. Criminal Law § 856 et seq.; 31A C.J.S. Evidence §§ 259 et seq., 282; 32 C.J.S. Evidence § 495 et seq.; 32A C.J.S. Evidence §§ 834 et seq., 859, 860, 869, 920, 931, 932, 968, 1005 et seq., 1010, 1012 et seq., 1025.

11-804. Exceptions to the rule against hearsay – when the declarant is unavailable as a witness.

A. **Criteria for being unavailable.** "Unavailability as a witness" includes situations in which the declarant

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies,

(2) refuses to testify about the subject matter despite a court order to do so,

(3) testifies to not remembering the subject matter,

(4) cannot be present to testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness, or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure

(a) the declarant's attendance, in the case of a hearsay exception under Rule 11-804(B)(1) or (5) NMRA, or

(b) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 11-804(B)(2), (3), or (4) NMRA.

But Paragraph A does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability in order to prevent the declarant from attending or testifying.

B. **The exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) **Former testimony.** Testimony that

(a) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(b) is now offered against a party who had – or, in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) **Statement under the belief of imminent death.** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) **Statement against interest.** A statement that

(a) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability, and

(b) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) **Statement of personal or family history.** A statement about

(a) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact, or

(b) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) **Statement offered against a party who wrongfully caused the declarant's unavailability.**

A statement offered against a party that wrongfully caused – or acquiesced in wrongfully causing – the declarant's unavailability as a witness, and did so intending that result.

[As amended, effective April, 1, 1976; December 1, 1993; January 1, 1995; as amended by Supreme Court Order 07-8300-23, effective November 1, 2007; by Supreme Court Order No. 10-8300-042, effective January 31, 2011; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-804 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

Paragraph (B)(3) was amended in 2010 to be consistent with amendments to federal Rule 804(b)(3), effective on December 1, 2010. These amendments require the state to show corroborating circumstances as a condition for admission of an unavailable declarant's statement against penal interest. The previous rule required only the defendant to make such a showing. A unitary approach to declarations against penal interest assures both the prosecution and the accused that the rule will not be abused and that only reliable hearsay statements will be admitted under this exception.

In 2007, the identical "catch-all" exception in Subparagraph (5) of Paragraph B of this rule and former Paragraph X of Rule 11-803 NMRA were eliminated and combined in new Rule 11-807 NMRA, consistent with the corresponding federal rules, with no intended change in meaning.

The new exception added to Subparagraph (6) of Paragraph B was taken verbatim from federal Rule 804(b)(6), which was adopted in 1997, and reflects a substantial body of state and federal case law. *See, e.g., State v. Romero*, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694; *State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699 (2004). It lessens a party's ability to benefit from intentionally making a witness unavailable.

[Amended by Supreme Court Order No. 10-8300-042, effective January 31, 2011; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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 NMRA). Those cases decided pursuant to former Rule 43(a), N.M.R. Civ. P., but applicable to this rule, have been noted below.

Cross references. — For privileges generally, *see* Rules 11-501 to 11-513 NMRA and Sections 38-6-6 and 38-6-7 NMSA 1978.

For admissibility of land surveys upon death of surveyor, *see* Section 4-42-12 NMSA 1978.

The 1993 amendment, effective December 1, 1993, made gender neutral changes throughout the rule.

The 1995 amendment, effective January 1, 1995, added "(or in the case of a hearsay exception under Subparagraphs (2), (3) or (4) of Paragraph B, the declarant's attendance or testimony)" in Paragraph A(5), deleted former Subparagraph (2) of Paragraph B relating to statements of recent perception, and redesignated the remaining subparagraphs in Paragraph B accordingly.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-042, effective January 31, 2011, deleted the former language of Paragraph B(3) which excepted statements that are contrary to a declarant's pecuniary or proprietary interest, that subject a declarant to civil or criminal liability, or that render invalid a claim by a declarant against another which a declarant would not make unless the declarant believed the statements to be true and which provided that statements exposing a declarant to criminal liability and offered to exculpate the accused were not admissible unless they were corroborated by circumstances that indicated they were trustworthy; and added the current language.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, effective June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

I. GENERAL CONSIDERATION.

Crawford v. Washington, 124 S. Ct. 1354 (2004) interprets the federal constitution in a way that grants broader rights to criminal defendants. *State v. Duarte*, 2004-NMCA-117, 136 N.M. 404, 98 P.3d 1054.

Crawford v. Washington, 124 S.Ct. 1354 (2004) should be applied in New Mexico. *State v. Duarte*, 2004-NMCA-117, 136 N.M. 404, 98 P.3d 1054.

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).

II. UNAVAILABILITY.

Impeachment of unavailable witness's testimony to introduce other inadmissible hearsay. — Where defendant was charged with the rape and murder of the victim; the trial court admitted the preliminary hearing testimony of an unavailable witness; at the preliminary hearing, the witness denied that the witness had told an acquaintance that the witness saw defendant choke and rape the victim; the trial court permitted the state to call the acquaintance to impeach the witness's denial; and the acquaintance testified that the witness told the acquaintance that the witness saw defendant choke and rape the victim, the trial court erred in admitting the otherwise inadmissible hearsay of the acquaintance under the auspices of the state's impeachment of the preliminary hearing testimony of the unavailable witness. *State v. Lopez*, 2011-NMSC-035, 150 N.M. 179, 258 P.3d 458.

Admission of unavailable accomplice's custodial statements inculpating defendant under hearsay exception for statements against penal interest was not harmless error because defendant had no prior opportunity to cross-examine accomplice, pursuant to U.S. Supreme Court's holding in *Crawford v. Washington*, 124 S.Ct. 1354 (2004). *State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699.

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 Paragraph 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 NMRA. *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).

Preliminary hearing testimony. — Where defendant was charged with the rape and murder of the victim; the trial court admitted the preliminary hearing testimony of an unavailable witness; defendant had the opportunity to cross-examine the witness at the preliminary hearing; and defendant had the same motive for cross-examining the witness at the preliminary hearing and at trial to show that defendant did not rape and murder the victim, the trial court did not abuse its discretion in admitting the witness's preliminary hearing testimony. *State v. Lopez*, 2011-NMSC-035, 150 N.M. 179, 258 P.3d 458.

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).

Failure to recall making statement. — When a witness testifies consistently with the substance of a prior written statement, but fails to recall writing the statement, the witness is not unavailable within the meaning of Paragraph A. *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

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 stress. — State successfully introduced into evidence transcript of doctor's testimony from the first trial on the basis of his unavailability, due to significant stress factors resulting from his participation in military operations overseas. *State v. Aragon*, 116 N.M. 291, 861 P.2d 972 (Ct. App. 1993).

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).

Unavailability of child. — Where a defendant was charged with criminal sexual contact and sexual penetration of a child under the age of 13, and the determination of the child's competency by the district court was made without adequate inquiry into the elements of competency at a meaningful time, the appropriate remedy was to remand for a competency hearing. *State v. Macias*, 110 N.M. 246, 794 P.2d 389 (Ct. App. 1990).

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).

Burden is upon state to prove unavailability of its witness. *State v. Ewing*, 97 N.M. 235, 638 P.2d 1080 (1982).

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).

"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).

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.

Witness claims lack of memory. — Where at defendant's third trial for murder, a witness for the state stated that the witness had no memory of the events on the day of the murders and that the witness felt threatened; the trial court permitted the witness's testimony from defendant's first trial to be played; at defendant's first trial, the witness voluntarily testified and was cross-examined; and the trial court permitted defendant to cross-examine the witness after the recording was played, the witness's prior testimony was admissible under the prior testimony exception to the hearsay rule. *State v. Johnson*, 2010-NMSC-016, 148 N.M. 50, 229 P.3d 523.

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, 86 S. Ct. 1869, 16 L. Ed. 2d 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).

Preliminary hearing testimony of a witness unavailable for trial was admissible even though defendant claimed his motive for questioning her had changed by the time of the trial, because defendant was given the opportunity to cross-examine the witness at the preliminary hearing and his failure to due so because of a tactical decision does not operate to remove the testimony from this hearsay exception. *State v. Gonzales*, 113 N.M. 221, 824 P.2d 1023 (1992).

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).

Opportunity and similar motive to cross-examine. — Where defendant was freely allowed to cross-examine prosecution witness without any restrictions at the preliminary hearing about whether any crime was committed and whether defendant was involved, defendant had an opportunity and similar motive to cross-examine the witness at the preliminary hearing as defendant would have at trial, there were no circumstances showing a real difference in defendant's motive to cross-examine the witness differently at the preliminary hearing than at trial, and the witness later became unavailable to testify at trial, defendant's recorded preliminary hearing testimony was admissible as an exception to the hearsay rule. *State v. Henderson*, 2006-NMCA-059, 139 N.M. 595, 136 P.3d 1005, cert. denied, 2006-NMCERT-005.

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).

Grand jury testimony held not admissible. — Even though a witness was unavailable, her grand jury testimony that was in conflict with the testimony of a state's witness was not admissible under the former testimony exception, since the state did not examine her at the grand jury hearing as it would have at the trial, and the exclusion of the testimony did not prejudice defendant. *State v. Baca*, 1997-NMSC-045, 124 N.M. 55, 946 P.2d 1066.

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 NMRA.)

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).

Deposition giving details declarant no longer remembers. — The witness's lack of memory made him unavailable to testify. A review of the witness's testimony supports this ruling - the witness repeatedly stated he could not remember events and details about which he previously testified during the deposition. Accordingly, the deposition was properly admitted as former testimony of a declarant who is unavailable as a witness under Subparagraph (1) of Paragraph B of Rule 11-804 NMRA. *State v. Gonzales*, 112 N.M. 544, 817 P.2d 1186 (1991).

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).

Objection waived. — Where defense counsel made the tactical decision that, in the absence of live testimony by a defendant's wife, the prior testimony of his wife would be advantageous to the defendant, there was neither plain error nor fundamental error in admitting the testimony, even though the evidence would have been inadmissible if either party had objected. *State v. Crislip*, 110 N.M. 412, 796 P.2d 1108 (Ct. App. 1990), overruled on other grounds, *Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993).

C. STATEMENT OF RECENT PERCEPTION.

Paragraph 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.

Victim's statements to 911 operator and police officer were admissible as a dying declaration. — Where an altercation occurred between defendant and the victim and defendant shot the victim; the victim told the 911 operator that defendant shot the victim; the victim also told a police officer that defendant shot the victim; the victim was shot multiple times and was lying in a fetal position, bleeding, complaining of pain in the abdominal area, and experiencing shallow breaths; there was blood in the victim's urine; the victim tried to hold the victim's torso up but was unable to do so; the victim expressed concern for the victim's children and called out for the victim's mother; and the victim died six hours later, the victim's statements were admissible as a dying declaration. *State v. Largo,* 2012-NMSC-015, 278 P.3d 532.

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. — A co-defendant's hearsay statements to a friend that the co-defendant murdered the decedent and that defendant told him to shoot the decedent were admissible as statements against the co-defendant's penal interest. *State v. Silva*, 2007-NMCA-117, 142 N.M. 686, 168 P.3d 1110, cert. granted, 2007-NMCERT-008.

Rule satisfies Confrontation Clause. — The penal interest exception within the meaning of Paragraph (B)(3) is firmly rooted hearsay exception for purposes of satistfying the indicia of reliability requirement of the Confrontation Clause, U.S. Const. amend. VI. *State v. Martinez-Rodriguez*, 2001-NMSC-029, 131 N.M. 47, 33 P.3d 267, cert. denied, 535 U.S. 937, 152 L. Ed. 2d 225, 122 S. Ct. 1317 (2002).

Confrontation rights under U.S. Const. amend. VI are not violated by the penal interest exception to the hearsay rule, as it is a firmly rooted hearsay exception for purposes of satisfying the indicia of reliability requirement of the Confrontation Clause. *State v. Reyes*, 2002-NMSC-024, 132 N.M. 576, 52 P.3d 948.

Rationale underlying Paragraph B(3) of this rule is that a statement of fact distinctly against one's interest is unlikely to be false, and is therefore admissible even without oath and cross-examination. *State v. Duarte*, 2004-NMCA-117, 136 N.M. 404, 98 P.3d 1054.

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).

In determining whether statement is against penal interest, consideration is given whether the statement is offered in exchange for leniency, and whether it shift blame to another. *State v. Duarte*, 2004-NMCA-117, 136 N.M. 404, 98 P.3d 1054

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).

Although the circumstances surrounding the making of the statement are certainly relevant in determining whether a reasonable person would falsely make the statement, other types of evidence corroborating and contradicting the hearsay statement are irrelevant to the admissibility of a statement incriminating the accused. *State v. Gutierrez*, 119 N.M. 658, 894 P.2d 1014 (Ct. App. 1995).

Evaluation. — Declarations against interest must be evaluated on a statement-by-statement basis. *State v. Torres*, 1998-NMSC-052, 126 N.M. 477, 971 P.2d 1267.

In addition to conducting a statement-by-statement review, a trial court should also examine the statement in light of all surrounding circumstances. *State v. Martinez-Rodriguez*, 2001-NMSC-029, 131 N.M. 47, 33 P.3d 267, cert. denied, 535 U.S. 937, 152 L. Ed. 2d 225, 122 S. Ct. 1317 (2002).

Standard of review. — The appropriate inquiry for an admission of evidence under Paragraph B(3) is to determine whether the trial court's ruling constitutes an abuse of discretion. *State v. Benavidez*, 1999-NMSC-041, 128 N.M. 261, 992 P.2d 274.

Self-exculpatory statements. — Collateral and self-exculpatory statements of the declarant are inadmissible. *State v. Torres*, 1998-NMSC-052, 126 N.M. 477, 971 P.2d 1267.

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).

Statements made by co-defendant. — Trial court correctly ruled exculpatory statements made by co-defendant inadmissible as hearsay, where the only corroborating circumstance under Paragraph B(3) was the defendant's confirmation of his statements. *State v. Urias*, 1999-NMCA-042, 127 N.M. 75, 976 P.2d 1027.

Because the trial court could reasonably have determined that co-defendant's statements incriminated both co-defendant and defendant, and the statements were not made in an attempt to curry favor with the authorities, the trial court did not err in holding that the statements were admissible as statements against penal interest. *State v. Alvarez-Lopez*, 2003-NMCA-039, 133 N.M. 404, 62 P.3d 1286.

Statement of co-conspirator. — A co-conspirator's declaration that defendant paid him for the killings qualified as a statement against penal interest because it implicated him for the crime of first degree murder and exposed him to liability for other crimes and, in context, provided a motive and supported an inference that he killed the victims. *State v. Gonzales*, 1999-NMSC-033, 128 N.M. 44, 989 P.2d 419, cert. denied, 529 U.S. 1025, 120 S. Ct. 1434, 146 L. Ed. 2d 323 (2000).

The first paragraph of a note written by a co-conspirator which discussed the need for the four co-conspirator's to develop a consistent cover story was against the declarant's interest in that it revealed knowledge of the crimes and a consciousness of guilt. *State v. Martinez-Rodriguez*, 2001-NMSC-029, 131 N.M. 47, 33 P.3d 267, cert. denied, 535 U.S. 937, 152 L. Ed. 2d 225, 122 S. Ct. 1317 (2002).

Statement of accomplice. — An out-of-court statement made by defendant's accomplice, implicating defendant, was not admissible when the accomplice did not testify and was not subject to cross-examination. *State v. Duarte*, 2004-NMCA-117, 136 N.M. 404, 98 P.3d 1054.

Where the accomplice admitted attempting to sell marijuana to an undercover police officer, but claimed that defendant had given him directions about how to complete the sale, the statement was inadmissible. *State v. Duarte*, 2004-NMCA-117, 136 N.M. 404, 98 P.3d 1054.

Statement made to friend of declarant. — Statement by a declarant to a friend in whom she often confided implicating herself, along with the defendant and two others in an armed robbery, was admissible as a statement against penal interest. *State v. Gutierrez*, 119 N.M. 658, 894 P.2d 1014 (Ct. App. 1995).

Where a witness testified that her good friend, and accused's girlfriend, told the witness that she had been with the accused, had planned the robbery, and had driven to the service station where the robbery took place with the accused and others, and the girlfriend told the witness that she stayed in the car while the accused went into the station and that he had a knife, the trial court had not abused its discretion in admitting the statement under Paragraph B(4) of this rule. *Gutierrez v. Dorsey*, 105 Fed. Appx. 229 (10th Cir. 2004).

Statements of fellow employees. — In a proceeding for termination of a city employee, non-self-inculpatory statements of absent coemployees of the employee were not admissible under Subparagraph (4) of Paragraph B. *Chavez v. City of Albuquerque*, 1997-NMCA-111, 124 N.M. 239, 947 P.2d 1059.

Statements to law enforcement officer. — Deceased witness's statements to a law enforcement officer containing both self-inculpatory and nonself-inculpatory declarations were not admissible under Subparagraph (3) of Paragraph B. *State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234.

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.

Notice required. — Paragraph X of Rule 11-803 NMRA and Paragraph B(5) of this rule, the two catchall exceptions to the hearsay rule, require prior notice to an adverse party. *State v. Frank G.*, 2005-NMCA-026, 137 N.M. 137, 108 P.3d 534, cert. granted, 2005-NMCERT-002.

Construction of "other exceptions" provision. — Subparagraph (6) of Paragraph B of this rule, like Rule 11-803X NMRA, 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).

Statements offered under the New Mexico catch-all exception are presumptively unreliable and inadmissible under the confrontation clause unless they possess sufficient guarantees of trustworthiness to permit their admission into evidence. *State v. Lopez*, 2000-NMSC-003, 128 N.M. 410, 993 P.2d 727.

A catch-all exception should not be used as a fall-back for second rate evidence that does not pass muster under other exceptions; it should be a method by which evidence that is of equal reliability but does not fall under a "firmly rooted" exception is admitted. *State v. Gurule*, 2004-NMCA-008, 134 N.M. 804, 82 P.3d 975.

In determining the existence of "particularized guarantees of trustworthiness" required to admit hearsay when the established and named hearsay exceptions fail, corroborating evidence may not be considered; the court must look to see if the totality if circumstances surrounding the hearsay statements provide the required guarantees. *State v. Gurule*, 2004-NMCA-008, 134 N.M. 804, 82 P.3d 975.

In criminal cases. — The "other" hearsay exceptions of Rules 11-803 and 11-804 NMRA 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).

Testimony of deceased witness admissible. — The admission of hearsay testimony of a deceased witness was proper in a murder prosecution where it was offered to show the actions of the defendant during a relevant time frame, it was more probative on that point than any other evidence that could be produced, and its probative value was not outweighed by its prejudicial effect. *State v. Mora*, 1997-NMSC-060, 124 N.M. 346, 950 P.2d 789.

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).

Testimony of deceased witness not admissible. — Statement to an investigator by a witness who died approximately a month before trial was properly excluded where the trial court found that it was unreliable. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

Murdered victim's opinion on sexual act. — In a prosecution for murder and criminal sexual penetration in which the defendant was accused of forcing the victim to have

anal sexual intercourse after she had refused to do so willingly, testimony by the victim's cousin and close friend that the victim had stated she thought anal sex was disgusting and not intended by God was admissible. *State v. Williams*, 117 N.M. 551, 874 P.2d 12 (1994).

Error found. — Where defendants were charged with kidnapping and rape, the trial court's decision to allow an out-of-court alibi statement into evidence was error because it lacked any circumstantial guarantees of trustworthiness, and because it lacked sufficient indicia of reliability to satisfy confrontation concerns. Thus, admission of the out-of-court statement denied defendants their constitutional right to confront the person making the statement. *State v. Pacheco*, 110 N.M. 599, 798 P.2d 200 (Ct. App. 1990).

Even though admission of the hearsay statement of a witness was error, it was harmless beyond a reasonable doubt because the testimony of other witnesses, in addition to physical evidence, provided substantial evidence to support the conviction without reference to that statement. *State v. Lopez*, 2000-NMSC-003, 128 N.M. 410, 993 P.2d 727.

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).

For annual survey of New Mexico law of evidence, 19 N.M.L. Rev. 679 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29 Am. Jur. 2d Evidence § 690 et seq.; 29A Am. Jur. 2d Evidence § 906 et seq.; 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.

Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804B(5), 75 A.L.R.4th 199.

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.

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.

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.

When do corroborating circumstances clearly indicate trustworthiness of hearsay statement tending to expose declarant to criminal liability and offered to exculpate accused, so as to permit admission of statement under Rule 804(b)(3) of Federal Rules of Evidence (28 USCS Appx), 125 A.L.R. Fed. 477.

When is witness "unavailable" for purposes of admission of evidence under Rule 804 of Federal Rules of Evidence, providing hearsay exception where declarant is unavailable, 174 A.L.R. Fed. 1

23 C.J.S. Criminal Law §§ 867 et seq., 951, 960; 31A C.J.S. Evidence §§ 265, 269, 273 et seq.; 32 C.J.S. Evidence §§ 349 et seq., 478.

11-805. Hearsay within hearsay.

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-805 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 805 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes.

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 the declarant's credibility.

When a hearsay statement – or a statement described in Rule 11-801(D)(2)(c), (d), or (e) NMRA – has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

[As amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-806 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 806 of the Federal Rules of Evidence.

Cross references. — For impeaching generally, *see* Rules 11-607 to 11-609 NMRA.

The 1993 amendment, effective December 1, 1993, substituted "the declarant's" for "his" and "the declarant" for "he" in the second sentence, and substituted "the declarant" for "him" in the last sentence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

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 § 705 et seq.

98 C.J.S. Witnesses §§ 491, 538, 576, 629.

11-807. Residual exception.

A. **In general.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 11-803 NMRA or Rule 11-804 NMRA:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

B. **Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

[Approved by Supreme Court Order 07-8300-23, effective November 1, 2007; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-807 NMRA has been amended to be consistent with the restyling of the federal rules of evidence to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

This "catch-all" hearsay exception provision applies to Rule 11-803 NMRA and Rule 11-804 NMRA and replaces the redundant provisions previously repeated in both of those rules.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 807 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes.

Statements about past events and present thoughts were not admissible. — Where defendant was charged with first-degree murder; defendant claimed the defendant was acting in self-defense; to support its theory of deliberate murder, the state introduced the victim's diary into evidence to show that defendant was increasingly violent and controlling towards the victim, including specific acts of domestic violence against the victim; diary entries such as "Im scared", "Im so mad an sad an confused", "my boyfriend hit me cuz we were argueing so he gave me a fat lip and a black eye an a big bruzed on my check bone", "da 17th was the scaryest day of my life", and "I still don't know if I should be wit him Im scared 2 even see him" were not admissible under Rule 110-83 NMRA; and the state made no attempt to show why the diary should be considered more or less reliable than any other diary and never asked the trial court to address any specific criteria of the residual exception, the diary was not admissible under the residual exception. *State v. Leyba*, 2012-NMSC-037, 289 P.3d 1215.

Verified allegations in a complaint. — Where registered shareholders sold and transferred their certificates of shares in the defendant corporation; the certificates were

subsequently transferred to plaintiff in 1989; the registered shareholders obtained replacement certificates in 1987; when plaintiff attempted to register the original certificates in plaintiff's name in 1990, the corporation refused to register the original certificates; when plaintiff discovered in 2007 that the corporation had issued replacement certificates to the registered shareholders, plaintiff filed suit for fraud; in plaintiff's verified complaint, plaintiff alleged that the chief executive officer of the corporation had informed plaintiff that plaintiff's certificates would be noted in the corporation's records; plaintiff died during the course of the litigation; plaintiff's estate contended that the verified statements in plaintiff's complaint were sworn statements that supported plaintiff's argument that the statute of limitations had been tolled; and the estate offered evidence that tended to corroborate plaintiff's verified statements, but did not offer any evidence of the circumstances surrounding the making of plaintiff's statements that would tend to guarantee their trustworthiness, the residual hearsay exception did not apply to the statements. *Wilde v. Westland Dev. Co., Inc.*, 2010-NMCA-085, 148 N.M. 627, 241 P.3d 628.

ARTICLE 9
Authentication and Identification

11-901. Requirement of authentication or identification.

A. **In general.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

B. **Examples.** The following are examples only – not a complete list – of evidence that satisfies the requirement:

(1) **Testimony of a witness with knowledge.** Testimony that an item is what it is claimed to be.

(2) **Nonexpert opinion about handwriting.** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) **Comparison by an expert witness or the trier of fact.** A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) **Distinctive characteristics and the like.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) **Opinion about a voice.** An opinion identifying a person's voice – whether heard firsthand or through mechanical or electronic transmission or recording – based

on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) **Evidence about a telephone conversation.** For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(a) a particular person, if circumstances, including self-identification, show that the person answering was the one called, or

(b) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) **Evidence about public records.** Evidence that

(a) a document was recorded or filed in a public office as authorized by law, or

(b) a purported public record or statement is from the office where items of this kind are kept.

(8) **Evidence about ancient documents or data compilations.** For a document or data compilation, evidence that it

(a) is in a condition that creates no suspicion about its authenticity,

(b) was in a place where, if authentic, it would likely be, and

(c) is at least twenty (20) years old when offered.

(9) **Evidence about a process or system.** Evidence describing a process or system and showing that it produces an accurate result.

(10) **Methods provided by a statute or rule.** Any method of authentication or identification allowed by a statute or a rule prescribed by the Supreme Court.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-901 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 901 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

Chain of custody. — Where, during a search incident to arrest, the arresting police officer found on defendant a plastic "bindle" containing a white crystalline substance which the officer recognized as methamphetamine; the arresting officer observed another officer perform a presumptive field test on the substance; the arresting officer took the substance into evidence and transferred the substance to an evidence technician who sent the substance to the state laboratory; an analyst in the drug analysis unit obtained the evidence from the laboratory's evidence custodian; the analyst performed two tests on the evidence and concluded that the substance was methamphetamine; the analyst sealed the evidence so that it would be apparent if anyone tried to tamper with or alter it and returned the evidence to the evidence custodian, there was sufficient evidence to support the verdict that the substance seized from defendant was the same substance that was tested by the state laboratory and determined to be methamphetamine. *State v. Rodriguez*, 2009-NMCA-090, 146 N.M. 824, 215 P.3d 762.

General rule requiring authentication of records. — Unless records fall within the narrow exception for self-authenticating documents (set out in Rule 11-902 NMRA), they must be authenticated. Thus, public records or reports admissible under Rule 11-803 NMRA (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), overruled on other grounds, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

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), overruled on other grounds, *Ellingwood v. N.N. Investors Life Ins. Co.*, 111 N.M. 301, 805 P.2d 70 (1991).

Foundation for admitting telephone conversations. — Facts support admissibility of telephone conversation between defendant and witness. *State v. Garcia*, 110 N.M. 419, 796 P.2d 1115 (Ct. App. 1990).

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*, 95 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).

Failure to lay foundation for admission of possible bullet. — Where defendant, who was charged with the murder of the victim, claimed that the victim shot at defendant and defendant shot the victim is self-defense; defendant sought to introduce into evidence an unidentified hard fragment found in the lining of the jacket defendant wore at the time of the shooting in an attempt to bolster defendant's claim that the victim shot defendant in the shoulder; and defendant did not offer any evidence that the unidentified fragment might have been a bullet, defendant failed to lay a foundation for the admissibility of the unidentified fragment that would show how the unidentified fragment would be relevant to the claim of self-defense. *State v. Arrendondo,* 2012-NMSC-013, 278 P.3d 517.

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 a 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).

Police officer deemed witness with knowledge sufficient to provide required authentication of sales receipt for defendant's gun. *State v. Rivera*, 115 N.M. 424, 853 P.2d 126 (Ct. App. 1993).

Where plaintiff conceded that the almost illegible document attached to defendant's motion exhibited the exact characteristics of the document that plaintiff stated he had signed, district court correctly concluded that the document attached to defendant's motion was what defendant claimed it was. *Murken v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-080, 140 N.M. 68, 139 P.3d 864.

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).

Court documents. — The testimony of an attorney who has participated in civil litigation and can adequately identify documents pertaining to that litigation should be sufficient to support admission of the documents. *Spear v. McDermott*, 1996-NMCA-048, 121 N.M. 609, 916 P.2d 228.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29A Am. Jur. 2d Evidence § 934 et seq.; 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.

Cautionary instructions to jury as to reliability of, or factors to be considered in evaluating, voice identification testimony, 17 A.L.R.5th 851.

Admissibility of evidence of voice identification of defendant as affected by allegedly suggestive voice lineup procedures, 55 A.L.R.5th 423.

Authentication of bullets and other inorganic substances removed from human body for purposes of analysis, 79 A.L.R.5th 237.

Admissibility in evidence of aerial photographs, 85 A.L.R.5th 671.

22A C.J.S. Criminal Law § 799 et seq.; 31A C.J.S. § 211; 32 C.J.S. Evidence § 528 et seq.; 32A C.J.S. Evidence §§ 801 et seq., 870 et seq., 982, 1010.

11-902. Evidence that is self-authenticating.

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) **Domestic public documents that are sealed and signed.** A document that bears

(a) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; a Federally Recognized American Indian Tribe or Nation; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above, and

(b) a signature purporting to be an execution or attestation.

(2) **Domestic public documents that are not sealed but are signed and certified.** A document that bears no seal if

(a) it bears the signature of an officer or employee of an entity named in Rule 11-902(1)(a) NMRA, and

(b) another public officer who has a seal and official duties within that same entity certifies under seal – or its equivalent – that the signer has the official capacity and that the signature is genuine.

(3) **Foreign public documents.** A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester – or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consult general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either

(a) order that it be treated as presumptively authentic without final certification, or

(b) allow it to be evidenced by an attested summary with or without final certification.

(4) **Certified copies of public records.** A copy of an official record – or a copy of a document that was recorded or filed in a public office as authorized by law – if the copy is certified as correct by

(a) the custodian or another person authorized to make the certification, or

(b) a certificate that complies with Rule 11-902(1), (2), or (3), a statute, or a rule prescribed by the Supreme Court.

(5) **Official publications.** A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) **Newspapers and periodicals.** Printed material purporting to be a newspaper or periodical.

(7) **Trade inscriptions and the like.** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) **Acknowledged documents.** A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) **Commercial paper and related documents.** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) **Presumptions under a statute.** A signature, document, or anything else that a statute declares to be presumptively or prima facie genuine or authentic.

(11) **Certified domestic records of a regularly conducted activity.** The original or a copy of a domestic record that meets the requirements of Rule 11-803(6)(a) to (c) NMRA, as shown by a certification of the custodian or another qualified person that complies with a statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record – and must make the record and certification available for inspection – so that the party has a fair opportunity to challenge them.

(12) **Certified foreign records of a regularly conducted activity.** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 11-902(11) NMRA, modified as follows: the certification, rather than complying with a statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 11-902(11) NMRA.

[As amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order 07-8300-23, effective November 1, 2007; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-902 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility. The internal lettering of the rule was also changed to conform to the numbering of the federal rule. The committee added the seal of a Federally Recognized American Indian Tribe or Nation to the list of seals in Paragraph (1)(a) of this rule.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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 NMRA), concerning authentication documents.

Cross references. — For admissibility of duplicates and other evidence of contents, *see* Rules 11-1001 to 11-1005 NMRA.

For admissibility of electronic records and signatures, *see* Section 14-16-13 NMSA 1978.

For admissibility of abstracts of title, *see* Sections 38-7-3 and 38-7-4 NMSA 1978.

For judicial notice, *see* Rule 1-044 NMRA.

The 1993 amendment, effective December 1, 1993, substituted "the official" for "his official" in Paragraph B, substituted "an official" for "his official" in Paragraph C, inserted "an" preceding "embassy" and substituted "court" for "judge" in Subparagraph C(2), and substituted "or any Supreme Court rule" for "or rule adopted by the supreme court" at the end of Paragraph D.

The 2007 amendment, approved by Supreme Court Order 07-8300-23, effective November 1, 2007, added new Paragraphs K and L that incorporate the provisions added to the federal rule on self-authentication that were added to the federal rules in 2000, setting forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. *See* the 2007 amendment to Rule 11-803(F) NMRA. The notice requirements are

intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

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), overruled on other grounds, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

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. *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. — 29A Am. Jur. 2d Evidence § 1180 et seq.; 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.; 32A C.J.S. Evidence §§ 819, 820, 827, 834 et seq., 883, 903, 967, 1003.

11-903. Subscribing witness' testimony.

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-903 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 903 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29A Am. Jur. 2d Evidence § 1038 et seq.

32A C.J.S. Evidence §§ 831 et seq., 1010.

ARTICLE 10
Contents of Writings, Recordings and Photographs

11-1001. Definitions that apply to this article.

In this article

A. A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

B. A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

C. A "photograph" means a photographic image or its equivalent stored in any form.

D. An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout – or other output readable by sight – if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

E. A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

[As amended, effective April 1, 1976; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1001 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 1001 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

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, cert. denied, 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).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Admissibility of computer generated animation, 111 A.L.R.5th 529.

11-1002. Requirement of the original.

An original writing, recording, or photograph is required in order to prove its content unless these rules or a statute provides otherwise.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1002 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 1002 of the Federal Rules of Evidence.

Cross references. — For admissibility of electronic records and signatures, *see* Section 14-16-13 NMSA 1978.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

Applicability of best evidence rule. — Whether the best evidence rule applies depends on what the document is intended to prove. *Naranjo v. Paull*, 111 N.M. 165, 803 P.2d 254 (1990).

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).

Best evidence 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).

Best evidence rule inapplicable where documents used 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).

Best evidence rule inapplicable where documents used to prove lost insurance coverage. — Where the plaintiff in a personal injury action sought only to prove the fact of lost insurance coverage rather than the contents of the insurance policies, there was no need to have the original policies submitted into evidence. The best evidence rule is applicable only when a party seeks to prove the contents of a writing. *Gutierrez v. Albertsons, Inc.*, 113 N.M. 256, 824 P.2d 1058 (Ct. App. 1991).

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).

Rule not violated by offering limited partnership tax forms. — Where the purpose of offering limited partnership tax forms into evidence was to prove how much income was actually received by the limited partners, the best evidence rule did not foreclose oral proof directed to the same issue. *Naranjo v. Paull*, 111 N.M. 165, 803 P.2d 254 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29A Am. Jur. 2d Evidence § 1049 et seq.

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.

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.

Admissibility of visual recording of event or matter giving rise to litigation or prosecution, 41 A.L.R.4th 812.

23 C.J.S. Criminal Law § 1025 et seq.; 32A C.J.S. Evidence §§ 1061, 1080, 1081, 1086, 1087, 1089, 1095 et seq.

11-1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1003 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

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 NMRA), relating to the admissibility of copies of public documents.

Cross references. — For admissibility of electronic records and signatures, *see* Section 14-16-13 NMSA 1978.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the rule to make stylistic changes.

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).

Business ledgers not "copies". — The defendant's reliance on best evidence rule as grounds of exclusion of ledger book on the issue of business revenues was misplaced. *Central Sec. & Alarm Co. v. Mehler*, 1996-NMCA-060, 121 N.M. 840, 918 P.2d 1340.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29A Am. Jur. 2d Evidence § 1085 et seq.

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; 32A C.J.S. Evidence §§ 873, 876, 877, 878, 879, 1027, 1035, 1041.

11-1004. Admissibility of other evidence of content.

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if

A. all the originals are lost or destroyed, and not by the proponent acting in bad faith;

B. an original cannot be obtained by any available judicial process;

C. the party against whom the original would be offered has control of the original, was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing, and fails to produce it at the trial or hearing; or

D. the writing, recording, or photograph is not closely related to a controlling issue.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1004 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 1004 of the Federal Rules of Evidence.

The 1993 amendment, effective December 1, 1993, substituted "that party" for "he" in two places in Paragraph C.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

Best evidence rule. — Where the defendant and another person were driving separate vehicles in a cooperative operation known as using “tandem vehicles” to smuggle drugs into the United States; the defendant was driving a Mustang and the other person was driving a Nissan; the officers stopped the defendant and did not discover any drugs; the officers later stopped the Nissan and discovered marijuana; a Border Patrol Agent testified at trial that the agent observed a registration document in the glove box of the Nissan and obtained a printout of a registration check through the National Law Enforcement system which showed that the defendant owned the Nissan; and the documents referred to by the agent were not introduced at trial and the State provided no explanation as to the unavailability of the documents, the trial court erred in admitting the testimony of the agent with regard to the documents. *State v. Lopez*, 2009-NMCA-044, 146 N.M. 98, 206 P.3d 1003.

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. *Sundberg v. Hurley*, 89 N.M. 511, 554 P.2d 673 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

Business ledgers not "copies". — The defendant's reliance on best evidence rule as grounds of exclusion of ledger book on the issue of business revenues was misplaced. *Cent. Sec. & Alarm Co. v. Mehler*, 1996-NMCA-060, 121 N.M. 840, 918 P.2d 1340.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29A Am. Jur. 2d Evidence § 1053 et seq.

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 § 1054 et seq.

11-1005. Copies of public records to prove content.

The proponent may use a copy to prove the content of an official record – or of a document that was recorded or filed in a public office as authorized by law – if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 11-902(4) NMRA or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1005 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

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 NMRA), concerning proof of official record.

Cross references. — For admissibility of abstracts of title, *see* Sections 38-7-3 and 38-7-4 NMSA 1978.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, rewrote the title of the rule and the rule to make stylistic changes.

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. — 29A Am. Jur. 2d Evidence § 1082 et seq.

23 C.J.S. Criminal Law § 1025 et seq.; 32A C.J.S. Evidence §§ 834 et seq., 859, 860, 863, 891, 924, 925; 82 C.J.S. Statutes §§ 85, 90, 450, 451, 457.

11-1006. Summaries to prove content.

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. The court may order the proponent to produce them in court.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1006 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 1006 of the Federal Rules of Evidence.

The 1993 amendment, effective December 1, 1993, substituted "court" for "judge" in the last sentence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

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).

Foundation for summary. — An adequate foundation for admission of a summary was established by a witness who did not personally prepare the summary but who had a supervisory role and knowledge of how it was compiled. *Cafeteria Operators v. Coronado - Santa Fe Assocs.*, 1998-NMCA-005, 124 N.M. 440, 952 P.2d 435.

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).

Evidentiary standard of proof. — The rationale of the United States Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), holding that the burden of proof at summary judgment proceedings is "clear and convincing evidence," rather than the preponderance of the evidence standard, has not been adopted in New Mexico. *Bartlett v. Mirabal*, 2000-NMCA-036, 128 N.M. 830, 999 P.2d 1062.

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. — 29A Am. Jur. 2d Evidence § 1059 et seq.

Admissibility of evidence summaries under Uniform Evidence Rule 1006, 59 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.

32A C.J.S. Evidence §§ 873, 876, 877, 878, 1027, 1035, 1041.

11-1007. Testimony or statement of a party to prove content.

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1007 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 1007 of the Federal Rules of Evidence.

The 1993 amendment, effective December 1, 1993, substituted "that party's" for "his" near the end of the rule.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29A Am. Jur. 2d Evidence § 1049 et seq.

32A C.J.S. Evidence § 1119.

11-1008. Functions of the court and jury.

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 11-1004 or 11-1005 NMRA. But in a jury trial, the jury determines – in accordance with Rule 11-104(B) NMRA – any issue about whether

A. an asserted writing, recording, or photograph ever existed,

B. another one produced at the trial or hearing is the original, or

C. other evidence of content accurately reflects the content.

[As amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1007 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 1008 of the Federal Rules of Evidence.

The 1993 amendment, effective December 1, 1993, substituted "court" for "judge" in the rule heading and near the end of the introductory paragraph.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

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. — 29A Am. Jur. 2d Evidence § 1049 et seq.

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 the rules.

A. **To courts and judges.** These rules apply to proceedings before New Mexico district courts, metropolitan court, magistrate courts, municipal courts, and special masters, referees, and child support hearing officers appointed by the court.

B. **To cases and proceedings.** These rules apply in civil cases and proceedings, criminal cases and proceedings, and contempt proceedings, except those in which the court may act summarily.

C. **Rules on privilege.** The rules on privilege apply to all stages of a case or proceeding.

D. **Exceptions.** These rules - except for those on privilege - do not apply to the following:

(1) the court's determination, under Rule 11-104(A) NMRA, on a preliminary question of fact governing admissibility;

(2) grand jury proceedings, and

(3) miscellaneous proceedings, such as

(a) extradition or rendition,

(b) issuing an arrest warrant, criminal summons, or search warrant,

(c) sentencing by the court without a jury,

(d) granting or revoking probation or supervised release,

(e) considering whether to release on bail or otherwise,

(f) dispositional hearings in children's court proceedings, and

(g) the following abuse and neglect proceedings:

(i) issuing an ex parte custody order;

(ii) custody hearings;

(iii) permanency hearings; and

(iv) judicial review proceedings.

[As amended effective July 1, 1980; December 1, 1993; November 17, 1999; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012; by Supreme Court Order No. 13-8300-003, effective for all cases pending or filed on or after May 5, 2013.]

Committee commentary. — The language of Rule 11-1101 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective

December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 1101 of the Federal Rules of Evidence.

Cross references. — For issuance of *ex parte* custody orders, *see* Section 32A-4-16 NMSA 1978.

For provisions relating to custody hearings, *see* Section 32A-4-18 NMSA 1978.

For permanency hearings, *see* Section 32A-4-25.1 NMSA 1978.

The 1993 amendment, effective December 1, 1993, rewrote the last sentence of Paragraph A, which read "The word 'judge' in these rules includes magistrates, and masters, and referees appointed by the court"; substituted "court" for "judge" in Paragraph B and Subparagraph D(1); and inserted "extradition or rendition" in Subparagraph D(2).

The 1999 amendment, effective November 17, 1999, inserted "district" in the second sentence in Paragraph A and added "dispositional hearings in children's court proceedings; and issuance of *ex parte* custody orders, custody hearings, permanency hearings and judicial review proceedings in abuse and neglect proceedings" at the end of Paragraph D(2).

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, modified the title of the rule and rewrote the rule to make stylistic changes.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-003, effective May 5, 2013, provided that the rules do not apply to dispositional hearings in children’s court proceedings and certain abuse and neglect proceedings; deleted former Item (f) of Subparagraph (3) of Paragraph D, which excluded dispositional hearings, permanency hearings and judicial review proceedings in abuse and neglect proceedings from the application of the rules; and added Items (f) and (g) of Subparagraph (3) of Paragraph D.

Probation revocation proceedings. — The formal rules of evidence do not apply to probation revocation hearings. *State v. Phillips*, 2006-NMCA-001, 138 N.M. 730, 126 P.3d 546, cert. granted, 2006-NMCERT-001.

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).

Probation revocation proceedings. — The provision making rules of evidence inapplicable to probation revocation hearings does not militate against application of the exclusionary rule in such hearings. *State v. Marquart*, 1997-NMCA-090, 123 N.M. 809, 945 P.2d 1027.

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).

Applicability to children's court. — The Rules of Evidence apply in transfer hearings in Children's court. *In re Darcy S.*, 1997-NMCA-026, 123 N.M. 206, 936 P.2d 888.

Application to juvenile probation revocation proceedings. — Adjudicatory phase of juvenile probation revocation proceedings are not exempt from the New Mexico Rules of Evidence. *State v. Erickson K.*, 2002-NMCA-058, 132 N.M. 258, 46 P.3d 1258, cert. quashed, 132 N.M. 732, 55 P.3d 428 (2002).

Provision that the New Mexico Rules of Evidence do not apply to "dispositional hearings in children's court proceedings" means that those rules do not apply to the dispositional phase of a juvenile's probation revocation hearing. *State v. Erickson K.*, 2002-NMCA-058, 132 N.M. 258, 46 P.3d 1258, cert. quashed, 132 N.M. 732, 55 P.3d 428 (2002).

Law reviews. — For annual survey of New Mexico law of evidence, 19 N.M.L. Rev. 679 (1990).

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 §§ 124 to 134.

11-1102. Title.

These rules may be cited as the New Mexico Rules of Evidence.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1102 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 1103 of the Federal Rules of Evidence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012, made a stylistic change in the rule and after "These rules may be", deleted "known and".

Table Of Corresponding Rules

The first table below reflects the disposition of the former Rules of Evidence. The left-hand column contains the former rule number, and the right-hand column contains the corresponding present Rule of Evidence.

The second table below reflects the antecedent provisions in the former Rules of Evidence (right-hand column) of the present Rules of Evidence (left-hand column).

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