Rules of Appellate Procedure

ANNOTATIONS

Effective dates. — Pursuant to an order of the supreme court dated September 16, 1986, the Rules of Appellate Procedure are effective for and are to govern the procedure for all appeals from orders or judgments entered on or after January 1, 1987, and are to govern the procedure for all original proceedings filed in the supreme court on or after January 1, 1987.

ARTICLE 1
Applicability of Rules; Jurisdiction

12-101. Scope and title of rules.

A. **Scope of rules.** These rules govern procedure in appeals to the supreme court and the court of appeals, in applications to the supreme court for extraordinary writs, in proceedings for the removal of public officials, in actions removed from the State Corporation Commission [public regulation commission] and in matters certified to the supreme court from the court of appeals or a federal court.

B. **Title.** These rules may be known as the Rules of Appellate Procedure and cited as NMRA, 12-___. (For example, this rule may be cited as NMRA, 12-101.)

ANNOTATIONS

Cross references. — For references to state corporation commission being construed as references to the public regulation commission, see 8-8-21 NMSA 1978.

For appeals under the Children's Code, see 32A-1-17 NMSA 1978.

Bracketed material. — The bracketed material was inserted by the compiler. It was not approved by the Supreme Court and it is not part of the rule.

Federal rules. — See Fed. R. App. P. Rules 1 and 48.

I. GENERAL CONSIDERATION.

Unquestioned power rests in supreme court to promulgate rules of pleading, practice and procedure. State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947).

Supreme court will construe its rules liberally so that causes on appeal may be determined on merits. Montgomery v. Cook, 76 N.M. 199, 413 P.2d 477 (1966).

In order that causes coming on for appeal may be reviewed on merits, former Supreme Court Rules were to be construed liberally. Fairchild v. United Serv. Corp., 52 N.M. 289, 197 P.2d 875 (1948).

Court must look to exact wording of amendment to apply amended rule. Miller v. Doe, 70 N.M. 432, 374 P.2d 305 (1962).

II. CAUSES AND ACTIONS APPEALABLE.

Supreme court cannot create right of appeal. — The creation of the right of appeal is a matter of substantive law, and is not within the rulemaking power of the supreme court. State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947).

The appellate rules do not confer the right to appeal since the right of appeal is a matter of substantive law outside of the supreme court's rule making authority. Sanchez v. Bradbury & Stamm Constr., 109 N.M. 47, 781 P.2d 319 (Ct. App. 1989).

Generally, appeal only from formal written order or judgment. — In the absence of an express provision or rule, no appeal will lie from anything other than a formal written order or judgment signed by the judge and filed in the case or entered upon the records of the court and signed by the judge thereof. State v. Morris, 69 N.M. 89, 364 P.2d 348 (1961).

Oral ruling by trial judge is not a final judgment. — It is merely evidence of what the court has decided to do, as the judge can change such a ruling at any time before the entry of a final judgment. State v. Morris, 69 N.M. 89, 364 P.2d 348 (1961).

III. APPEALS SUBJECT TO RULES.

"Otherwise provided by law". — Under former Rule 1, N.M.R. App. P. (Civ.) (see now this rule), Rule 27, N.M.R. App. P. (Civ.), (see now Rule 12-403 NMRA) was not applicable in situations otherwise provided for by law, and appeals from decisions of former tax commissioner were otherwise covered by 7-1-25B NMSA 1978, which provides that transcript costs in such proceedings should be borne by appellant taxpayer. New Mexico Bureau of Revenue v. Western Elec. Co., 89 N.M. 468, 553 P.2d 1275 (Ct. App. 1976).

IV. CRIMINAL PROCEEDINGS.

Children's court matters not criminal proceedings. — The applicability of the former Rules of Appellate Procedure for Criminal, Children's Court, Domestic Relations Matters and Worker's Compensation Cases to appeals from judgments of the children's court where the child was alleged to be delinquent or in need of supervision did not change the fact that children's court matters are not criminal proceedings. Health & Social Servs. Dep't v. Doe, 91 N.M. 675, 579 P.2d 801 (Ct. App. 1978).

District court loses jurisdiction to modify sentence in criminal cases upon appeal to the supreme court. State v. White, 71 N.M. 342, 378 P.2d 379 (1962).

Defendant's death while his appeal was pending did not require abatement of the criminal proceedings to their inception; rather, the court could permit the appeal to move forward and appoint defense counsel of record as defendant's substitute for the remainder of the proceeding. State v. Salazar, 1997-NMSC-044, 123 N.M. 778, 945 P.2d 996 overruling State v. Doak, 89 N.M. 532, 554 P.2d 993 (Ct. App. 1976).

Effect of defective appeal. — Where defendant appealed order of mistrial and mandate dismissing the appeal was filed after defendant's trial, the appeal did not deprive the trial court of jurisdiction because defendant's appeal of an order declaring mistrial was not an appeal of a final order, defendant did not file a proper application for interlocutory appeal, and the Court of Appeals did not grant an interlocutory appeal. State v. Lobato, 2006-NMCA-051, 139 N.M. 431, 134 P.3d 122, cert. denied, 2006-NMCERT-004.

Law reviews. — For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

For survey of 1990-91 appellate procedure, see 22 N.M.L. Rev. 623 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 223 et seq.; 20 Am. Jur. 2d Courts §§ 1, 78 et seq.

Erroneous decision as law of the case on subsequent appellate review, 87 A.L.R.2d 271.

Right to institute or maintain appeal where client refuses to do so, 91 A.L.R.2d 618.

When criminal case becomes moot so as to preclude review of or attack on conviction or sentence, 9 A.L.R.3d 462.

Construction of contingent fee contract as regards compensation for services after judgment or on appeal, 13 A.L.R.3d 673.

Appealability of order staying, or refusing to stay, action because of pendency of another action, 18 A.L.R.3d 400.

Abatement effects of accused's death before appellate review of federal criminal conviction, 80 A.L.R. Fed. 446.

4 C.J.S. Appeal and Error § 1 et seq.; 21 C.J.S. Courts §§ 124 to 134.

12-102. Appeals; where taken.

A. **Supreme Court.** The following appeals shall be taken to the Supreme Court:

(1) appeals from the district courts in which a sentence of death or life imprisonment has been imposed;

(2) appeals from the Public Regulation Commission;

(3) appeals from the granting of writs of habeas corpus; and

(4) appeals in any other matter in which jurisdiction has been specifically reserved to the Supreme Court by the New Mexico Constitution or by Supreme Court order or rule.

B. **Court of Appeals.** All other appeals shall be taken to the Court of Appeals.

[As amended, effective June 1, 1994; September 1, 1995; June 15, 2000.]

ANNOTATIONS

Cross references. — For appellate jurisdiction of supreme court, see N.M. Const., art. VI, § 2.

For original jurisdiction of supreme court, see N.M. Const., art. VI, § 3.

For references to state corporation commission being construed as references to the public regulation commission, see 8-8-21 NMSA 1978.

For appellate jurisdiction of court of appeals, see 34-5-8 NMSA 1978.

For appellate jurisdiction of supreme court, see 34-5-14 NMSA 1978.

The 1994 amendment, effective June 1, 1994, added Paragraph C.

The 1995 amendment, effective September 1, 1995, deleted former Subparagraph A(1), which read: "appeals from the district courts in which one or more counts of the complaint alleges a breach of contract or otherwise sound in contract", and redesignated the remaining subparagraphs accordingly; and deleted former Paragraph C, which related to transfer of appeals from the Court of Appeals to the Supreme Court.

The 2000 amendment, effective June 15, 2000, deleted former Paragraphs A(2) and A(3) pertaining to appeals from the Public Utility Commission and removals from the State Corporation Commission respectively; and redesignated former Paragraphs A(4) and A(5) as Paragraphs A(3) and A(4) and inserted "appeals from the Public Regulation Commission" in Paragraph A(2).

Youthful offenders. — Serious youthful offenders convicted of first-degree murder shall be allowed to invoke the New Mexico supreme court's mandatory jurisdiction. State v. Trujillo, 2002-NMSC-005, 131 N.M. 709, 42 P.3d 814.

Limit of court of appeals jurisdiction. — Court of appeals does not have appellate jurisdiction over post-conviction remedy proceedings where the sentence involved is death or life imprisonment. Martinez v. State, 110 N.M. 357, 796 P.2d 250 (Ct. App. 1990).

Law reviews. — For article, "New Mexico's Summary Calendar for Disposition of Criminal Appeals: An Invitation for Inefficiency, Ineffectiveness and Injustice," see 24 N.M.L. Rev. 27 (1994).

ARTICLE 2
Appeals from District Court

12-201. Appeal as of right; when taken.

A. **Filing notice.** A notice of appeal shall be filed:

(1) if the appeal is filed from a decision or order suppressing or excluding evidence or requiring the return of seized property pursuant to Paragraph (2) of Subsection B of Section 39-3-3 NMSA 1978, within ten (10) days after the decision or order appealed from is filed in the district court clerk's office; and

(2) for all other appeals, within thirty (30) days after the judgment or order appealed from is filed in the district court clerk's office.

The three (3) day mailing period set forth in Paragraph B of Rule 12-308 NMRA does not apply to the time limits set forth in Subparagraphs (1) and (2) of this paragraph.

A notice of appeal filed after the announcement of a decision, or return of the verdict, but before the judgment or order is filed in the district court clerk's office shall be treated as filed after such filing and on the day thereof. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten (10) days after the date on which the first notice of appeal was served or within the time otherwise prescribed by this rule, whichever period last expires.

B. **Cross-appeals.** If more than one party files a notice of appeal, the party to file the first notice of appeal shall be deemed the appellant, and any opposing party filing a notice of appeal shall be a cross-appellant, unless the court orders otherwise.

C. **Review without cross-appeal.** An appellee may, without taking a cross-appeal or filing a docketing statement or statement of the issues, raise issues on appeal for the

purpose of enabling the appellate court to affirm, or raise issues for determination only if the appellate court should reverse, in whole or in part, the judgment or order appealed from.

D. **Post-trial motions extending the time for appeal.** If a party timely files a motion pursuant to Section 39-1-1 NMSA 1978, Paragraph B of Rule 1-050 NMRA, Paragraph D of Rule 1-052 NMRA, or Rule 1-059 NMRA, the full time prescribed in this rule for the filing of the notice of appeal shall commence to run and be computed from the entry of an order expressly disposing of the motion. If a party timely files a motion pursuant to a rule or statute that provides that the motion is automatically denied if not granted within a specified period of time, the full time prescribed in this rule for the filing of the notice of appeal shall commence to run and be computed from either the entry of an order expressly disposing of the motion or the date of any automatic denial of the motion, whichever occurs first. An order granting a motion for new trial in civil cases is not appealable and renders any prior judgment non-appealable. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits set forth in this paragraph.

E. **Other extensions of time for appeal.**

(1) Before the time for filing a notice of appeal has expired, upon a showing of good cause, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this rule.

(2) After the time has expired for filing a notice of appeal, upon a showing of excusable neglect or circumstances beyond the control of the appellant, the district court may extend the time for filing a notice of appeal by any party for a period not to exceed thirty (30) days from the expiration of time otherwise provided by this rule, but it shall be made upon motion and notice to all parties.

(3) The district court retains jurisdiction to rule on a motion for extension of time to file the notice of appeal regardless of whether the notice of appeal has been filed.

(4) No motion for extension of time to file the notice of appeal may be granted after sixty (60) days from the time the appealable order is entered. If the motion is not granted within the sixty (60) days, the motion is automatically denied. If a post-trial motion is timely filed pursuant to Section 39-1-1 NMSA 1978, Paragraph B of Rule 1-050 NMRA, Paragraph D of Rule 1-052 NMRA or Rule 1-059 NMRA, or a motion pursuant to Rule 5-614 NMRA based on grounds other than newly discovered evidence, this sixty (60) day period begins to run from either the entry of an order expressly disposing of the motion or the date of any automatic denial of the motion under that statute or any of those rules, whichever occurs first.

(5) In computing time, pursuant to this paragraph, the three (3) day mailing period set forth in Rule 12-308 NMRA does not apply.

(6) Any party obtaining an order extending the time to file an appeal shall promptly serve notice of the order in accordance with Rule 12-307 NMRA.

[As amended, effective July 1, 1990; September 1, 1991; April 1, 1998; December 4, 1998; January 1, 2000; as amended by Supreme Court Order 05-8300-18, effective October 11, 2005; by Supreme Court Order 06-8300-36, effective February 1, 2007.]

Committee commentary. — The 2005 amendment corrects Paragraphs D and E in light of revisions to Rule 1-052 effective February, 2001. The motion referred to by the citation to Rule 1-052(B)(2) -- a motion to amend the district court's findings and judgment -- is now referenced in Paragraph D of Rule 1-052 NMRA; there is no longer a Rule 1-052(B)(2). The citation in Paragraphs D and E of this rule is made current by this amendment.

ANNOTATIONS

Cross references. — For absolute right of aggrieved party to one appeal, see N.M. Const., art. VI, § 2.

As to appeal of certain interlocutory orders or decisions which do not practically dispose of merits but involve controlling questions of law, see 39-3-4 NMSA 1978.

As to appeals in contempt and habeas corpus proceedings, see 39-3-15 NMSA 1978.

The 1991 amendment, effective for cases filed in the supreme court and court of appeals on and after September 1, 1991, in Paragraph A, twice inserted "is filed in the district court clerk's office" and deleted "filing of" preceding both occurrences of "judgment or order"; rewrote Paragraph D; and, in Paragraph E, substituted the present heading for "Extensions of time", and deleted former Subparagraph (5), relating to automatic denial of post-trial motion if not granted within 30 days, and redesignated the subsequent subparagraphs accordingly.

The first 1998 amendment, effective for pleadings due on or after April 1, 1998, inserted "or statement of the issues" following "docketing statement" in Paragraph C.

The second 1998 amendment, effective December 4, 1998, added the last sentence in Subparagraph E(4).

The 1999 amendment, effective for cases filed on and after January 1, 2000, added Paragraph A(1), designated the former first undesignated paragraph as Paragraph A(2), substituted "in Subparagraphs (1) and (2) of this paragraph in the undesignated paragraph following Paragraph A(2); in Paragraph E(4), added the last sentence to

conform this rule to *Chavez v. U-Haul of New Mexico, Inc.*, 1997-NMSC-051, 124 N.M. 165, 947 P.2d 122.

The 2005 amendment, approved by Supreme Court Order 05-8300-18, effective October 11, 2005, amended Paragraphs D and E to change the internal reference to from Paragraph B(2) to Paragraph D of Rule 1-052 NMRA.

The 2006 amendment, approved by Supreme Court Order 06-8300-36, effective February 1, 2007, amended Paragraph D to delete motions based on newly discovered evidence filed pursuant to Rule 5-614 NMRA and include in a separate new sentence the language relating to the time for filing a notice appeal when a motion is automatically denied pursuant to a rule or statute.

Federal rules. — See Fed. R. App. P. Rule 4.

I. GENERAL CONSIDERATION.

Appeals from district court. — Appeals from the district court arising out of objection to a state engineer permit to transfer water rights under 72-7-3 NMSA 1978 are governed by Rule 12-201 NMRA rather than this rule. Town of Silver City v. Scartaccini, 2006-NMCA-009, 138 N.M. 813, 126 P.3d 1177.

Compliance with applicable rules in perfecting appeal is jurisdictional requirement. Scott v. Newsom, 74 N.M. 399, 394 P.2d 253 (1964).

Court proposes to consider nonjurisdictional deviation from rules in each case as it arises; so far as jurisdictional defects are concerned there can be no exercise of discretion. Johnson v. Johnson, 74 N.M. 567, 396 P.2d 181 (1964).

When no appeal as of right, statute governs. — Since the state has no constitutional appeal as of right from a suppression order, the time for filing such an appeal is governed by the ten-day limit set forth in Subsection B(2) of 39-3-3 NMSA 1978 and not the thirty-day limit provided for in Paragraph A of this rule. State v. Alvarez, 113 N.M. 82, 823 P.2d 324 (Ct. App. 1991).

Appellate court has duty to determine whether it has jurisdiction of appeal; it will examine record and, if required, will sua sponte question its jurisdiction. Rice v. Gonzales, 79 N.M. 377, 444 P.2d 288 (1968).

Timely filing of notice of appeal. — The appellate court cannot accept jurisdiction merely because issues of general public interest and fundamental personal due process rights are at stake. The timely filing of a notice of appeal under Paragraph A is jurisdictional. State ex rel. Human Servs. Dep't v. Jasso, 107 N.M. 75, 752 P.2d 790 (Ct. App. 1987).

Judicial error is circumstance permitting untimely appeal. – Although the court will not ordinarily entertain an appeal in the absence of a timely notice, judicial error is an unusual circumstance creating an exception that warrants permitting an untimely appeal; the court will not decline to hear the appeal because of a technical defect that it helped create. Romero v. Pueblo of Sandia, 2003-NMCA-137, 134 N.M. 553, 81 P.3d 490.

Jurisdiction of trial court after notice of appeal. — A pending appeal does not divest the trial court of jurisdiction to take further action when the action will not affect the judgment on appeal and when, instead, the further action enables the trial court to carry out or enforce the judgment. The notice of appeal in this case did not deprive the judge of jurisdiction to permit the party to file its supplemental proposed findings, which had been submitted to the judge well before filing of the notice. Barela v. ABF Freight Sys., 116 N.M. 574, 865 P.2d 1218 (Ct. App. 1993).

An order denying intervention is fundamentally interlocutory, although it is deemed final for purposes of allowing it to be immediately appealed. Appeal of order denying intervention does not divest district court of jurisdiction over the merits of the case. Murken v. Solv-Ex Corporation, 2006-NMCA-064, 139 N.M. 625, 136 P.3d 1035.

II. PARTIES ENTITLED TO APPEAL.

Substantial interest required. — Only party who has real and substantial interest in subject matter before court and who is aggrieved or prejudiced by decision of trial court may appeal. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968).

Parties may appeal only if they have real and substantial interest in subject matter before court and are aggrieved or prejudiced by the decision. Home Fire & Marine Ins. Co. v. Pan Am. Petroleum Corp., 72 N.M. 163, 381 P.2d 675 (1963).

Joint tortfeasor. — Defendant in damage suit was aggrieved party within meaning of former rule, where judgment notwithstanding verdict was granted in favor of codefendant, in view of right of contribution between joint tortfeasors. Marr v. Nagel, 58 N.M. 479, 272 P.2d 681 (1954).

Continued applicability of *Marr v. Nagel* is limited due to changes in the law regarding comparative negligence and joint liability. St. Sauver v. New Mexico Peterbilt, Inc., 101 N.M. 84, 678 P.2d 712 (Ct. App. 1984).

Defendant not "aggrieved" by dismissal of codefendant. — In a multi-party tort action in which the claim against one defendant is dismissed for lack of jurisdiction, a codefendant is not an aggrieved party where his aggrievement depends on the contingency that the trial court will hold that joint and several liability is applicable. St. Sauver v. New Mexico Peterbilt, Inc., 101 N.M. 84, 678 P.2d 712 (Ct. App. 1984).

Insurance company. — Insurance company which had advanced money to insured and had taken loan receipt was "aggrieved party" entitled to appeal from decision of trial court in suit brought by insurance company and insured against third-party tortfeasor. Home Fire & Marine Ins. Co. v. Pan Am. Petroleum Corp., 72 N.M. 163, 381 P.2d 675 (1963).

Sureties on appeal bond. — Where judgment was rendered against sureties on appeal bond filed in justice of peace court (now replaced by magistrate court) on appeal to district court, such sureties had right to appeal to supreme court from final order of district court affecting their substantial rights after final judgment had been entered in district court. Miller v. Oskins, 33 N.M. 109, 263 P. 764 (1927).

III. APPEALABLE JUDGMENTS AND ORDERS.

A. IN GENERAL.

Appeals will lie only from formal written order or judgment signed by judge and filed in case, or entered upon record of court and signed by judge. Bouldin v. Bruce M. Bernard, Inc., 78 N.M. 188, 429 P.2d 647 (1967); Curbello v. Vaughn, 76 N.M. 687, 417 P.2d 881 (1966); Harrison v. ICX, Illinois-California Express, Inc., 98 N.M. 247, 647 P.2d 880 (Ct. App. 1982).

Where record failed to disclose judgment, order or decision, final or interlocutory, appeal would be dismissed upon motion. Cornett v. Fulfer, 26 N.M. 175 (1919), opinion on rehearing, 26 N.M. 368, 189 P. 1108 (1920).

Purpose of finality requirement. — Policy behind rules and statutes preventing appeals from anything but final judgments or orders which substantially dispose of merits is to discourage piecemeal litigation. Floyd v. Towndrow, 48 N.M. 444, 152 P.2d 391 (1944); Burns v. Fleming, 48 N.M. 40, 145 P.2d 861 (1944); Foster v. Addington, 48 N.M. 212, 148 P.2d 373 (1944).

Test of appealability. — The test of whether a judgment is final, so as to permit the taking of an immediate appeal, lies in the effect the judgment has upon the rights of some or all of the parties. Bralley v. City of Albuquerque, 102 N.M. 715, 699 P.2d 646 (Ct. App. 1985).

Complete disposition of issues. — Judgment or order is not final unless all issues of law and of fact necessary to be determined were determined, and case completely disposed of so far as court has power to dispose of it. Clancy v. Gooding, 98 N.M. 252, 647 P.2d 885 (Ct. App. 1982).

Judgment, order or decree, to be final for purposes of appeal or error, must dispose of cause, or distinct branch thereof, as to all parties, reserving no further questions or directions for future determination. Marr v. Nagel, 58 N.M. 479, 272 P.2d 681 (1954).

Petition in probate usually considered independent proceeding. — Each petition in a probate file should ordinarily be considered as initiating an independent proceeding, so that an order disposing of the matters raised in the petition should be considered a final, appealable order. When the subject matter of two petitions overlap, it would generally be appropriate to consider both petitions as belonging to the same proceeding. In re Estate of Newalla, 114 N.M. 290, 837 P.2d 1373 (Ct. App. 1992).

B. SPECIFIC JUDGMENTS AND ORDERS.

Order referring issues to arbitration is a final, appealable order if it is the last deliberative action of the court with respect to the controversy before it. Where, however, the court leaves open the possibility that it would need to later rule on the substantive claims before it, the court did not dispose of the case or divest itself of the power to further rule on case issues and the order referring issues to arbitration was not a final, appealable order. Edward Family Ltd. Partnership v. Brown, 2006-NMCA-083, 140 N.M. 104, 140 P.3d 525, cert. denied, 2006-NMCERT-005.

Conditional plea entered in magistrate court. — The preferred procedure for appeal to the Court of Appeals after a conditional plea is entered in magistrate court is for the district court to issue a final and appealable order dismissing the appeal or to issue an order granting the motion to suppress. State v. Celusniak, 2004-NMCA-070, 135 N.M. 728, 93 P.3d 10.

Temporary injunction. — Test to determine if temporary injunction entered after full trial of issues was appealable was whether parties to suit contemplated further proceedings. Texas Pac. Oil Co. v. A.D. Jones Estate, Inc., 78 N.M. 348, 431 P.2d 490 (1967).

Order dismissing party's entire complaint, without authorizing or specifying a definite time for leave to file an amended complaint, is a final order for purposes of appeal. Bralley v. City of Albuquerque, 102 N.M. 715, 699 P.2d 646 (Ct. App. 1985).

Order compelling arbitration was a final order from which defendants were obligated to appeal within 30 days. Lyman v. Kern, 2000-NMCA-013, 128 N.M. 582, 995 P.2d 504, cert. denied, 128 N.M. 688, 997 P.2d 820 (2000).

Failure to enter order denying motion for new trial. — Where district court failed to enter an order denying defendant's motion for a new trial within thirty days, the motion was deemed automatically denied and defendant could challenge the denial of the motion on appeal even though a final, written order denying the motion had not been filed by the district court. State v. Huber, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007.

Workers’ compensation judge’s order allowing examination. — Where a workers’ compensation judge stated in its order that the only pending issue before it was whether the worker could see a particular doctor, and the order allowed for such an examination,

the order was final and appealable. Flores v. J.B. Henderson Constr., 2003-NMCA-116, 134 N.M. 364, 76 P.3d 1121.

Dismissal "without prejudice" for failure to exhaust administrative remedies is a final order necessitating a timely appeal in order to preserve appellate review. Bralley v. City of Albuquerque, 102 N.M. 715, 699 P.2d 646 (Ct. App. 1985).

Summary judgment is final order and final orders are appealable. Ortega v. Shube, 93 N.M. 584, 603 P.2d 323 (Ct. App. 1979), overruled on other grounds Bracken v. Yates Petroleum Corp., 107 N.M. 463, 760 P.2d 155 (1988).

Summary judgment for third-party defendant. — Summary judgment in favor of third-party defendant became appealable final judgment upon entry of judgment in favor of plaintiff and against defendant - third-party plaintiff, because at that point all claims had been adjudicated. Mabrey v. Mobil Oil Corp., 84 N.M. 272, 502 P.2d 297 (Ct. App.), cert. denied, 83 N.M. 740, 497 P.2d 742 (1972).

Default judgment entered against defendants was final judgment, as was order denying defendants' motion to vacate same, and both were appealable. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Order overruling motion to set aside default judgment was appealable. Wooley v. Wicker, 75 N.M. 241, 403 P.2d 685 (1965).

Setting aside of final judgment. — Order setting aside a final judgment 119 days after entry affected a substantial right and was appealable. Singleton v. Sanabrea, 35 N.M. 205, 292 P. 6 (1930).

Refusal to set aside judgment. — Order of district court overruling motion of sureties on appeal bond to recall execution and set aside judgment affirming that of justice of the peace court (now magistrate court) was a final order affecting the substantial right of the sureties, made after entry of a final judgment, and supreme court had jurisdiction to hear appeal therefrom. Miller v. Oskins, 33 N.M. 109, 263 P. 764 (1927). See also Miller v. Oskins, 33 N.M. 660, 275 P. 97 (1929).

Vacation of entered judgments. — Orders vacating judgments previously entered so as to permit new pleadings or trial are final and may be appealed. Starnes v. Starnes, 72 N.M. 142, 381 P.2d 423 (1963); Scott v. J.C. Penney Co., 67 N.M. 219, 354 P.2d 147 (1960).

Vacation of voidable judgment. — Judgment of a district court purporting to vacate a previous judgment of that court which, though voidable, was not void, was a final judgment. Weaver v. Weaver, 16 N.M. 98, 113 P. 599 (1911).

Dismissal of appeal to district court. — Judgment of district court dismissing an appeal from a justice of the peace (now magistrate) was a final judgment. Oskins v. Miller, 33 N.M. 104, 263 P. 766 (1927).

Dismissal of an appeal from a probate court by district court under former probate law was final judgment and appeal could be had therefrom. Grim v. Proctor, 47 N.M. 307, 142 P.2d 544 (1943).

Order in show cause hearing. — Order entered in show cause hearing after attorney and client city failed to obey certain order in main action, which order held attorney and city jointly and severally liable for certain attorney's fees, was final judgment appealable under Subdivision (a)(1) of former Rule 3, N.M.R. App. P. (Civ.) as to attorney, since proceeding against him was independent of main action; order against city would be held appealable on same basis as order against attorney. Miller v. City of Albuquerque, 88 N.M. 324, 540 P.2d 254 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Child neglect. — Proceeding relating to care and custody of neglected children is civil action, not special proceeding, and judgment therein is reviewable. Blanchard v. State ex rel. Wallace, 29 N.M. 584, 224 P. 1047 (1924).

Permissive appeal of children's court order. — Order of children's court, denying motion to dismiss petition which sought to extend custody over delinquent child for one year, was not appealable under Rule 5 of former Supreme Court Rules, but was appealable under 39-3-4 NMSA 1978. In re Doe, 85 N.M. 691, 516 P.2d 201 (Ct. App. 1973).

Master's sale. — Decree for sale of mortgaged property ordering that specific sum of money be paid to plaintiffs, that master or trustee sell premises and that case remain pending in court awaiting master's report was final decree. Lohman v. Cox, 9 N.M. 503, 56 P. 286 (1899), overruled on other grounds Field v. Otero, 35 N.M. 68, 290 P. 1015 (1930).

Confirmation of foreclosure sale. — Order confirming a foreclosure sale is a final order affecting a substantial right, made after final judgment, and is appealable. Shortle v. McCloskey, 38 N.M. 548, 37 P.2d 800 (1934).

Entry of deficiency judgment after sale. — Order entering personal deficiency judgment after sale is a final order affecting a substantial right made after the entry of final judgment, and jurisdiction to make such order is not cut off by appeal. Armijo v. Pettit, 34 N.M. 559, 286 P. 827 (1930).

Overruling of motion to vacate sale. — Order which overruled a motion to vacate a commissioner's sale and confirmation thereof could be treated as an appealable order only on theory that it was a final order affecting a substantial right made after the entry of final judgment and application for allowance of appeal therefrom was made too late. Hess v. Wheeling-Lordsburg Copper Co., 46 N.M. 195, 125 P.2d 344 (1942).

Mandamus to compel payment of judgment. — Order making writ of mandamus to compel payment of money judgment permanent was final order made after entry of final judgment, affected substantial rights of appellant state highway commission [state transportation commission] and was appealable. State ex rel. State Hwy. Comm'n v. Quesenberry, 72 N.M. 291, 383 P.2d 255 (1963). See also State ex rel. State Hwy. Comm'n v. Quesenberry, 74 N.M. 30, 390 P.2d 273 (1964).

Will contest. — Supreme court had jurisdiction of appeal from district court dismissing will contest, where by long usage and acquiescence, right had become firmly established. In re Morrow's Will, 41 N.M. 117, 64 P.2d 1300 (1937).

Compensation allowance and sale order. — Decree allowing compensation to master and attorney and in default of payment, ordering sale of property in order to create fund for payment, was final and appealable judgment. Neher v. Crawford, 10 N.M. 725, 65 P. 156 (1901).

Sale of estate's realty. — Decree for sale of real estate of deceased person to pay debts and order confirming same constituted final judgments from which appeal or writ of error could be taken. Cooper v. Brownfield, 33 N.M. 464, 269 P. 329 (1928).

Appointment of receivers. — Order that receiver be appointed, and order appointing joint receivers, taken together, amount to "final decree." Cooper v. Otero, 38 N.M. 164, 29 P.2d 341 (1934).

Decree granting injunction and appointing receiver for insolvent corporation was final decree. Eagle Mining & Imp. Co. v. Lund, 15 N.M. 696, 113 P. 840 (1910); Sacramento Valley Irrigation Co. v. Lee, 15 N.M. 567, 113 P. 834 (1910).

Rate order case not moot. — While it is not within province of appellate court to decide abstract, hypothetical or moot questions where no actual relief can be afforded, nevertheless, so long as intrastate freight rate order appealed from had vitality and could be given implementation, even temporarily, case was not moot and was entitled to consideration. Atchison, T. & S.F. Ry. v. SCC, 79 N.M. 793, 450 P.2d 431 (1969).

IV. NONAPPEALABLE JUDGMENTS AND ORDERS.

A. IN GENERAL.

Case to be completely disposed of. — Unless all issues of law and fact necessary to be determined were determined and the case completely disposed of so far as the court might do so, the judgment or decree was not final in contemplation of former rule. Floyd v. Towndrow, 48 N.M. 444, 152 P.2d 391 (1944).

Order is not final where parties and court consider it a nonfinal order. Hernandez v. Home Educ. Livelihood Program, Inc., 98 N.M. 125, 645 P.2d 1381 (Ct. App. 1982).

Oral ruling by trial judge is not final judgment, but merely evidence of what court had decided to do, which decision court can change at any time before entry of final judgment. Bouldin v. Bruce M. Bernard, Inc., 78 N.M. 188, 429 P.2d 647 (1967).

Oral rulings are not final and therefore not a proper basis for an appeal. There was no final order denying reinstatement until the Judge issued a written order on November 23, 1992. Nor was the worker's motion for reinstatement deemed denied by operation of law under 39-1-1 NMSA 1978. The worker's motion for reinstatement was not filed pursuant to 39-1-1 NMSA 1978, but was instead filed pursuant to Rule 1-041E NMRA, which does not contain a provision saying that motions filed pursuant to it are deemed denied is not acted upon within a certain amount of time. Vigil v. Thriftway Mktg. Corp., 117 N.M. 176, 870 P.2d 138 (Ct. App. 1994).

Order denying objection of change of physician in workers compensation. — A judge's order denying a request, or an objection, to change health care provider is not final and appealable when a claim for benefits is pending before the workers compensation administration. Kellewood v. BHP Minerals Int'l, 116 N.M. 678, 866 P.2d 406 (Ct. App. 1993).

Entry of erroneous order of dismissal does not commence time for appeal. — Where trial court erroneously entered an order dismissing criminal charges on grounds that state's evidence failed to support a verdict, but rather had intended to dismiss the charges for lack of venue, the dismissal order was nonappealable by the state and did not correctly reflect the trial court's ruling on improper venue, the time for appeal by the state did not run from the original dismissal order and the state's post-dismissal motions suspended the finality of the original dismissal order and delayed the time for filing an appeal until the trial court disposed of the state's motions. State v. Roybal, 2006-NMCA-043, 139 N.M. 341, 132 P.3d 598, cert. denied, 2006-NMCERT-003.

Order quashing peremptory writ of mandamus was not a final, appealable order where the writ directed the respondent public official to answer the petition for writ and where the answer raised issues of fact which the court had to resolve to determine if the public official had a clear duty to perform a ministerial act and whether he was performing that act. Mimbres Valley Irrigation Co. v. Salopek, 2006-NMCA-093, 140 N.M. 168, 140 P.3d 1117.

B. MULTIPLE PARTIES OR CLAIMS.

Action involving multiple claims as single judicial unit. — Where the action involves multiple claims, an order or decision is not final if it adjudicates less than all claims in the action, unless the trial court makes: (1) an express determination that there is no reason for delay, and (2) an express direction for entry of judgment. Absent such express determination and order, a multiple claims action is treated in its entirety as a single judicial unit, and the adjudication of one or more of such multiple claims, but less than all of them, is not a final judgment or order, and therefore, is not appealable. Aetna Cas. & Sur. Co. v. Miles, 80 N.M. 237, 453 P.2d 757 (1969).

Summary judgment for fewer than all defendants. — Where one claim is asserted against two defendants, the dismissal of one defendant by summary judgment was neither a final appealable judgment nor interlocutory order practically disposing of the merits of the action. Lopez v. Hoffman, 77 N.M. 396, 423 P.2d 429 (1967).

Judgment dismissing one of two defendants in case was not appealable final judgment. Platco Corp. v. Colonial Homes, Inc., 78 N.M. 35, 428 P.2d 9 (1967).

Appeal from an order dismissing the complaint as to one or more of the several defendants is not appealable until all issues are resolved as to all other defendants, where theories of liability are closely related. Klinchok v. Western Sur. Co. of Am., 71 N.M. 5, 375 P.2d 214 (1962).

Where the theory of liability of one defendant is so related to or connected with that of the other defendants that one affects the other, an appeal from a dismissal of complaint as to one or more defendants may not be had until all issues are resolved as to other defendants. Klinchok v. Western Sur. Co. of Am., 71 N.M. 5, 375 P.2d 214 (1962).

Where justice of the peace (now magistrate) was alleged to have acted beyond the scope of his authority in issuing a writ of execution directed against plaintiff's goods and plaintiff sought damages for assault, battery and false arrest committed by the server of the writ, summary judgments which were granted in favor of justice of the peace (now magistrate) and his surety were not appealable, since action against writ server was still pending, as liability of justice of the peace (now magistrate) and his surety was dependent upon the establishment of acts alleged to have been committed by writ server; summary judgments were not final judgments or orders which practically disposed of the merits of the action. Chavez v. Atkinson, 78 N.M. 130, 428 P.2d 985 (Ct. App. 1967).

Direction of verdict for one defendant not appealable. — Where, in entering judgment on a directed verdict in favor of one of two defendants, the trial court did not make an express determination under former Rule 54, N.M.R. Civ. P. (see now Rule 1-054 NMRA), that no just reason existed for delay in entry of judgment, trial court retained jurisdiction to revise same at any time before the entry of the judgment adjudicating all the claims; and because power to alter the judgment was reserved, it was not one that practically disposed of the merits of the action, and was not appealable. Nichols v. Texico Conference Ass'n of Seventh Day Adventists, 78 N.M. 310, 430 P.2d 881 (Ct. App. 1967).

If issues interrelated. — In a personal injury suit against two defendants, if the determination of the issues relating to one defendant will or may affect the determination of the issues relating to the other, directed verdict in favor of one is not appealable absent final judgment, since there is but one claim against both defendants and judgment in favor of one is neither a final judgment on that claim nor an interlocutory order which practically disposes of the merits of the action. Nichols v.

Texico Conference Ass'n of Seventh Day Adventists, 78 N.M. 310, 430 P.2d 881 (Ct. App. 1967).

C. OTHER JUDGMENTS AND ORDERS.

Decision without entry of order. — No appeal could be had from announcement by district court, after water rights hearing, that special master's report would be confirmed and conflicting requested findings denied, where no order carrying court's decision into effect was entered. State ex rel. Reynolds v. McLean, 74 N.M. 178, 392 P.2d 12 (1964).

Temporary custody order. — Writ of error sued out by grandparent of child, with whom he was living, when a petitioner in habeas corpus proceeding was awarded temporary custody for the purpose of transporting child out of state and presenting him before another state court at a scheduled custody hearing would be dismissed because the temporary custody order was not a final judgment or an interlocutory judgment, order or decision which practically disposed of the merits of the action. Angel v. Widle, 86 N.M. 442, 525 P.2d 369 (1974).

Temporary restraining order. — As a general rule, a temporary restraining order is interlocutory and not appealable as a final order. State ex rel. Department of Human Servs. v. Natural Mother, 97 N.M. 707, 643 P.2d 271 (Ct. App. 1982).

Where the children's court denied the application for a temporary restraining order after a disposition and judgment and the order denying the application affected the mother's substantial rights to visitation and to move her child out of state, the appellate court had jurisdiction to review the order denying the application for the temporary order. State ex rel. Department of Human Servs. v. Natural Mother, 97 N.M. 707, 643 P.2d 271 (Ct. App. 1982).

Temporary injunction. — Order granting a temporary injunction, until the final disposition of the case, does not practically dispose of the merits of the action, and is not appealable. Griffin v. Jones, 25 N.M. 603, 186 P. 119 (1919).

Imposition of fine for injunction violation. — Order imposing a fine payable by way of reimbursement to the opposite party for violation of a preliminary injunction was interlocutory, and could be reviewed only after final decree. Costilla Land & Inv. Co. v. Allen, 15 N.M. 528, 110 P. 847 (1910).

Denial of motion for stay in taking deposition not appealable final judgment. — Denial of motion for protective order which sought to have court order a stay in taking of deposition of patient seeking to perpetuate testimony until such time as court first determined competency of patient as witness was not an appealable final judgment, and was not appealable as interlocutory order where order did not comply with 39-3-4 NMSA 1978. Bartow v. Kernan, 101 N.M. 532, 685 P.2d 387 (Ct. App. 1984).

Order striking motion to quash replevin. — Interlocutory order striking motion to quash writ of replevin was not appealable as an order practically disposing of the merits of the action. Stephenson v. Board of County Comm'rs, 24 N.M. 486, 174 P. 739 (1918).

Denial of motion to quash garnishment. — Order denying a motion to quash a writ of garnishment was neither a final judgment nor an interlocutory judgment, order or decision practically disposing of the merits of the action, and was not appealable. Cornett v. Fulfer, 26 N.M. 368, 189 P. 1108 (1920) (opinion on rehearing).

Denial of motion for default judgment in garnishment. — Denial of a motion for a default judgment in a garnishment proceeding is not an appealable order. Pena v. Trujillo, 117 N.M. 371, 871 P.2d 1377 (Ct. App. 1994).

Vacation of suit consolidation. — Order vacating a consolidation of employers' liability insurer's cause of action against a third-party with that of the injured employee is not appealable. Kandelin v. Lee Moor Contracting Co., 37 N.M. 479, 24 P.2d 731 (1933).

Order denying motion to amend complaint is not final for purposes of appeal. Clancy v. Gooding, 98 N.M. 252, 647 P.2d 885 (Ct. App. 1982).

Where the plaintiff did not demonstrate that her cause of action would be effectively lost or irreparably damaged as a result of an order denying her motion to amend, the order was not final and was not reviewable. Clancy v. Gooding, 98 N.M. 252, 647 P.2d 885 (Ct. App. 1982).

Denial of motion to dismiss complaint. — Order denying defendant city's motion to dismiss was not appealable, as it was a part of the main action; no final judgment or interlocutory order which practically disposed of the merits had been entered and the order did not contain the requisite finding on which to base an application for an interlocutory appeal under 39-3-4 NMSA 1978. Miller v. City of Albuquerque, 88 N.M. 324, 540 P.2d 254 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 249 (1975).

Order denying a motion for leave to dismiss a cause, filed by a plaintiff, did not practically dispose of the merits of the action and was not appealable. Otto-Johnson Mercantile Co. v. Garcia, 24 N.M. 356, 174 P. 422 (1918).

Order denying a motion to dismiss a petition or a complaint is not appealable, because such is not a final judgment nor an interlocutory judgment, order or decision as practically disposes of the merits of the action. Public Serv. Co. v. Wolf, 78 N.M. 221, 430 P.2d 379 (1967).

Judgment overruling plea of res judicata cannot be appealed as it does not finally dispose of the action. Foster v. Addington, 48 N.M. 212, 148 P.2d 373 (1944).

Dismissal without prejudice is not a final order and is not appealable. Ortega v. Transamerica Ins. Co., 91 N.M. 31, 569 P.2d 957 (Ct. App. 1977).

Order overruling demurrer. — Order overruling demurrer did not decide the merits of the action and was not appealable before judgment. Wanser v. Fuqua, 46 N.M. 217, 126 P.2d 20 (1942).

Order sustaining demurrer. — Order sustaining a demurrer to a complaint, without further action by the court finally disposing of the cause, was not a final judgment reviewable by the supreme court. Morrison v. Robinson, 25 N.M. 417, 184 P. 214 (1919).

Order sustaining a demurrer to a complaint was not a final judgment reviewable on appeal. Cutler & Neilson Paint Color Co. v. Hinman, 14 N.M. 62, 89 P. 267 (1907).

Striking of counterclaim. — Where in addition to a stricken counterclaim, appellants had answered with numerous defenses which remained to be determined by the trial court, so that the trial court's order striking the counterclaim did not practically dispose of the merits, appeal from striking of counterclaim would not be permitted. Floyd v. Towndrow, 48 N.M. 444, 152 P.2d 391 (1944).

Order to strike an amended counterclaim filed in answering a complaint in action on a note was not a final judgment. Floyd v. Towndrow, 48 N.M. 444, 152 P.2d 391 (1944).

Ruling on motion to strike. — Ruling on a motion to strike generally is not appealable unless it has the practical effect of disposing of the merits. Floyd v. Towndrow, 48 N.M. 444, 152 P.2d 391 (1944).

Denial of motion to dismiss defense. — Order denying a motion to dismiss one of three defenses fell far short of disposing of the merits of a workmen's compensation action, its effect being to permit the defense to stand until issue was determined at trial, and hence, the order was not appealable. Duran v. Transit Remanufacturing Corp., 73 N.M. 139, 386 P.2d 237 (1963).

Denial of motion to prevent entry of judgment. — Order denying motion seeking to prevent entry of final judgment prior to retrial or a new trial of all matters relating to injunctive relief against trespass by electric cooperative was not appealable, since after condemnation proceedings gave defendant cooperative right of possession to go on plaintiffs' land, injunction was without authority and subject to dissolution. Hall v. Lea County Elec. Coop., 76 N.M. 229, 414 P.2d 211 (1966), cert. denied, 78 N.M. 792, 438 P.2d 632 (1968).

Ballot recount order. — Appeal from an order directing a recount of ballots in a municipal election vested no jurisdiction in the supreme court because such an appeal was not from a final judgment nor from an interlocutory judgment, order or decision

practically disposing of the merits of the action. Hampton v. Priddy, 49 N.M. 1, 154 P.2d 839 (1945).

Order dispensing with adoption consent. — Defendant's appeal from an order of the district court dispensing with necessity for her consent to the adoption of her two children was not timely, since the merits of the action were not disposed of with such order, hearing on the final adoption not yet having been held, and supreme court was without jurisdiction absent necessary determination and order of the trial court. In re Quintana, 82 N.M. 698, 487 P.2d 126 (1971), subsequent appeal, 83 N.M. 772, 497 P.2d 1404 (1972).

Judgment or order which reserves issue of assessment of damages for future determination is not a final order for purposes of appeal. Cole v. McNeill, 102 N.M. 146, 692 P.2d 532 (Ct. App. 1984).

Order dismissing punitive damage claim is not appealable. North v. Public Serv. Co., 97 N.M. 406, 640 P.2d 512 (Ct. App. 1982).

Order favoring intervener. — Order of default against a plaintiff and in favor of intervener (defendant having disclaimed any interest in the automobile in question), which granted intervener the full relief prayed for upon proof sustaining allegations of his petition was nonappealable. Packard Westchester Co. v. Zolko Co., 39 N.M. 467, 49 P.2d 1133 (1935).

Partition order. — Judgment in a statutory partition suit declaring the rights of all the parties, ordering partition and appointing commissioners for such purpose was an interlocutory decree and not appealable. Torrez v. Brady, 35 N.M. 217, 292 P. 901 (1930).

Order of judicial sale. — An order granting defendant's motion pursuant to former Rule 60(b), N.M.R. Civ. P. (see now Rule 1-060B NMRA) and ordering a judicial sale was not a final, appealable order, where further action was contemplated by the trial court, i.e., the foreclosure and sale of a vehicle and a determination of the method of distributing the proceeds of the sale. Waisner v. Jones, 103 N.M. 749, 713 P.2d 565 (Ct. App. 1986)rev'd on other grounds, 107 N.M. 260, 755 P.2d 598 (1988).

Decree establishing lien priorities. — Decree establishing the priority of liens and directing a sale by the receiver, with proceeds to be held subject to the further court order was not a final decree. Bateman v. Gitts, 17 N.M. 619, 133 P. 969 (1913).

Appeal of contempt sui generis. — Appeal of judgment in civil contempt under Rule 5(2) of former Supreme Court Rules was sui generis, and was in no sense based on finality of judgment; purpose was to provide speedy determination of judgment in contempt. Zellers v. Huff, 57 N.M. 609, 261 P.2d 643 (1953).

Imposition of sentence for contempt prerequisite to appeal. — Where no sentence has yet been imposed for civil contempt judgment, appeal therefrom is premature and must be dismissed. Zellers v. Huff, 57 N.M. 609, 261 P.2d 643 (1953).

Where no sentence is imposed subsequent to a contempt finding, such finding is not subject to appeal. Henderson v. Henderson, 93 N.M. 405, 600 P.2d 1195 (1979).

Contempt judgment entered after decree not reviewable therewith. — On appeal of final decree, judgment in a contempt proceeding originating subsequent to the decree was not reviewable. Canavan v. Canavan, 17 N.M. 503, 131 P. 493 (1913).

Vacation of order. — In workmen's compensation case, where material issue was whether defendant company was self-insurer by virtue of certain certificate, and company filed answer claiming to be such only after judge entered order sustaining validity of certificate, subsequent vacation of that order insofar as it related to particular plaintiff did not practically dispose of merits of action, and was not appealable. Transit Remanufacturing Corp. v. Duran, 73 N.M. 141, 386 P.2d 238 (1963).

Striking of motion to vacate default. — Appeal does not lie from an order striking a motion to vacate an order entering defendant's default and leaving the cause for hearing ex parte. Winans v. Bryan, 33 N.M. 532, 271 P. 469 (1928).

Imposition of conditions for vacation of judgment. — Appeal will not lie from an order of court imposing terms as a condition precedent to the vacating of a judgment, as it is not a final judgment. Board of County Comm'rs v. Blackington, 11 N.M. 360, 68 P. 938 (1902).

Refusal to amend judgment or order. — As a general rule, where an appeal may properly be taken from a judgment, order or decree, but has not been taken, a subsequent order refusing to amend or modify the judgment, order or decree is not appealable. Public Serv. Co. v. First Judicial Dist. Court, 65 N.M. 185, 334 P.2d 713 (1959).

Judgment on application to amend erroneous decree. — Application to amend a decree entered through inadvertence is a final order affecting a substantial right made after final judgment, and hence a judgment on such application is not a final judgment denying relief on the merits. Alamogordo Imp. Co. v. Palmer, 28 N.M. 590, 216 P. 686 (1923).

Order awarding a new trial is ordinarily not appealable. In re Richter's Will, 42 N.M. 593, 82 P.2d 916 (1938).

Order which set aside verdict and interrogatories for contradictoriness and granted a new trial could not be appealed. Cockrell v. Gilmore, 74 N.M. 66, 390 P.2d 655 (1964).

Where motions for judgment n.o.v. and new trial are made in the alternative, and no judgment has been rendered on the verdict, order granting new trial renders verdict a nullity and is not appealable. Scott v. J.C. Penney Co., 67 N.M. 219, 354 P.2d 147 (1960).

Order granting new trial, entered upon timely motion filed by plaintiff following judgment upon jury verdict in defendant's favor, was not appealable. Warren v. Zimmerman, 82 N.M. 583, 484 P.2d 1293 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971).

Order granting remittitur or new trial is not ordinarily final judgment disposing of the merits of the action, and is not appealable. Hudson v. Otero, 80 N.M. 668, 459 P.2d 830 (1969); Nally v. Texas-Arizona Motor Freight, Inc., 67 N.M. 153, 353 P.2d 678 (1960).

Order denying motion for new trial is ordinarily not appealable. Public Serv. Co. v. First Judicial Dist. Court, 65 N.M. 185, 334 P.2d 713 (1959); Harrison v. ICX, Illinois-California Express, Inc., 98 N.M. 247, 647 P.2d 880 (Ct. App. 1982).

Denial of motions for new trial and decree amendment. — Denial of motions for new trial and to amend final injunction decree based on matters which could be reviewed by supreme court on appeal from final judgment itself are not final orders affecting substantial rights and are not appealable. Public Serv. Co. v. First Judicial Dist. Court, 65 N.M. 185, 334 P.2d 713 (1959).

Motion for reconsideration or new trial. — The denial of a motion for reconsideration or in the alternative for a new trial is not appealable. Labansky v. Labansky, 107 N.M. 425, 759 P.2d 1007 (Ct. App. 1988).

Order refusing to amend or modify judgment. — Where an appeal may properly be taken from a judgment, but has not been taken, a subsequent order refusing to amend or modify the judgment is not appealable, since the denial order merely confirms the finality of the judgment. State ex rel. Human Servs. Dep't v. Jasso, 107 N.M. 75, 752 P.2d 790 (Ct. App. 1987).

Order reopening claim for workmen's compensation was not an appealable order. Davis v. Meadors-Cherry Co., 63 N.M. 285, 317 P.2d 901 (1957).

Denial of petition for habeas corpus. — Petitioner had no right to appeal to supreme court from denial by district court of petition for writ of habeas corpus. California v. Clements, 83 N.M. 764, 497 P.2d 975 (1972).

Ruling on party's standing to appeal. — Where a cause relating to the administration of an estate, under former probate procedure, had been removed from the probate court to the district court, and appellee requested the district court to try certain issues de novo, the ruling of the district court that he was an "interested person" to appeal to the supreme court from an adverse ruling was not appealable as an interlocutory decision

practically disposing of the merits. In re Romero's Estate, 38 N.M. 308, 31 P.2d 999 (1934).

Review of nonappealable matters on appeal of final judgment. — As orders entered on procedural motions that do not practically dispose of the case on the merits, in this case, orders limiting discovery, are not of themselves appealable, such errors were properly before the appellate court on the appeal of the summary judgment. Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977).

V. FILING NOTICE.

Appeal treated as filed after final judgment. — An appeal filed after the announcement of a decision, but before the final judgment is filed, will be treated as filed after the final judgment. Healthsource, Inc. v. X-Ray Associates, 2005-NMCA-097, 138 N.M. 70, 116 P.3d 861, cert. denied, 2005-NMCERT-007.

Time for notice of appeals. — In jury trial cases where one of the parties files a post-trail motion for judgment as a matter of law, the time for filing a notice of appeal does not begin to run until the district court enters an order ruling on the motion. Valley Bank of Commerce v. Hilburn, 2005-NMCA-004, 136 N.M. 741, 105 P.3d 294.

Timely filing of a notice of appeal is jurisdictional. Public Serv. Co. v. Wolf, 78 N.M. 221, 430 P.2d 379 (1967); Rivera v. King, 108 N.M. 5, 765 P.2d 1187 (Ct. App. 1988).

Timely filing of an appeal is a jurisdictional requirement. Miller v. Doe, 70 N.M. 432, 374 P.2d 305 (1962).

Failure to obtain timely allowance of an appeal pursuant to former appellate procedure was jurisdictional. Cook v. Mills Ranch-Resort Co., 31 N.M. 514, 247 P. 826 (1926); Chavez v. Village of Cimarron, 65 N.M. 141, 333 P.2d 882 (1958); Adams v. Tatsch, 68 N.M. 446, 362 P.2d 984 (1961); Scott v. Newsom, 74 N.M. 399, 394 P.2d 253 (1964); Morales v. Cox, 75 N.M. 468, 406 P.2d 177 (1965).

Failure to perfect timely appeal is jurisdictional. Breithaupt v. State, 57 N.M. 46, 253 P.2d 585 (1953); State v. Weddle, 77 N.M. 417, 423 P.2d 609 (1967); State v. Navas, 78 N.M. 365, 431 P.2d 743 (1967); State v. Sisk, 79 N.M. 167, 441 P.2d 207 (1968); State v. Sedillo, 81 N.M. 622, 471 P.2d 192 (Ct. App. 1970).

Where the record indicates an appeal was not filed within the time provided by the applicable rules and there is no claim that a basis exists for avoiding the effect of the rules, the court of appeals is without jurisdiction to hear the appeal. State v. Martinez, 84 N.M. 766, 508 P.2d 36 (Ct. App. 1973).

When a notice of appeal is not timely filed, the court has no jurisdiction to consider the merits of the issue raised. Brazfield v. Mountain States Mut. Cas. Co., 93 N.M. 417, 600 P.2d 1207 (Ct. App.), cert. denied, 93 N.M. 205, 598 P.2d 1165 (1979).

Employer's appeal from the district court's denial of its claim against the subsequent injury fund was dismissed by the court of appeals for lack of jurisdiction, where the employer filed its notice of appeal with the court of appeals instead of with the district court. Torres v. Smith's Mgt. Corp., 111 N.M. 547, 807 P.2d 245 (Ct. App. 1991).

A notice of appeal and an amended notice of appeal both filed on June 25, 2002 from a district court's dismissal order of October 3, 2001 was filed well within the thirty-day requirement. Sam v. Estate of Sam, 2004-NMCA-018, 135 N.M. 101, 84 P.3d 1066.

Such as where notice filed one day late. — Where the notice of appeal is filed one day late, the supreme court is without jurisdiction to hear the appellant's appeal. State v. Brinkley, 78 N.M. 39, 428 P.2d 13 (1967).

Late filing of appeal. — Because timely filing of an appeal is a mandatory precondition rather than an absolute jurisdictional requirement, a trial court may, under unusual circumstances, use its discretion and entertain an appeal even though it is not timely filed. The decision to dismiss an appeal is extreme and must be determined on a case-by-case basis. Trujillo v. Serrano, 117 N.M. 273, 871 P.2d 369 (1994).

Court error may excuse late appeal. — One unusual circumstance which would warrant permitting an untimely appeal is if the delay is a result of judicial error. To deny a party the constitutional right to an appeal because of a mistake on the part of the court runs against the most basic precepts of justice and fairness. Trujillo v. Serrano, 117 N.M. 273, 871 P.2d 369 (1994).

Time period required by rule applicable to order denying post-conviction relief. — An appeal from an order denying a motion for post-conviction relief is dismissed because not taken within the required time period and the court is hence without jurisdiction to consider the matter further. State v. Weddle, 79 N.M. 252, 442 P.2d 210 (Ct. App. 1966).

The defendant's attempt to seek appellate review of the propriety of the judge's finding on post-conviction relief comes too late where the judge's finding for which relief is sought was made several months prior to the motion. Maimona v. State, 82 N.M. 281, 480 P.2d 171 (Ct. App. 1971).

Time limitation on appeals not affected by constitutional right to appeal. — The time element relating to appeals is not affected by N.M. Const., art. VI, § 2, providing for the absolute right to one appeal. State v. Garlick, 80 N.M. 352, 456 P.2d 185 (1969).

Untimely notice waived where counsel ineffective. — Where the untimeliness of a criminal defendant's appeal was the consequence of ineffective assistance of counsel, the appeal was treated as if the notice had been filed in a timely fashion, from both the judgment and from the deemed denial of the motion to withdraw his plea of no contest. State v. Peppers, 110 N.M. 393, 796 P.2d 614 (Ct. App. 1990).

Counsel's error failure to file notice of appeal or request an extension within the thirty-day time limit prescribed by this rule constituted ineffective assistance of counsel, and did not strip the court of jurisdiction to hear the appeal. State ex rel. Children, Youth & Families Dep't v. Ruth Anne E., 1999-NMCA-035, 126 N.M. 670, 974 P.2d 164.

As supreme court authorized to reduce time. — It is within the rulemaking power of the supreme court to reduce the time for taking an appeal once the legislature has authorized an appeal, since the regulation of the manner and time for taking an appeal is a procedural matter. State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947).

Place of filing jurisdictional. — An appellant who filed a notice of appeal with the clerk of the court of appeals rather than with the clerk of the district court did not comply with the place-of-filing requirement of Paragraph A of Rule 12-202 NMRA. Thus, the court was without jurisdiction to consider the appeal. Lowe v. Bloom, 110 N.M. 555, 798 P.2d 156 (1990) (overruling Martinez v. Wooten Construction Co., 109 N.M. 16, 780 P.2d 1163 (Ct. App. 1989) to the extent it holds otherwise).

Filing of notice of appeal "in open court" on the thirtieth day following judgment constituted substantial compliance with the thirty-day filing requirement, even though the appeal was not filed in the clerk's office until a week later. Williams v. Board of County Comm'rs, 1998-NMCA-090, 125 N.M. 445, 963 P.2d 522, cert. denied, 125 N.M. 654, 964 P.2d 818 (1998).

Jurisdiction of appeal cannot be conferred by waiver or consent of the parties. Evans v. Barber Super Mkts., Inc., 69 N.M. 13, 363 P.2d 625 (1961).

Parties cannot by stipulating confer jurisdiction upon the supreme court. Wanser v. Fuqua, 46 N.M. 217, 126 P.2d 20 (1942).

Rule that unless the appeal is taken within 30 days, the supreme court has no jurisdiction, is not discretionary nor can it be waived. William K. Warren Found. v. Barnes, 67 N.M. 187, 354 P.2d 126 (1960).

Where no final judgment has been entered, appeal is premature and must be dismissed. Curbello v. Vaughn, 76 N.M. 687, 417 P.2d 881 (1966).

Notice of appeal filed before entry of judgment is premature and, therefore, not timely. Public Serv. Co. v. Wolf, 78 N.M. 221, 430 P.2d 379 (1967).

Attempted taking or granting of appeal prior to entry of judgment is premature. Cook v. Mills Ranch-Resort Co., 31 N.M. 514, 247 P. 826 (1926); D.M. Miller & Co. v. Slease, 30 N.M. 469, 238 P. 828 (1925).

Premature filing and notice valid. — Plaintiff was justified in filing and serving notice of appeal prematurely but making notice effective as of the date when judgment was actually filed, where, due to the prior delays which had occurred, plaintiff had good

cause to believe that the time for signing and filing the judgment would be indefinite and that plaintiff would not be notified of the date that the judgment would be filed; however, this type of filing was not to be approved under normal circumstances. Weiss v. Hanes Mfg. Co., 90 N.M. 683, 568 P.2d 209 (Ct. App.), cert. denied, 90 N.M. 3, 569 P.2d 413 (1977).

Time for taking appeal begins to run when judgment is entered. King v. McElroy, 37 N.M. 238, 21 P.2d 80 (1933).

Notice when motion for attorney's fees pending. — In cases in which a motion for attorney's fees is filed after the entry of judgment but before the expiration of the time for filing of a notice of appeal, the appellant may elect to file a timely notice of appeal from the judgment or to file a timely notice of appeal from the trial court's resolution of the supplemental matter of attorney's fees. Executive Sports Club v. First Plaza Trust, 1998-NMSC-008, 125 N.M. 78, 957 P.2d 63.

Notice filed before judgment entered but after sentencing hearing held timely. — Where defendant filed his notice of appeal prior to entry of judgment and sentence but after a sentencing hearing, at the end of which the district court announced its disposition, defendant perfected a timely appeal from a final judgment. State v. Ortiz, 105 N.M. 308, 731 P.2d 1352 (Ct. App. 1986).

Party could not deprive adversary of full period for appeal by imposing consolidation for single judgment of suit providing for a limited appeal with adversary's previously filed suit providing a longer period of appeal, over adversary's protest. Palmer v. Town of Farmington, 25 N.M. 145, 179 P. 227 (1919).

Unexplained delay after mailing. — Where counsel was diligent and acted within ample time to accomplish timely allowance of appeal under former appellate procedure, and order allowing same was mailed in more than enough time to have reached clerk of supreme court, unexplained fact that it was filed one day late would not overcome presumption of receipt in due course of mail. Adams v. Tatsch, 68 N.M. 446, 362 P.2d 984 (1961).

Untimely appeal. — Application for the allowance of an appeal, under former appellate procedure, from an interlocutory judgment, made 80 days after entry, came too late. State ex rel. Sandoval v. Taylor, 43 N.M. 170, 87 P.2d 681 (1939).

Where the district court’s orders denying an intervention motion and approving the final settlement were filed on June 27, 2002 and the thirtieth day fell on a weekend, the notice of appeal was due Monday, July 29, 2002. An appeal filed on July 30 was one day late. Wilson v. Massachusetts Mutual Life Ins. Co., 2004-NMCA-051, 135 N.M. 506, 90 P.3d 525, cert. denied, 2004-NMCERT-004.

On appeal from judgment awarding damages for taking of property under the Conservancy Act pursuant to 73-17-17 NMSA 1978, supreme court was without

jurisdiction to consider rulings assigned as error, the appeal not having been taken within the 30 days prescribed by that statute. Albuquerque Gun Club v. Middle Rio Grande Conservancy Dist., 42 N.M. 8, 74 P.2d 67 (1937).

Res judicata where time for appealing formal testacy had run. — Where the time for appealing a formal testacy order had run, the distribution of the estate was res judicata absent fraud or jurisdictional error. Wisdom v. Kopel, 95 N.M. 513, 623 P.2d 1027 (Ct. App. 1981).

Notice of cross-appeal timely. — Notice of cross-appeal filed on Monday following expiration on Saturday of 15-day (now 10-day) period after service of notice of appeal was timely. Sierra Life Ins. Co. v. First Nat'l Life Ins. Co., 85 N.M. 409, 512 P.2d 1245 (1973).

Premature filing and notice valid. — Appellate court had jurisdiction to review a modification to a permit to operate a hazardous waste disposal site even though the notice of appeal was prematurely filed, because, under Paragraph A of this rule, a premature notice of appeal was treated as if filed as of the date of the order being appealed. S.W. Research & Info. Ctr. v. State, 2003-NMCA-012, 133 N.M. 179, 62 P.3d 270.

Child abuse and neglect cases. — Because the adjudication of abuse and neglect can have a serious impact on a parent's fundamental interest in the care, custody and management of a child, and because a parent has the right to effective assistance of counsel in abuse and neglect adjudications, the court will presume that counsel was ineffective where a notice of appeal from an adjudication of abuse and neglect is filed late and will accept jurisdiction over the appeal. State ex rel. CYFD v. Amanda M., 2006-NMCA-133, 140 N.M. 578, 144 P.3d 139.

VI. CROSS-APPEALS.

Rule controls over statute. — This rule, which requires a party to file cross-appeals not later than ten days following notice of appeal, controls over 39-3-8 NMSA 1978, allowing 15 days to file a cross appeal. Rodriguez v. McAnally Enters., 117 N.M. 250, 871 P.2d 14 (Ct. App. 1994).

Purpose of cross-appeal. — Rule 7(2) of former Supreme Court Rules (similar to third sentence of Paragraph A of this rule) contemplated cross-appeal to review rulings which were prejudicial to appellee, regardless of outcome of appeal proper. Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964).

Cross-appeal could be had where party timely applied therefor. Montgomery v. Cook, 76 N.M. 199, 413 P.2d 477 (1966).

Timely notice of initial appeal. — The plain language of Paragraph A makes the additional ten-day period of time within which to file a cross-appeal contingent upon the

filing of a timely notice of the initial appeal. Shain v. Birnbaum, 112 N.M. 700, 818 P.2d 1224 (Ct. App. 1991).

Notice of cross-appeal timely. — Where plaintiff served his notice of appeal by mail on Friday, February 6, defendants' ten days in which to file their notice of cross-appeal did not end until Friday, February 20 and, because they had been served by mail, they still had an additional three days in which to file their notice of cross-appeal. A.D. Powers v. Miller, 1999-NMCA-080, 127 N.M. 496, 984 P.2d 177.

Misnamed cross-appeal not dismissed. — Application for cross-appeal denominated "notice of cross-appeal" would not be dismissed. Montgomery v. Cook, 76 N.M. 199, 413 P.2d 477 (1966).

Failure of one party to cross-appeal not fatal. — Failure of father of minor, one of three defendants, who was himself made defendant by amended complaint, to cross-appeal, as did other defendants, from order overruling their motion to dismiss for want of prosecution when plaintiffs appealed from dismissal of action on other grounds, would not prevent the supreme court from entering a proper order to avoid prejudice and inequity. Morris v. Fitzgerald, 73 N.M. 56, 385 P.2d 574 (1963).

Failure to follow rules. — Where no effort was made to comply with former rule, questions raised by cross-appeal would not be considered. Reynolds v. Ruidoso Racing Ass'n, 69 N.M. 248, 365 P.2d 671 (1961).

Where party, in the middle of his answer brief, included a section denominated "cross-appeal," by which he undertook to attack the court's judgment, but made no effort to comply with Rule 5 of former Supreme Court Rules, providing for appeals or Rule 7(2) thereof, providing for cross-appeals, the court would hold that no cross-appeal was ever taken, and refuse to consider the questions attempted to be raised. Reynolds v. Ruidoso Racing Ass'n, 69 N.M. 248, 365 P.2d 671 (1961).

Court of appeals was without jurisdiction to hear the merits of a cross-appeal, where the notice of cross-appeal was not filed within the time required. Olguin v. County of Bernalillo, 109 N.M. 13, 780 P.2d 1160 (Ct. App. 1989).

Period runs despite nonfiling of docketing statement. — Rule 12-601 NMRA does not provide that the Rules of Appellate Procedure governing appeals from the district court do not commence to apply until after the filing of the docketing statement by the appellant in an administrative appeal. Nothing in that rule authorizes a party to file his notice of cross-appeal more than ten days from the date the appellant files its notice of appeal, as provided by Paragraph A of this rule. Rodriguez v. McAnally Enters., 117 N.M. 250, 871 P.2d 14 (Ct. App. 1994).

Preservation of error by appellee required. — Where appellee cross-complainant failed to except to any of the trial court's findings and conclusions and thus failed to preserve any error, having taken no cross-appeal and not having brought within Rule

17(2) of former Supreme Court Rules, he was obliged to sustain the trial court's decision solely against the attacks made upon it by appellant. Pacheco v. Fresquez, 49 N.M. 373, 164 P.2d 579 (1945).

Issue waived by failure to cross-appeal. — Where appellee failed to cross-appeal question of attorney's fees pursuant to Rule 7 of former Supreme Court Rules, he waived issue. State ex rel. State Hwy. Dep't v. Yurcic, 85 N.M. 220, 511 P.2d 546 (1973).

Election of remittitur as bar to attack. — Where the court orders a successful plaintiff to remit a portion of the verdict or to stand a new trial, and the plaintiff elects the remittitur, he cannot attack the court's order on cross-appeal. Hudson v. Otero, 80 N.M. 668, 459 P.2d 830 (1969).

VII. REVIEW WITHOUT CROSS-APPEAL.

Review of rulings adverse to appellee. — Rulings adverse to appellee because of which it was contended the case should be affirmed, but which needed to be considered only if appeal was found to have merit, could be reviewed under Rule 17(2) of former Supreme Court Rules, which was similar to Paragraph C of this rule. Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964).

On appeal by plaintiff from judgment that cause of action was barred by statute of limitations, defendant-appellee would be permitted to assign errors committed against it and thus raise the question whether, notwithstanding any error found to have been committed against the plaintiff-appellant on the statute of limitations, judgment should nevertheless be affirmed. Munro v. City of Albuquerque, 48 N.M. 306, 150 P.2d 733 (1943).

Failure of one defendant to cross-appeal not fatal. — Failure of father of minor, one of three defendants, who was himself made defendant by amended complaint, to cross-appeal, as did other defendants, from order overruling their motion to dismiss for want of prosecution when plaintiffs appealed from dismissal of action on other grounds, would not prevent the supreme court from entering a proper order to avoid prejudice and equity. Morris v. Fitzgerald, 73 N.M. 56, 385 P.2d 574 (1963).

Raising of error in brief sufficient. — No notice of cross-appeal was required for appellee to obtain review, but merely the making of a point of the claimed error in brief, together with argument thereon. Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964).

Where claimant in workmen's compensation case failed to cross-appeal or raise any error under Rule 17(2) of former Supreme Court Rules as to trial court findings, merely attempting in his brief to argue the evidence submitted to the trial court as showing a loss of wage-earning ability, supreme court would accept the findings before it as facts. Brownlee v. Lincoln County Livestock Co., 76 N.M. 137, 412 P.2d 562 (1966).

Failure of appellee to demonstrate error. — To obtain a review under Rule 17(2) of former Supreme Court Rules, no notice of cross-appeal was required, but merely the making of a point in the appellee's brief of the claimed error together with arguments thereon. However, where plaintiff did not preserve his argument for review, did not assert that any finding made by the trial court was error nor refer to any requested conclusions refused by the trial court, he failed to carry the burden of demonstrating how the trial court erred in failing to apply his doctrines in the light of the unchallenged findings. Adams v. Thompson, 87 N.M. 113, 529 P.2d 1234 (Ct. App.), cert. denied, 87 N.M. 111, 529 P.2d 1232 (1974).

Where the appellee did not preserve her argument for review, did not assert that any finding made by the trial court was error, and did not refer to any requested conclusions refused by the trial court, she failed to carry the burden of demonstrating how the trial court committed reversible error by not awarding her attorney fees. Peterson v. Peterson, 98 N.M. 744, 652 P.2d 1195 (1982).

VIII. EXTENSIONS OF TIME.

A. IN GENERAL.

Tolling provisions apply to all parties. — The filing of a post-trial motion by one party tolls the time limit for filing a notice of appeal and the time limit for granting extensions of time to file a notice of appeal for all parties in the litigation. Capco Acquisub, Inc. v. Greka Energy Corporation, 2007-NMCA-011, 140 N.M. 920, 149 P.3d 1017.

Strict construction. — Former Rule 3, N.M.R. App. P. (Civ.) (see now this rule) was strictly construed to prevent its progressive erosion to the point that attorneys would assume that they had 60 days within which to file notices of appeal. Guess v. Gulf Ins. Co., 94 N.M. 139, 607 P.2d 1157 (1980).

Court will not exercise it discretion to excuse untimely filing of appeal by the state in a criminal case, as the court does for criminal defendants by presuming the ineffective assistance of counsel, because the state does not possess the constitutional right of an accused to the effective assistance of counsel and the court will not excuse untimely filing of an appeal because of the inadvertence of the state's counsel or because the opposing party was not prejudiced by the delay resulting from the untimely appeal. State v. Upchurch, 2006-NMCA-076, 139 N.M. 739, 137 P.3d 679.

Extension cannot arise by implication. — Although the appellant claimed that her prior counsel's motion to withdraw gave reference to her intention to appeal and, by granting the motion, the trial court impliedly granted an extension of time to appeal, an extension of time to file an appeal does not arise by implication. The extension must be asked for and granted. State ex rel. Human Servs. Dep't v. Jasso, 107 N.M. 75, 752 P.2d 790 (Ct. App. 1987).

An extension of time to file an appeal does not arise by implication from the filing of a motion for a new trial or a motion for reconsideration; an extension of time for the filing of an appeal must be specifically requested and granted. Labansky v. Labansky, 107 N.M. 425, 759 P.2d 1007 (Ct. App. 1988).

District court retains for 60 days authority to grant extensions. — Where a post-trial motion is filed, the district court retains, for a period of 60 days from the disposition, either express or automatic of the post-trial motion, the authority to grant extensions of the time to file a notice of appeal. Chavez v. U-Haul Co., 1997-NMSC-051, 124 N.M. 165, 947 P.2d 122.

Applicability to Rule 1-060B NMRA motions. — Paragraph E(5) was not intended to apply to Rule 1-060B NMRA motions. Archuleta v. New Mexico State Police, 108 N.M. 543, 775 P.2d 745 (Ct. App. 1989).

Court will not extend exception to late filing to circumstances where the court played no part in the delay and where options available to the appellant to ensure timely filing of the notice were not taken. Wilson v. Massachusetts Mutual Life Ins. Co., 2004-NMCA-051, 135 N.M. 506, 90 P.3d 525, cert. denied, 2004-NMCERT-004.

Amended extension order without effect. — Where there is no question that the district court’s initial order of August 14 was entered within the 60-day period to grant an extension to appeal, and the court attempted to amend it on September 24, because there is no precedent allowing for an extension order to be amended after the 60-day period, the September 24 order is considered to be a second order for an extension and is without effect. Wilson v. Massachusetts Mutual Life Ins. Co., 2004-NMCA-051, 135 N.M. 506, 90 P.3d 525, cert. denied, 2004-NMCERT-004.

Certiorari petitions. — No rule allows district courts the authority to grant extensions to file certiorari petitions. Cassidy-Baca v. Board of County Comm'rs of Sandoval County, 2004-NMCA-108, 136 N.M. 307, 98 P.3d 316.

Removals from corporation commission's ratemaking proceedings. — Period within which removals from corporation commission's ratemaking proceedings may be taken was governed by former Rules 3(d) and 4(c), N.M.R. App. (Civ.) (see now Rule 12-202 NMRA and this rule). Mountain States Tel. & Tel. Co. v. Corporation Comm'n, 99 N.M. 1, 653 P.2d 501 (1982).

Amendment of judgment without material change. — When an amendment of the judgment does no more than restate what has been decided by the original judgment, so that there is no material change of substance, the time for review starts to run from the date of the original judgment. Rice v. Gonzales, 79 N.M. 377, 444 P.2d 288 (1968).

Substantial modification of judgment. — Movant who obtains a substantial modification of the judgment against him is entitled to have the time for taking his

appeal tolled during the pendency of the motion. Scofield v. J.W. Jones Constr. Co., 64 N.M. 319, 328 P.2d 389 (1958).

Nunc pro tunc order does not extend time for appeal. — Where a timely notice of appeal is not taken and an extension of appeal time is not granted until after the maximum time for extending the appeal time has expired, a nunc pro tunc provision of the district court order attempting to supply an omitted action is not effective in extending the time for appeal, since a nunc pro tunc order properly refers only to the making of an entry now, of something which was actually previously done, so as to have it effective as of the earlier date. Gonzales v. City of Albuquerque, 90 N.M. 785, 568 P.2d 621 (Ct. App. 1977).

Appeal by defendant was not timely, as order of court in garnishment suit finally disposed of the litigation, by its very terms allowing exemptions claimed and ordering balance paid to the plaintiff, and subsequent order denying the motion to quash was unnecessary, merely completing record. Time for the defendant to appeal commenced to run on that date and motion for additional findings was not timely and could in no sense extend the time of appeal. Advance Loan Co. v. Kovach, 79 N.M. 509, 445 P.2d 386 (1968).

Appeal not timely notwithstanding hearing. — Plaintiff's appeal from an order denying her motion for a new trial was untimely since it was filed over three and one-half months after the motion for a new trial was filed, and over 60 days from the date the motion was denied by operation of law, and no extensions of time within which to file an appeal were sought or granted; the fact that the trial court held a hearing on the motion for a new trial within 30 days after it was filed did not have the effect of tolling the period within which to file the notice of appeal. Feynn v. St. Martin's Hospitality Ctr., 1997-NMCA-122, 124 N.M. 317, 950 P.2d 290.

Motion for attorneys' fees may extend time for appeal. — Motion for attorney fees could toll the time for filing notice of appeal in workers' compensation case. Trujillo v. Hilton of Santa Fe, 115 N.M. 397, 851 P.2d 1064 (1993).

Appeal from second compensation order also awarding attorneys fees. — Although the court issued the second compensation order nunc pro tunc to correct errors in the first order, the court also awarded attorneys fees, which award could not relate back. Thus, the parties could appeal from either order. The appeal in this case from the second compensation order awarding attorneys fees, although more than 30 days from the first order, was nevertheless timely. Barela v. ABF Freight Sys., 116 N.M. 574, 865 P.2d 1218 (Ct. App. 1993).

B. EXCUSABLE NEGLECT OR CIRCUMSTANCES BEYOND APPELLANT'S CONTROL.

No excusable neglect. — The district court did not abuse its discretion in denying appellants’ motion for an extension of time to file a notice of appeal where appellants

failed to monitor the progress of their appeal, appellants had plenty of time and several opportunities to correct any miscommunication with their trial counsel, and appellants' general counsel was aware that trial counsel had not included the appellants in post-trial motions or the notice of appeal filed on behalf of the appellants' parent corporation in the litigation. Capco Acquisub, Inc. v. Greka Energy Corporation, 2007-NMCA-011, 140 N.M. 920, 149 P.3d 1017.

Inability to contact attorney. — Where appellants' motion for extension recited that they had tried, before the time for appeal had expired, to notify their attorney that they wished to appeal but had been unable to reach him until the time had expired, and that these circumstances were beyond their control or constituted excusable neglect, the trial court's order granting an extension for good cause was presumed to be correct in the absence of any indication to the contrary. White v. Singleton, 88 N.M. 262, 539 P.2d 1024 (Ct. App. 1975).

Nature of proceedings. — Insofar as a motion for extension may be filed before the time for filing the notice has expired, the rule actually contemplates ex parte proceedings so long as service of notice of those proceedings is otherwise made; but once the time for filing a notice of appeal has passed, party not pressing the appeal has an opportunity to challenge granting of the motion for extension, which a challenge could involve an evidentiary hearing on the issue of excusable neglect or circumstances beyond the control of the appellant. White v. Singleton, 88 N.M. 262, 539 P.2d 1024 (Ct. App. 1975).

Reliance on motion for extension for proof of service. — Where neither the motion for extension nor the notice of appeal included in the transcript proper indicated certification of service upon opposing counsel, but the copy of the motion in the skeleton transcript prepared by counsel did certify that service had been made, in light of the fact that the skeleton transcript was required as part of the appellate process and was required to be certified by the clerk of the district court, the court of appeals would rely on the copies of the motion for extension and the notice of appeal included in skeleton transcript for proof that opposing counsel was served. White v. Singleton, 88 N.M. 262, 539 P.2d 1024 (Ct. App. 1975).

C. MOTIONS NOT RULED ON.

Motion not ruled on deemed denied. — Where motion to set aside the judgment was not ruled upon within 30 days thereafter, it was deemed denied by operation of law; therefore, appeal taken more than five months later was not timely. New Mexico Sav. & Loan Ass'n v. Blueher Lumber Co., 80 N.M. 254, 454 P.2d 268 (1969).

Since the trial court's ruling on the motion for new trial prior to the expiration of the 30-day period would have been reviewable, court's failure to rule could not avoid supreme court review, and a timely motion for new trial raising issue of excessive damages, would be considered as having been denied by the lower court if denied by operation of law. Montgomery Ward v. Larragoite, 81 N.M. 383, 467 P.2d 399 (1970).

The failure to rule within 30 days of the filing of the motion for new trial constitutes a denial of the motion by operation of law. Chavez-Rey v. Miller, 99 N.M. 377, 658 P.2d 452 (Ct. App. 1982).

The parties were required to file their notice of appeal from an order of distribution of certain settlement proceeds within 30 days from the date their motion for reconsideration was deemed denied by operation of law. Beneficial Fin. Corp. v. Morris, 120 N.M. 228, 900 P.2d 977 (Ct. App. 1995).

Law reviews. — For article, "The Writ of Prohibition in New Mexico," see 5 N.M.L. Rev. 91 (1974).

For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

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

For note, "Federal Civil Rights Act - The New Mexico Appellate Courts' Choice of the Proper Limitations Period for Civil Rights Actions Filed Under 42 U.S.C. § 1983: DeVargas v. State ex rel. New Mexico Department of Corrections," see 13 N.M.L. Rev. 555 (1983).

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

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

For survey of 1990-91 appellate procedure, see 22 N.M.L. Rev. 623 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 285 et seq.

Motion or petition for rehearing in court below as affecting time within which appellate proceedings must be taken or instituted, 10 A.L.R.2d 1075.

Right to appellate review, on single appellate proceedings, of separate actions consolidated for trial together in lower court, as affected by failure to object seasonably to appellate procedure, 36 A.L.R.2d 849.

Right to perfect appeal, against party who has not appealed, by cross-appeal filed after time for direct appeal has passed, 32 A.L.R.3d 1290.

Filing of notice of appeal as affecting jurisdiction of state trial court to consider motion to vacate judgment, 5 A.L.R.5th 422.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages - modern cases, 5 A.L.R.5th 875.

Excessiveness or adequacy of damages awarded for injuries causing metal or psychological damage, 52 A.L.R. 5th 1.

Appellate review of order denying extension of time for filing notice of appeal under Rule 4(a) of Federal Rules of Appellate Procedure, 39 A.L.R. Fed. 829.

Acceptance by United States District Court of Notice of Appeal in criminal case untimely filed, as grant of additional time to file notice, under Rule 4(b) of Federal Rules of Appellate Procedure, 43 A.L.R. Fed. 815.

Failure to appeal denial of double jeopardy claim within time limits of Rule 4, Federal Rules of Appellate Procedure, as precluding review of claim on appeal of conviction at retrial, 51 A.L.R. Fed. 770.

Appealability of federal court order denying motion for appointment of counsel for indigent party, 67 A.L.R. Fed. 925.

Bail bond forfeiture proceedings as civil or criminal for purposes of time for appeal under Rule 4 of Federal Rules of Appellate Procedure, 70 A.L.R. Fed. 952.

When will premature notice of appeal be retroactively validated in federal civil case, 76 A.L.R. Fed. 199.

4 C.J.S. Appeal and Error §§ 154 et seq., 264 et seq., 368 et seq.; 5 C.J.S. Appeal and Error § 734 et seq.

12-202. Appeal as of right; how taken.

A. **Filing the notice of appeal.** An appeal permitted by law as of right from the district court shall be taken by filing a notice of appeal with the district court clerk within the time allowed by Rule 12-201 NMRA.

B. **Content of the notice of appeal.** The notice of appeal shall specify:

(1) each party taking the appeal and each party against whom the appeal is taken, except that in appeals concerning children involved in litigation under the provisions of the Children's Code, the provisions of Paragraph D of Rule 12-305 NMRA, shall be followed;

(2) the name and address of appellate counsel if different from the person filing the notice of appeal; and

(3) the name of the court to which the appeal is taken.

C. **Attachment to notice of appeal.** A copy of the judgment or order appealed from, showing the date of the judgment or order, shall be attached to the notice of appeal.

D. **Additional requirements for appeals in criminal cases.** In addition to the requirements set forth in Paragraphs B and C of this rule, the following are required, when applicable, with a notice of appeal in criminal cases:

(1) a notice of appeal by the state under Section 39-3-3(B)(2) NMSA 1978 shall also include the certificate of the district attorney required by the statute;

(2) if the notice of appeal names the appellate division of the public defender department as appellate counsel, a copy of the order appointing the appellate division of the public defender department shall be attached to the notice of appeal; and

(3) if the appeal is an appeal taken from the district court in which a sentence of death or life imprisonment has been imposed, and the proceedings are not audio recorded, a designation of proceedings shall be filed at the same time as the notice of appeal in accordance with Subparagraph (5) of Paragraph C of Rule 12-211 NMRA.

E. **Service of the notice of appeal.** The appellant shall give notice of the filing of a notice of appeal:

(1) in criminal cases, including criminal contempt cases, and cases governed by the Children's Court Rules, by serving a copy on the appellate court, appellate division of the attorney general, appellate division of the public defender when the public defender is appointed on appeal, trial judge, trial counsel of record for each party other than the appellant, and the court monitor or court reporter who took the record;

(2) in child abuse and neglect proceedings and proceedings involving the termination of parental rights, in addition to those required in Subparagraph (1) of this paragraph, by serving a copy on the Legal Services Bureau of the Human Services Department; and

(3) in all other cases, by serving a copy on the appellate court, trial judge, court monitor or court reporter who took the record and trial counsel of record for each party other than the appellant.

F. **Service on party.** If a party is not represented by counsel, service shall be made by mailing a copy of the notice of appeal to the party's last known address.

G. **Joint or consolidated appeals.**

(1) If two or more persons are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of

appeal, or may join in an appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant.

(2) Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties.

[As amended, effective September 1, 1993; September 15, 2000; as amended by Supreme Court Order 05-8300-03, effective March 15, 2005; by Supreme Court Order 06-8300-11, effective May 15, 2006.]

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For appellate jurisdiction of Supreme Court, see N.M. Const., art. VI, § 2.

For original jurisdiction of Supreme Court, see N.M. Const., art. VI, § 3.

For references to state corporation commission being construed as references to the public regulation commission, see Section 8-8-21 NMSA 1978.

For appellate jurisdiction of court of appeals, see Section 34-5-8 NMSA 1978.

For appellate jurisdiction of Supreme Court, see Section 34-5-14 NMSA 1978.

Federal rules. — See Fed. R. App. P. Rule 3.

The 1993 amendment, effective September 1, 1993, substituted "the party's" for "the party at his" in Paragraph E.

The 2000 amendment, effective September 15, 2000, added Paragraph C(3).

The 2005 amendment, effective March 15, 2005, substituted "audio recorded" for "on tape" in Subparagraph (3) of Paragraph C and "court monitor" for "tape monitor" in Subparagraphs (1) and (3) of Paragraph D.

The 2006 amendment, approved by Supreme Court Order 06-8300-11 effective May 15, 2006, revised Paragraph B to exclude children under the Children's Code, added Paragraph C and Paragraph E (former Paragraph D) to add to Subparagraph (1) "when the public defender is appointed on appeal".

Federal rules. — See Fed. R. App. P. Rule 3.

Where plaintiff's attached copy of the order, by which summary judgment was granted as to all pending claims, their appeal from this order simultaneously perfected

an appeal from the court's previous interlocutory order dismissing the fraud claim. Williams v. Stewart, 2005-NMCA-061, 137 N.M. 420, 112 P.3d 281, cert. denied, 2005-NMCERT-005.

Exception to panel of randomly chosen judges. — The consolidation of cases authorised by Paragraph F(2) of this rule would be an exception to the right to a panel of randomly chosen judges under Paragraph B(3) of Rule 12-210 NMRA. Mannick v. Wakeland, 2005-NMCA-098, 138 N.M. 113, 117 P.3d 919, cert. granted, 2005-NMCERT-001.

Two-step process to perfecting appeal. — New Mexico cases, under older versions of the relevant appellate rules, followed the rule that timely service of the notice of appeal is not a jurisdictional prerequisite to perfecting an appeal, and this rule continues to make filing of the notice and service of the notice a two-step process. Russell v. University of N.M. Hospital/Bernalillo County Medical Center, 106 N.M. 190, 740 P.2d 1174 (Ct. App. 1987).

Law reviews. — For article, "New Mexico's Summary Calendar for Disposition of Criminal Appeals: An Invitation for Inefficiency, Ineffectiveness and Injustice," see 24 N.M.L. Rev. 27 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 269 et seq.

Who is adverse party within statute providing for service of notice of appeal on adverse party, 88 A.L.R. 419.

Right of public officer or board to appeal from a judicial decision affecting his or its order or decision, 117 A.L.R. 216.

Who entitled to contest, or appeal from, allowance of claim against decedent's estate, 118 A.L.R. 743.

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

Appealability of adjudication as to sexual psychopathy, 24 A.L.R.2d 350.

Personal representative, guardian or trustee as parties entitled to appeal from order on application for removal of, 37 A.L.R.2d 751.

Defeated party's payment or satisfaction of, or other compliance with civil judgment as barring his right to appeal, 39 A.L.R.2d 153.

Plea of guilty in justice of the peace or similar inferior court as precluding appeal, 42 A.L.R.2d 995.

Ruling on motion to quash execution as ground of appeal or writ of error, 59 A.L.R.2d 692.

Right of an attorney to prosecute an appeal to protect his contingent fee notwithstanding desire of client to dismiss appeal or to substitute attorneys, 91 A.L.R.2d 618.

Filing of notice of appeal as affecting jurisdiction of state trial court to consider motion to vacate judgment, 5 A.L.R.5th 422.

Appellate review of order denying extension of time for filing notice of appeal under Rule 4(a) of Federal Rules of Appellate Procedure, 39 A.L.R. Fed. 829.

Acceptance by United States District Court of Notice of Appeal in criminal case untimely filed, as grant of additional time to file notice, under Rule 4(b) of Federal Rules of Appellate Procedure, 43 A.L.R. Fed. 815.

Failure to appeal denial of double jeopardy claim within time limits of Rule 4, Federal Rules of Appellate Procedure, as precluding review of claim on appeal of conviction at retrial, 51 A.L.R. Fed. 770.

Bail bond forfeiture proceedings as civil or criminal for purposes of time for appeal under Rule 4 of Federal Rules of Appellate Procedure, 70 A.L.R. Fed. 952.

Tolling of time for filing notice of appeal in civil action in federal court under Rule 4(a)(4) of Federal Rules of Appellate Procedure, 74 A.L.R. Fed. 516.

Untimely notice of appeal as motion for extension of time to appeal under Rule 4(a)(5) of Federal Rules of Appellate Procedure, 74 A.L.R. Fed. 775.

4 C.J.S. Appeal and Error § 154 et seq.

II. FILING NOTICE OF APPEAL.

Timely filing of notice of appeal is a fundamental requirement for appellate review. Seaboard Fire & Marine Ins. Co. v. Kurth, 96 N.M. 631, 633 P.2d 1229 (Ct. App. 1980).

Notices of appeal must be timely filed in the correct tribunal. Singer v. Furr's, Inc., 111 N.M. 220, 804 P.2d 411 (Ct. App. 1990).

Employer's appeal from the district court's denial of its claim against the subsequent injury fund was dismissed by the court of appeals for lack of jurisdiction, where the employer filed its notice of appeal with the court of appeals instead of with the district court. Torres v. Smith's Mgt. Corp., 111 N.M. 547, 807 P.2d 245 (Ct. App. 1991).

But judicial error is circumstance permitting untimely appeal. – Although the court will not ordinarily entertain an appeal in the absence of a timely notice, judicial error is

an unusual circumstance creating an exception that warrants permitting an untimely appeal. Romero v. Pueblo of Sandia, 2003-NMCA-137, 134 N.M. 553, 81 P.3d 490.

Judicial miscommunication led litigants to believe they had perfected their appeal where the court, within the time for filing a notice of appeal and well within the time that would be allowed with an extension, informed the litigants that it would consider their application for interlocutory appeal to serve as a notice of appeal and docketing statement; the court would not decline to hear the appeal because of a technical defect that it helped create. Romero v. Pueblo of Sandia, 2003-NMCA-137, 134 N.M. 553, 81 P.3d 490.

Notice requirement jurisdictional. — Failure of appellant to give notice of an appeal from a summary judgment was jurisdictional. Mabrey v. Mobil Oil Corp., 84 N.M. 272, 502 P.2d 297 (Ct. App.), cert. denied, 83 N.M. 740, 497 P.2d 742 (1972).

But jurisdiction over prior appeal not reviewed. — Although timely entry of order allowing appeal pursuant to Rule 5(5) of former Supreme Court Rules prior to effective date of 1961 amendment thereto was jurisdictional, nevertheless, the claim that appellant had followed wrong procedure for appealing from judgment in case filed prior to such date on prior appeal would not be considered on subsequent appeal, as appellate court will not question jurisdiction over prior appeal whether or not expressly ruled upon. Varney v. Taylor, 79 N.M. 652, 448 P.2d 164 (1968).

Sufficient compliance. — While motion for appeal and order allowing same in case filed after March 15, 1961, were ineffective to accomplish appeal, nevertheless, notice filed and served within 30 days, which stated that order had been entered allowing the appeal and specified that plaintiff was taking the appeal and that the judgment against him was being appealed from, sufficiently complied with former Supreme Court Rules, as there was only one plaintiff and one judgment. Reed v. Fish Eng'r Corp., 74 N.M. 45, 390 P.2d 283 (1964).

Notice filed on same day as motion and order granting an appeal, which substantially complied with former Supreme Court Rules, was sufficient to confer jurisdiction on the supreme court. Mirabal v. McKee, 74 N.M. 455, 394 P.2d 851 (1964).

Sufficient notice of accident in untimely filing. — Where plaintiffs' lead trial counsel was on vacation when the notice of appeal was filed, he instructed an associate to supervise the progress of the appeal in his absence and instructed his secretary to make sure the notice of appeal was timely filed, it was standard office practice for his secretary to serve all pleadings and notices on opposing counsel, counsel served notice of appeal on defendants' counsel as soon as the matter was brought to his attention, and defendants demonstrated no actual prejudice as a result of the untimely notice, there was a sufficient showing of accident or excusable mistake, and such a showing permits the appellate court to allow plaintiffs' appeal to proceed. Russell v. University of N.M. Hospital/Bernalillo County Medical Center, 106 N.M. 190, 740 P.2d 1174 (Ct. App. 1987).

Effect of filing on trial court jurisdiction. — Trial court loses jurisdiction of the case upon the filing of the notice of appeal, except for the purposes of perfecting such appeal, or of passing upon a motion directed to the judgment pending at the time. Wagner Land & Inv. Co. v. Halderman, 83 N.M. 628, 495 P.2d 1075 (1972).

Upon the filing of the notice of appeal, trial court loses jurisdiction to make findings or conclusions, and supreme court must disregard such findings in reviewing judgment. Davis v. Westland Dev. Co., 81 N.M. 296, 466 P.2d 862 (1970).

After filing of notice of appeal which substantially complied with former Supreme Court Rules, trial court was without jurisdiction to make findings and conclusions. Mirabal v. McKee, 74 N.M. 455, 394 P.2d 851 (1964).

Notice of appeal may divest trial court of jurisdiction even if technically defective. — Where father's notice of appeal of custody order, filed within 10 days, did not have a copy of judgment attached but was later amended by attaching such copy, and mother clearly had notice of judgment from which father appealed, notice of appeal divested trial court of jurisdiction and placed jurisdiction in appeals court despite technical defect. Martinez v. Martinez, 101 N.M. 493, 684 P.2d 1158 (Ct. App. 1984).

Filing with district court clerk jurisdictional. — An appellant who filed a notice of appeal with the clerk of the court of appeals rather than with the clerk of the district court did not comply with the place-of-filing requirement of Paragraph A of Rule 12-202 NMRA. Thus, the court was without jurisdiction to consider the appeal. Lowe v. Bloom, 110 N.M. 555, 798 P.2d 156 (1990) (overruling Martinez v. Wooten Construction Co., 109 N.M. 16, 780 P.2d 1163 (Ct. App. 1989) to the extent it holds otherwise).

Appeals from agency determinations. — In appealing from a workers compensation administration ruling it is sufficient under Paragraph B of Rule 12-601 NMRA to file the notice of appeal with the appellate court and a copy of the notice with the administration within 30 days, and then file a notice with the administration at a later time. Brewster v. Cooley & Assocs., 116 N.M. 681, 866 P.2d 409 (Ct. App. 1993).

Effect of failure to comply with place-of-filing requirement. — Workers' compensation claimant's failure to comply with the place-of-filing requirement of Rule 12-601B NMRA deprived the court of appeals of jurisdiction, even though claimant filed a notice of appeal with the workers' compensation division within thirty days of the filing of the order dismissing his claim for benefits. Singer v. Furr's, Inc., 111 N.M. 220, 804 P.2d 411 (Ct. App. 1990).

Filing of notice of appeal "in open court" on the thirtieth day following judgment constituted substantial compliance with the thirty-day filing requirement, even though the appeal was not filed in the clerk's office until a week later. Williams v. Board of County Comm'rs, 1998-NMCA-090, 125 N.M. 445, 963 P.2d 522, cert. denied, 125 N.M. 654, 964 P.2d 818 (1998).

Motion to dismiss party not abandoned. — Defendant did not abandon its motion to dismiss one of the plaintiffs, on grounds that he had no financial interest in the litigation and was not a real party in interest, by taking an appeal before the trial court ruled on the motion, since defendant raised the issue in its requested findings and conclusions; the issue never having been decided by the trial court, the cause would be remanded for such a ruling. Jesko v. Stauffer Chem. Co., 89 N.M. 786, 558 P.2d 55 (Ct. App. 1976).

Filing of notice as waiver of motion. — Where defendants filed motion for new trial or remittitur on November 15, which motion was never disposed of by trial court, final judgment was entered on November 27 and thereafter, on December 13, defendants filed notice of appeal, they abandoned the motion for a new trial or remittitur by depriving trial court of jurisdiction; their notice of appeal amounted to an election to waive the motion and proceed with the appeal as though the motion had not been made. Selgado v. Commercial Whse. Co., 88 N.M. 579, 544 P.2d 719 (Ct. App. 1975).

III. CONTENT OF NOTICE.

Notice of appeal should be construed so as to reach merits and not be dismissed by the use of strict or technical application of the rules. Baker v. Sojka, 74 N.M. 587, 396 P.2d 195 (1964).

But intent to appeal must appear. — Although notices of appeal are to be liberally construed, even under the rule of liberal interpretation a notice is sufficient only if the intent to appeal from a specific judgment can be fairly inferred therefrom. Mabrey v. Mobil Oil Corp., 84 N.M. 272, 502 P.2d 297 (Ct. App.), cert. denied, 83 N.M. 740, 497 P.2d 742 (1972).

Specificity necessary. — Where more than one order by the trial court exists, an appellant has a duty to specify each order in the notice of appeal from which an appeal is taken. Mabrey v. Mobil Oil Corp., 84 N.M. 272, 502 P.2d 297 (Ct. App.), cert. denied, 83 N.M. 740, 497 P.2d 742 (1972).

Notice of appeal giving erroneous date of order appealed from is a nullity and cannot be taken as an appeal from an order entered after the notice is filed. State v. Phillips, 78 N.M. 405, 432 P.2d 116 (Ct. App. 1967).

Substantial compliance determinative. — Denomination of the document as a "motion" rather than as a "notice" was not determinative; what was important was that the document substantially complied with and gave the information required, and thus met purpose of rule requiring filing of notice. Johnson v. Johnson, 74 N.M. 567, 396 P.2d 181 (1964).

The filing of a docketing statement that specifically referred to the notice of appeal, and to a motion to grant an extension of time to file the notice of appeal, and which substantially complied with the content provisions of Paragraph B was sufficient to vest

appellate jurisdiction in the court of appeals. Marquez v. Gomez, 111 N.M. 14, 801 P.2d 84 (1990).

Notice of appeal sufficient. — Notice of appeal was effective to appeal the portion of the judgment which awarded insured (third-party appellee) judgment for damages against insurer (appellant) where it specifically identified the judgment resulting from the first trial at which appellant's liability to insured was determined, specifically identified portion of the second judgment which awarded damages to joint plaintiff, and although it did not specifically identify the portion of the second judgment which carried forward appellant's liability to insured by naming the monetary amounts of that liability, made clear the intent to appeal this aspect. Lujan v. Gonzales, 84 N.M. 229, 501 P.2d 673 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972).

Although summary judgment, confined to issue of liability, was not mentioned in notice of appeal from judgment, where judgment, entered six months after summary judgment, recited issuance thereof and in its operative provisions "confirmed" same, appellant board would not be precluded from appealing issues determined by summary judgment. Nevarez v. State Armory Bd., 84 N.M. 262, 502 P.2d 287 (1972).

Although the defendants' notice of appeal did not specifically refer to the order denying the defendants' motion to dismiss, the defendants' intent to appeal from that order can be fairly inferred, especially since, but for the denial of that motion, the summary judgment would not have been entered. Additionally, the plaintiff has not alleged, and the record does not suggest, that the plaintiff was prejudiced or misled. Attachment of only the relevant final judgment perfects an appeal from any previous oral or written orders encompassed in that judgment, as long as error has otherwise been preserved. Thus, the defendants' notice of appeal adequately perfected an appeal from the order denying the defendants' dismissal motion. Board of County Comm'rs v. Ogden, 117 N.M. 181, 870 P.2d 143 (Ct. App. 1994).

Notice sustained where defendant not misled. — Even if the notice of appeal is deficient, if it is apparent therefrom that it is the intention of the appellant to appeal and if the appellee has not been misled, the notice of appeal will be sustained. Nevarez v. State Armory Bd., 84 N.M. 262, 502 P.2d 287 (1972).

Where the intent of the plaintiff to appeal was plain from notice, and trial court had entered only one order, defendant could not have been misled by the failure to designate judgment, order or part appealed from in the notice. Baker v. Sojka, 74 N.M. 587, 396 P.2d 195 (1964).

Notice insufficient. — Notice failed to comply with former rule, where it failed to indicate judgment, order or part appealed from. State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc., 85 N.M. 521, 514 P.2d 40 (1973).

Review of motions to vacate precluded. — Denial of motions to vacate default judgment would not be reviewed where defendants appealed from entry of default

judgment, but did not appeal from order denying motions to vacate same. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

IV. SERVICE OF NOTICE.

Jurisdiction over appellee dependent on notice. — Supreme court had jurisdiction of a "cause" on appeal, but not of appellee until notice under Rule 7 of former Supreme Court Rules was served or waived. Pankey v. Hot Springs Nat'l Bank, 42 N.M. 674, 84 P.2d 649 (1938).

Effect of failure to notify. — Supreme court could not consider alleged errors affecting rights of defendant to whom notice of appeal was not addressed and on whom such notice was not served. Commercial Std. Ins. Co. v. Hitson, 73 N.M. 328, 388 P.2d 56 (1963).

Proof of service. — Where neither the motion for extension nor the notice of appeal included in the transcript proper indicated certification of service upon opposing counsel, but the copy of the motion in the skeleton transcript prepared by counsel certified that service had been made, in light of the fact that the skeleton transcript was required as part of the appellate process and was required to be certified by the clerk of the district court, the court of appeals would rely on the copies of the motion for extension and the notice of appeal included in the skeleton transcript for proof that opposing counsel was served. White v. Singleton, 88 N.M. 262, 539 P.2d 1024 (Ct. App. 1975).

Removals from corporation commission's rate making proceedings. — Period within which removals from corporation commission's rate making proceedings may be taken was governed by Rules 3(d) and 4(c), N.M.R. App. (Civ.) (see now Rule 12-201 and this rule). Mountain States Tel. & Tel. Co. v. Corporation Comm'n, 99 N.M. 1, 653 P.2d 501 (1982).

12-203. Interlocutory appeals.

A. **Application for interlocutory appeal.** An appeal from an interlocutory order containing the statement prescribed by NMSA 1978, § 39-3-3(A)(3) or § 39-3-4(A) is initiated by filing an application for interlocutory appeal with the appellate court clerk within fifteen (15) days after the entry of such order in the district court. Copies of the application shall be served by the applicant on all persons who are required to be served with a notice of appeal pursuant to Rule 12-202 NMRA. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits set by this subsection.

B. **Content of application.** The application shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court, a statement of the question itself and a statement of the

reasons why a substantial ground exists for a difference of opinion on the question and why an immediate appeal may materially advance the ultimate termination of the litigation. The statement of reasons shall contain case references, where available, and shall contain a summary of the applicant's arguments. The application shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. The application may have annexed thereto any other documentary matters of record that will assist the appellate court in exercising its discretion. The docket fee shall accompany the application but no docketing statement or statement of the issues is required.

C. **Form of papers; number of copies.** An application for interlocutory appeal shall conform to the requirements of Rules 12-305 and 12-306 NMRA.

D. **Response.** Any other party may file a response, with attachments, if any, with the appellate court clerk within fifteen (15) days after service of the application and shall serve a copy on the appellant. The appellate court may deny the application prior to the filing of a response. The appellate court may set a hearing on the application.

E. **Grant of application; assignment.** If an application for interlocutory appeal is granted, the case may be assigned to a calendar and the appellate court clerk shall give notice of the assignment in accordance with Rule 12-210 NMRA. The district court clerk shall transmit a copy of the record proper upon receipt of the notice of calendar assignment or of the proposed summary disposition. The granting of an application shall automatically stay the proceedings in the district court unless otherwise ordered by the appellate court.

[As amended, effective January 1, 1997; April 1, 1998; June 15, 2000.]

ANNOTATIONS

The 1997 amendment, effective January 1, 1997, substituted "fifteen (15) days" for "ten (10) days" in Paragraph A and Paragraph D.

The 1998 amendment, effective for pleadings due on and after April 1, 1998, inserted "or statement of the issues" following "docketing statement" near the end of Paragraph B.

The 2000 amendment, effective June 15, 2000, inserted "or of the proposed summary disposition" at the end of the second sentence in Paragraph E.

Federal rules. — See Fed. R. App. P. Rule 5.

Generally, no appeal from anything other than formal written order or judgment. — In the absence of an express provision or rule, there is no appeal from anything other than a formal written order or judgment signed by the judge and filed in the case or

entered upon the records of the court and signed by the judge thereof. State v. Morris, 69 N.M. 89, 364 P.2d 348 (1961).

Allowance of interlocutory appeal is discretionary with appellate court. State v. Hernandez, 95 N.M. 125, 619 P.2d 570 (Ct. App. 1980).

Trial court has no authority to grant an interlocutory appeal. State v. Garcia, 91 N.M. 131, 571 P.2d 123 (Ct. App. 1977).

Failure to timely file application for appeal. — Where a district court certifies an order for interlocutory appeal, the appealing party must seek permission from the appellate court for leave to file an appeal by filing an application within 15 days of entry of the order in district court, but where the appealing party did not file an application for interlocutory appeal until 17 days after the filing of the district court's order, appealing party's attempt to perfect an interlocutory appeal was unavailing. Systems Technology, Inc. v. Hall, 2004-NMCA-130, 136 N.M.548 , 102 P.3d 107.

Orderly process of appellate review must be considered. — The grant of an application for an interlocutory appeal turns on whether a substantial ground exists for a difference of opinion on the question, and whether its resolution may materially advance the ultimate termination of the litigation. The policy of judicial economy served by this process of interlocutory appeal must, however, be weighed against the policy which favors the orderly process of appellate review. Schlieter v. Carlos, 108 N.M. 507, 775 P.2d 709 (1989).

Jurisdiction remains in trial court where permission to appeal from interlocutory order denied. — When the permission to appeal from an interlocutory order is denied, the appellate court never assumes jurisdiction of the matter; consequently, jurisdiction remains in the trial court and there is nothing to prevent the trial court from proceeding to try the pending case. State v. Hernandez, 95 N.M. 125, 619 P.2d 570 (Ct. App. 1980).

Appeal improperly denominated "as of right" treated as interlocutory. — Where the docketing statement proceeds on the basis that the appeal is as of right, and it is not, the court of appeals may treat the docketing statement as an application for an interlocutory appeal and deny it. State v. Garcia, 91 N.M. 131, 571 P.2d 123 (Ct. App. 1977).

Effect, not form, important. — Where the decree appealed from, although denominated "partial," appears to be interlocutory and to practically dispose of the merits of all claims of the parties, it is appealable. State ex rel. Reynolds v. Allman, 78 N.M. 1, 427 P.2d 886 (1967).

Extension of time for appeal. — Absent statutory authority or supreme court rule, appellate courts may not extend the time for an interlocutory appeal, even to relieve against mistake, inadvertence or accident. However, in appropriate circumstances, the

district court may reconsider the issue and enter a second interlocutory order from which application for a timely interlocutory appeal may be made. Candelaria v. Middle Rio Grande Conservancy Dist., 107 N.M. 579, 761 P.2d 457 (Ct. App. 1988).

Interlocutory decree appealable only if dispositive of merits. — Appeal is not timely when taken from an interlocutory order and must be dismissed unless the order in some manner practically disposes of the merits of the action so that further proceedings would only carry into effect the terms of the order. Miller v. Montano, 48 N.M. 78, 146 P.2d 172 (1944).

Dismissal of counterclaims. — Directed judgment on motion to dismiss counterclaims was final and appealable under former Rule 54(b), N.M.R. Civ. P. (see now Rule 1-054B NMRA), where order recited no reason to delay entry of the order and directed that the judgment should be entered. Mutual Bldg. & Loan Ass'n v. Fidel, 78 N.M. 673, 437 P.2d 134 (1968).

Conditioned order of dismissal. — Order of dismissal, providing that if plaintiffs did not file second amended complaint within 10 days from entry thereof cause would be dismissed with prejudice, was properly appealed even though plaintiffs filed notice of appeal three days after entry of order. Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d 788 (1966).

Determination of water rights. — Order entered in an action relating to artesian water rights, which covered specifics to which right was appurtenant, was final and appealable to that extent. State ex rel. Reynolds v. Sharp, 66 N.M. 192, 344 P.2d 943 (1959).

Partition order. — Judgment in statutory partition suit, declaring rights of all the parties, ordering partition and appointing commissioners, was interlocutory decree, appealable under former rule. Torrez v. Brady, 35 N.M. 217, 292 P. 901 (1930).

Order sustaining demurrer. — Order sustaining a demurrer to a complaint because of not stating a cause of action was appealable as an interlocutory order practically disposing of the merits. Roeske v. Lamb, 38 N.M. 309, 32 P.2d 257 (1934).

Order granting new trial. — Order granting a new trial based upon error at law disposed of merits and was appealable, where trial court held a will invalid because of latent ambiguity and no more evidence was adduced explaining the ambiguity. In re Richter's Will, 42 N.M. 593, 82 P.2d 916 (1938).

Order allowing a new trial is not appealable unless it practically disposes of the merits of the action. Milosevich v. Board of County Comm'rs, 46 N.M. 234, 126 P.2d 298 (1942).

Review of appealable interlocutory order on appeal from final judgment. — Upon appeal from the final judgment, interlocutory orders or decrees and proceedings upon which they are based may be reviewed, even though an appeal might have been taken

therefrom at the time entered. State ex rel. State Eng'r v. Crider, 78 N.M. 312, 431 P.2d 45 (1967).

Where appealable interlocutory judgment, order or decree is entered, and no appeal is taken therefrom within time allowed, such interlocutory decree and the proceeding prior to its entry may be considered in an appeal from the final decree. Torrez v. Brady, 37 N.M. 105, 19 P.2d 183 (1932).

Remand of zoning decision. — The district court's remand order of a zoning matter to the city council was not a final, appealable order; before a party would have the right to challenge that order on appeal to the Court of Appeals, it would have to await the council decision on remand, obtain review of the council decision in district court, and then appeal the district court judgment. High Ridge Hinkle Joint Venture v. City of Albuquerque, 119 N.M. 29, 888 P.2d 475 (Ct. App. 1994), aff'd, 123 N.M. 394, 940 P.2d 1189 (1997).

Law reviews. — For comment, "New Mexico's Analogue to 28 U.S.C. § 1292(b): Interlocutory Appeals Come to the State Courts," see 2 N.M.L. Rev. 113 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 84 et seq.; 5 Am. Jur. 2d Appellate Review § 693.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable, 79 A.L.R.2d 1352.

Appealability of orders or rulings, prior to final judgment in criminal case, as to accused's mental competency, 16 A.L.R.3d 714.

4 C.J.S. Appeal and Error § 81 et seq.

12-203A. Appeals from orders granting or denying class action certification.

A. **Application for appeal from order on class action certification.** An appeal from an order granting or denying class action certification pursuant to Paragraph F of Rule 1-023 NMRA is initiated by filing an application for such appeal with the Court of Appeals clerk within ten (10) days after entry of the order. Copies of the application shall be served by the applicant on the district court clerk and all persons who are required to be served with a notice of appeal pursuant to Rule 12-202 NMRA. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits in this paragraph.

B. **Content of the application.** The application shall have attached a copy of the certification order from which appeal is sought and any findings of fact, conclusions of law, and opinion relating thereto. The application may have attached any other documentary matters of record that will assist the appellate court in exercising its

discretion. Subject to the provisions of Rule 12-304 NMRA and Rule 23-113 NMRA, the docket fee shall accompany the application, but no docketing statement or statement of the issues is required. The application shall contain a concise statement of:

(1) each question being presented;

(2) the facts necessary to an understanding of each question presented;

(3) the relief sought; and

(4) the reasons why the certification order:

(a) is likely to terminate the litigation, independent of the merits, because it would be impracticable for the party seeking class certification to maintain the action absent certification or because class certification would create irresistible pressure on the opposing party to settle, and why the order is questionable or erroneous;

(b) presents an unsettled and fundamental issue of law in relation to class actions that is important to the specific litigation and the general state of the law and is likely to evade review on appeal from a final judgment; or

(c) is manifestly erroneous.

C. **Form of papers; number of copies.** An application for appeal from an order granting or denying class action certification shall conform to the requirements of Rules 12-305 and 12-306 NMRA.

D. **Response.** Any other party may file a response, with attachments, if any, with the Court of Appeals clerk within ten (10) days after service of the application and shall serve a copy on the applicant. The Court of Appeals may deny the application prior to the filing of a response. The Court of Appeals may set a hearing on the application.

E. **Grant of application; assignment.** If an application for appeal from an order granting or denying class action certification is granted, the case may be assigned to a calendar and the Court of Appeals clerk shall give notice of the assignment in accordance with Rule 12-210 NMRA. The district court clerk shall transmit a copy of the record proper upon receipt of the notice of calendar assignment or of the proposed summary disposition.

F. **Stay of proceedings in district court.** The granting of the application shall not stay proceedings in the district court unless ordered by the district court or the Court of Appeals. A party seeking a stay of the proceedings in district court shall first seek such an order from the district court, and any party may thereafter seek appellate review of the district court's ruling pursuant to Rule 12-207 NMRA.

[Approved, effective October 11, 2005; as amended by Supreme Court Order 08-8300-018, effective August 4, 2008.]

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order 08-8300-018, effective August 4, 2008, deleted the limitation in Subsection A, which provided that the application could not exceed twenty pages in length; added the reference to Rules 12-304 and 23-113 NMRA in Subsection B; and deleted the limitation in Subsection D, which provided that the response could not exceed 20 pages in length.

12-204. Appeals from orders regarding release entered prior to a judgment of conviction.

A. **Initiating the appeal.** An appeal provided for by NMSA 1978, § 39-3-3A(2), and Rule 5-405 of the Rules of Criminal Procedure shall be taken by filing a motion with the clerk of the court of appeals within ten (10) days after the decision of the district court and serving a copy on the district attorney and the appellate division of the attorney general. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the above time limit. The motion shall specify the decision appealed from, and shall include, by attachments, a copy of the "Record of Responses to Questions at Release Hearing," and such affidavits or other papers deemed necessary for consideration of the matter by the appellate court. The docket fee shall be paid or a free process order filed at the time the motion is filed.

B. **Response.** The state may file a response, with attachments, if any, with the appellate court clerk within five (5) days after service of the motion and serve a copy on appellant.

C. **Appellate court review.** The appellate court clerk shall docket the appeal upon receipt of the motion and present it to the court. The decision of the district court shall be set aside only if it is shown that the decision:

(1) is arbitrary, capricious or reflects an abuse of discretion;

(2) is not supported by substantial evidence; or

(3) is otherwise not in accordance with law.

The appellate court clerk shall send a copy of the order disposing of the appeal to the parties and the district court clerk.

ANNOTATIONS

Post-conviction proceedings must be invoked before habeas corpus may be sought. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Former Rule 204, N.M.R. App. P. (Crim.) (see now this rule) most appropriate means for appealing order denying or revoking bail. State v. David, 102 N.M. 138, 692 P.2d 524 (Ct. App. 1984).

Law reviews. — For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 C.J.S. Appeal and Error § 96 et seq.

12-205. Release pending appeal in criminal matters.

A. **Appeal by the state.** When the state appeals an order dismissing a complaint, information or indictment, the district court shall consider releasing the defendant on nominal bail or his own recognizance pending final determination of the appeal. When the state appeals an order suppressing or excluding evidence or requiring the return of seized property, the defendant may be released under conditions determined in accordance with Paragraph B of Rule 5-401 NMRA of the Rules of Criminal Procedure.

B. **Motion to review conditions of release.** Upon motion, the district court shall initially set conditions of release pending appeal. A motion by either party for modification of the conditions of release shall first be made to the district court and may be decided without the presence of the defendant. If the district court has refused release pending appeal or has imposed conditions of release pending appeal which the defendant cannot meet, a motion for modification of the conditions may be made to the court of appeals. If the case has not been previously docketed in the Court of Appeals, the docket fee or order granting free process shall accompany the motion. The motion may be made at any time and shall be determined promptly by the Court upon such papers, affidavits and portions of the record as the parties shall present. Either party may seek review of the decision of the Court of Appeals by filing a petition for writ of certiorari pursuant to Rule 12-502 NMRA. Upon the granting of a petition for writ of certiorari by the Supreme Court, the defendant may file a motion in the Supreme Court for modification of conditions of release in accordance with this rule. Unless otherwise ordered by the Supreme Court, the granting of the petition shall not stay the proceedings in the Court of Appeals.

C. **United States Supreme Court; appeal; certiorari.** Upon filing an appeal or a petition for certiorari in the United States Supreme Court, the defendant may file a motion for modification of conditions of release with the appellate court whose judgment or decision is sought to be reviewed.

D. **Further appeal by state.** If the state files a petition for rehearing or for certiorari in the Supreme Court or in the United States Supreme Court and the mandate is stayed in accordance with Rule 12-402 NMRA, the defendant may file a motion for release or modification of conditions of release with the appellate court whose judgment or decision is sought to be reviewed.

[As amended by Supreme Court Order 07-8300-19, effective August 13, 2007.]

ANNOTATIONS

Cross references. — As to the right to bail on appeal, see N.M. Const., art. II, § 13 and 31-11-1 NMSA 1978.

As to bail upon state's appeal, see 31-11-2 NMSA 1978.

The 2007 amendment, approved by Supreme Court Order 07-8300-19, effective August 13, 2007, added the last sentence of Paragraph B providing that the granting of the petition for writ of certiorari does not stay the proceedings in the Court of Appeals.

Federal rules. — See Fed. R. App. P. Rule 9.

Bail determination within discretion of trial court. — Where the defendant is entitled to bond pending final determination of his conviction, the determination of what bail is proper to grant is particularly within the trial court's discretion, but a demand for a corporate surety with a predetermined exclusion of all other collateral as surety is an abuse of discretion. State v. Lucero, 81 N.M. 578, 469 P.2d 727 (Ct. App. 1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — What is "a substantial question of law or fact likely to result in reversal or an order for a new trial" pursuant to 18 USCS § 3143(b)(2) respecting bail pending appeal, 79 A.L.R. Fed. 673.

12-206. Stay pending appeal in children's court matters.

A. **Application in the court of appeals.** A party appealing a judgment of the children's court, after a denial of a stay by the children's court, may request that the judgment be stayed by filing and serving an application for stay in the court of appeals at any time after the notice of appeal has been filed. If the case has not been previously docketed in the appellate court, the docket fee or order granting free process shall accompany the motion. Both the appellate division of the attorney general and the children's court attorney shall be served. Filing and service shall be governed by Rule 12-307 NMRA.

B. **Contents of application.** All applications to stay the judgment of the children's court shall include:

(1) a concise statement of such facts presented to the children's court necessary for an understanding of the application;

(2) a concise statement of the reasons why the judgment should be stayed, including a statement whether those reasons were presented to the children's court as a part of the appellant's case below;

(3) a concise statement of how suitable provisions will be made for the care and custody of the child if a stay is granted;

(4) certified copies, showing the filing dates of the petition initiating the children's court action, the judgment and any findings of the children's court and the notice of appeal. The application may also include documentary evidence presented to the children's court; provided, however, that any document not formally admitted as evidence or filed with the children's court clerk must include a certificate of counsel that the evidence was presented to the children's court.

C. **Response.** Any response to the application shall be filed and served within ten (10) days after service of the application. Filing and service shall be governed by Rule 12-307 NMRA. The response may include:

(1) a concise statement of facts presented to the children's court which are necessary for an understanding of the application but which were not stated in the application;

(2) a concise statement of reasons why the application should be denied;

(3) any documentary evidence presented to the children's court; provided, however, that any document not formally admitted as evidence or filed with the children's court clerk must include a certificate of counsel that the evidence was presented to the children's court; and

(4) any statements or documents relied on by the children's court in denying the stay as well as the record of children's court hearing denying the stay.

D. **Stay pending disposition of the application.** After the application has been filed, the court of appeals may grant an ex parte stay pending disposition of the application.

E. **Disposition of the application.** The application for stay shall be considered by the court of appeals as soon as practicable, and in any event not later than fifteen (15) days after the granting of an ex parte stay pending disposition. The court, in its discretion, may consider the matter with or without a hearing or oral argument. The court may review the official transcript of proceedings if filed in the court of appeals or any unofficial transcript of proceedings which is stipulated to and presented by the parties. Either party may seek a review of the decision of the court of appeals by filing a petition for writ of certiorari pursuant to Rule 12-502 NMRA.

12-207. Supersedeas and stay in civil matters.

A. **Appellate court review.** At any time after a notice of appeal has been filed and the docket fee paid, the appellate court may, upon motion and notice, review any action

of, or any failure or refusal to act by, the district court dealing with supersedeas or stay, irrespective of whether a docketing statement or statement of the issues has been filed.

B. **Application or motion for relief.** Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must be made in the first instance in the district court. A motion for review of the district court's action may be made to the appellate court, but the motion shall show that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Notice of the motion shall be given to all parties.

C. **Filing of the motion.** A motion for review of a supersedeas or stay shall be filed with the appellate court clerk.

D. **Standard of review.** The decision of the district court shall be set aside only if it is shown that the decision:

(1) is arbitrary, capricious or reflects an abuse of discretion;

(2) is not supported by substantial evidence; or

(3) is otherwise not in accordance with law.

E. **Additional time to file supersedeas bond.** If the appellate court modifies the terms, conditions or amount of a supersedeas bond or if it determines that the district court should have allowed supersedeas and failed to do so on proper terms and conditions, it shall enter an appropriate order and it may grant additional time, not to exceed fifteen (15) days from the date of such order, within which to file in the district court a supersedeas bond complying with the standards prescribed in such order. Upon the entry of such order, the appellate court clerk shall give prompt notice thereof to the district court clerk.

[As amended, effective April 1, 1998.]

ANNOTATIONS

Cross references. — As to posting of supersedeas bond where title to or possession of property is involved, see 39-3-9, 39-3-10 NMSA 1978.

As to supersedeas and stay in civil actions, see 39-3-22 NMSA 1978.

The 1998 amendment, effective for pleadings due on and after April 1, 1998, inserted "or statement of the issues" following "docketing statement" near the end of Paragraph A.

Supersedeas bond required to stay judgment. — If the status quo was to be maintained a supersedeas bond had to be provided pursuant to 39-3-9 NMSA 1978 in such an amount as would indemnify the appellee from all damages that might result from such supersedeas, the amount to be fixed by the court; absent a court order and a bond, the judgment would remain in effect and could be enforced. Gregg v. Gardner, 73 N.M. 347, 388 P.2d 68 (1963).

Absent supersedeas bond, appellee entitled to execute questioned plan. — Where county school board affected by administrative reorganization plan of school districts, on appealing from judgment denying injunction against state board of education and superintendent, did not apply for and file a supersedeas bond, state board and superintendent had right to execute plan of administrative reorganization. Board of Educ. v. State Bd. of Educ., 74 N.M. 496, 394 P.2d 1004 (1964).

Where the trial court determined that a fraudulent conveyance by the decedent and the failure to notify plaintiff of the probate proceedings improperly thwarted plaintiff's efforts to satisfy his judgment against decedent, and ordered the verified statement vacated and the probate matter reopened, and where after the filing of their notice of appeal the court entered an order appointing a new administrator for decedent's estate, the order implemented the judgment in this case which provided that such a person would be appointed. Because defendants did not seek to file a supersedeas bond to preserve the status quo, the judgment of the trial court remained in effect and could be enforced. Beagles v. Espinoza, 111 N.M. 206, 803 P.2d 1111 (Ct. App. 1990).

The district court may act on matters of supersedeas and stay during the pendency of an appeal. In re Estate of Gardner, 112 N.M. 536, 817 P.2d 729 (Ct. App. 1991).

Mandamus to compel stay. — Defendant against whom a mandatory injunction issued was entitled to supersede the judgment and suspend the force of the injunction pending appeal or writ of error, and mandamus would issue ordering judge to fix amount of supersedeas bond and on its approval to supersede mandatory injunction. State ex rel. Martinez v. Holloman, 25 N.M. 117, 177 P. 741 (1918).

Injunction suspended. — Order of justice of the supreme court that the judgment of the district court be superseded until the final disposition of cause, endorsed upon application for writ of error, suspended the operation of a prohibitory injunction issued by the district court. Sena v. District Court, 30 N.M. 505, 240 P. 202 (1925).

Grant of application discretionary. — Grant of an application for stay is not a matter of right but an exercise of judicial discretion, and is dependent on the circumstances of each individual case. Alpers v. Alpers, 111 N.M. 467, 806 P.2d 1057 (Ct. App. 1990).

Executors, administrators and corporations could supersede judgment against them, as such, only when they had sued out appeal or writ of error within the time allowed. Sakariason v. Mechem, 20 N.M. 307, 149 P. 352 (1915).

Factors to be considered in granting stay in custody matter. — The factors to be considered in deciding whether a motion to stay a trial court's custody order should be granted pending disposition of an appeal are: (1) the likelihood of hardship or harm to the children if the stay is denied; (2) whether the appeal is taken in good faith and the issues raised are not frivolous; (3) the potential harm to the interests of the nonmoving party if the stay is granted; and (4) a determination of other existing equitable considerations, if any. Alpers v. Alpers, 111 N.M. 467, 806 P.2d 1057 (Ct. App. 1990).

Adequate remedy despite court discretion. — Writ of prohibition seeking to prohibit further action in mandamus proceeding would not issue, as law provided adequate remedy by way of appeal or writ of error, despite fact that right to supersede judgment was discretionary with lower court or supreme court. Board of Comm'rs v. District Court, 29 N.M. 244, 223 P. 516 (1924).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 436 et seq.

Appeal from award of injunction as stay or supersedeas, 93 A.L.R. 709.

Right to stay without bond or other security pending appeal from judgment or order against executor, administrator, guardian, trustee or other fiduciary who represents interests of other persons, 119 A.L.R. 931.

Stay, pending review, of judgment or order revoking or suspending a professional, trade or occupational license, 166 A.L.R. 575.

Stay or supersedeas on appellate review in mandamus, 88 A.L.R.2d 420.

4 C.J.S. Appeal and Error § 408 et seq.

12-208. Docketing the appeal.

A. **Attorney responsible.** Unless otherwise ordered by the Court, trial counsel shall be responsible for preparing and filing a docketing statement in the Court of Appeals or a statement of the issues in the Supreme Court.

B. **When filed.** Within thirty (30) days after filing the notice of appeal in all appeals except those under Rules 12-203, 12-204, 12-603 and 12-604 NMRA, the appellant shall file a docketing statement, if the appeal has been docketed in the Court of Appeals, or a statement of the issues, if the appeal has been docketed in the Supreme Court.

C. **Service.** The appellant shall serve a copy of the docketing statement or statement of the issues on the district court clerk and on those persons who are required to be served with a notice of appeal pursuant to Rule 12-202 NMRA.

D. **Docketing statement; contents.**

A docketing statement shall contain:

(1) a statement of the nature of the proceeding;

(2) the date of the judgment or order sought to be reviewed, and a statement showing that the appeal was timely filed;

(3) a concise, accurate statement of the case summarizing all facts material to a consideration of the issues presented;

(4) a statement of the issues presented by the appeal, including a statement of how they arose and how they were preserved in the trial court, but without unnecessary detail. The statement of the issues should be short and concise and should not be repetitious. General conclusory statements such as "the judgment of the trial court is not supported by the law or the facts" will not be accepted;

(5) for each issue, a list of authorities believed to support the contentions of the appellant and any contrary authorities known by appellant and, where known, the applicable standard of review. Argument on the law shall not be included, but a short, simple statement of the proposition for which the case or text is cited shall accompany the citation;

(6) a statement specifying whether the entire proceedings were tape recorded, and if not, identifying the portion of the proceedings, other than the record proper, not tape recorded;

(7) a reference to all related or prior appeals. If the reference is to a prior appeal, the appropriate citation should be given; and

(8) where applicable, a copy of the order appointing appellate counsel.

E. **Statement of the issues; contents.** A statement of the issues shall contain each issue to be presented by the appeal, including a statement of how the issue arose, how each issue was preserved in the trial court and a statement of the court's jurisdiction, but without unnecessary detail. The statement of the issues should be short and concise and should not be repetitious. General conclusory statements such as "the judgment of the trial court is not supported by the law or the facts" will not be accepted.

F. **Amendment.** The Court of Appeals may, upon good cause shown, allow the amendment of the docketing statement. The Supreme Court may, upon good cause shown, allow the amendment of a statement of the issues.

G. **Cross-appeals.** A party who files a cross-appeal in accordance with Paragraph B of Rule 12-201 NMRA shall file a docketing statement in the Court of Appeals or a statement of the issues in the Supreme Court in accordance with this rule within thirty (30) days after the notice of appeal is filed by the cross-appellant and shall pay a docket fee as provided in Paragraph H of this rule.

H. **Docket fee.** Except where free process has been granted on appeal, the docket fee shall accompany the filing of a docketing statement in the Court of Appeals and a statement of the issues in the Supreme Court unless the party filing the docketing statement or statement of the issues has already paid a docket fee.

I. **Response not permitted.** No response to a docketing statement or statement of the issues is allowed.

J. **Failure to serve docketing statement or statement of the issues.** On a monthly basis, the district court clerk shall forward to the appellate court a list of all criminal cases in which a notice of appeal has been on file for at least sixty (60) days but in which the district court has not been served with a copy of a docketing statement or a statement of the issues.

[As amended, effective October 1, 1995; April 1, 1998; January 1, 2000; as amended by Supreme Court Order 06-8300-21, effective December 18, 2006.]

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For contents of briefs, see Rule 12-213 NMRA.

For form of papers, see Rule 12-305 NMRA.

The 1995 amendment, effective October 1, 1995, inserted "for each issue" and "and, where known, the applicable standard of review" in Subparagraph B(5).

The 1998 amendment, effective for pleadings due on and after April 1, 1998, in Paragraph A, inserted "Unless otherwise ordered by the Court", substituted "a" for "the", and substituted "in the Court of Appeals or a statement of the issues in the Supreme Court" for "unless relieved by order of the appellate court"; in Paragraph B, substituted "service" for "contents", substituted "If the appeal has been docketed in the Court of Appeals, or a statement of the issues, if the appeal has been docketed in the Supreme Court" for "with the appellate court clerk", inserted "or statement of the issues" following "docketing statement" and designated the former last sentence, including the

subparagraphs, as Paragraph C; in Paragraph C, inserted "Docketing statement; contents", and substituted "A" for "The"; added new Paragraph D; redesignated Paragraph C as Paragraph E and rewrote the paragraph; redesignated Paragraph D as Paragraph F, inserted "in the Court of Appeals or a statement of the issues in the Supreme Court" following "docketing statement", and substituted "Paragraph G" for "Paragraph E" at the end of the paragraph; redesignated Paragraph E as Paragraph G, substituted "the filing of a" for "all", substituted "statement in the Court of Appeals and a statement of the issues in the Supreme Court" for "statements filed" and inserted "or statement of the issues" following "docketing statement".

The 1999 amendment, effective for cases filed on and after January 1, 2000, added Paragraph C, renumbered Paragraphs C through H as present Paragraphs D through H and added Paragraph I.

The 2006 amendment, approved by Supreme Court Order 06-8300-21, effective December 18, 2006, deleted from Paragraph B "12-605" and the last sentence relating to service of the docketing statement by the appellant; added "or statement of the issues" to Paragraph I; and added Paragraph J relating to the filing of a monthly notice by the court clerk.

Federal rules. — See Fed. R. App. P. Rule 12.

Effect of failure to comply with rule. — Where defendants have failed to comply with this rule, or to indicate that the issue sought to be argued on appeal is jurisdictional, or that the issue was properly preserved for appellate review, an appellate court may decline to address such contention on appeal. State v. Goss, 111 N.M. 530, 807 P.2d 228 (Ct. App. 1991).

Law reviews. — For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

For article, "New Mexico's Summary Calendar for Disposition of Criminal Appeals: An Invitation for Inefficiency, Ineffectiveness and Injustice," see 24 N.M.L. Rev. 27 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 347.

4 C.J.S. Appeal and Error § 390 et seq.

II. ATTORNEY RESPONSIBLE.

Counsel held in contempt for failure to comply with former Rule 205(b), N.M.R. App. P. (Crim.). — Both nonadmitted counsel and associated local counsel, entering joint appearance under Rule 5-108, N.M.R. Crim. P., were held in contempt of court for failing to comply with former Rule 205(b), N.M.R. App. P. (Crim.) (see now Paragraph A of this rule). State v. White, 101 N.M. 310, 681 P.2d 736 (Ct. App. 1984).

Trial counsel has ultimate responsibility. — Even if appellate counsel may act as an agent for trial counsel in the filing of the docketing statement, trial counsel has the ultimate responsibility for the docketing statement. Loverin v. Debusk, 113 N.M. 1, 833 P.2d 1182 (Ct. App. 1992).

Failure to file the docketing statement can be contempt. — Trial counsel may be held in contempt for failure to prepare and file the docketing statement as required by the appellate rules. In re Palafox, 100 N.M. 563, 673 P.2d 1296 (1983).

Criminal appeals trial counsel believes are frivolous still require a thorough docketing statement. — Trial counsel in a criminal case is required to prepare a docketing statement of sufficient completeness to afford adequate appellate review even if trial counsel believes that the appeal is frivolous. State v. Talley, 103 N.M. 33, 702 P.2d 353 (Ct. App. 1985).

III. DOCKETING STATEMENT.

A. TIME FOR FILING.

District court cannot extend time to file. — Although former N.M.R. App. P. (Crim.) did not specifically state that a motion for extension of time to file the docketing statement was to be filed in the appellate court, the import of former Rule 402, N.M.R. App. P. (Crim.) (see now Rule 12-309 NMRA), was that motions involving appellate court responsibility in perfecting the appeal were to be filed in the appellate court. Therefore, the district court had no authority to extend the time specified under former Rule 205, N.M.R. App. P. (Crim.) (see now this rule) for filing the docketing statement, but an attorney who relied on such an erroneous extension was not to be held in contempt for late filing. State v. Brionez, 90 N.M. 566, 566 P.2d 115 (Ct. App.), aff'd, 91 N.M. 290, 573 P.2d 224 (1977).

Court of appeals can extend time. — Appellant's failure to file timely a docketing statement with the court of appeals did not deprive that court of jurisdiction over the appeal. The court of appeals has jurisdiction to grant an extension of time for the filing of a docketing statement. Johnson v. School Bd., 113 N.M. 117, 823 P.2d 917 (Ct. App. 1991).

B. SERVICE.

Reliance on skeleton transcript for proof of service. — Where neither the motion for extension nor the notice of appeal included in the transcript proper indicated certification of service upon opposing counsel, but the copy of the motion in the skeleton transcript prepared by counsel certified that service had been made, in light of the fact that the skeleton transcript was required as part of the appellate process by this rule and in light of the requirement that the skeleton be certified by the district court clerk, the court of appeals would rely on the copies of the motion for extension and the notice of appeal

included in the skeleton transcript for proof that opposing counsel had been served. White v. Singleton, 88 N.M. 262, 539 P.2d 1024 (Ct. App. 1975).

C. CONTENTS.

Issue not listed in statement may not be raised. — Following the 1990 amendment to Rule 12-213 NMRA, the docketing statement no longer governs the issues that may be raised in briefs on a nonsummary calendar. State v. Salgado, 112 N.M. 537, 817 P.2d 730 (Ct. App. 1991).

Failure to provide all material facts. — Defendant's failure to provide court with a summary of all the facts material to consideration of the issue on appeal, as required by Rule 12-208B(3) (now Paragraph D(3)), necessitated a denial of relief on this ground. State v. Chamberlain, 109 N.M. 173, 783 P.2d 483 (Ct. App. 1989).

Issues listed in docketing statement which have not been argued are deemed abandoned. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Affidavits not presented to trial court not considered with docketing statement. — No rule authorizes exhibits to docketing statements, but since exhibits to briefs neither identified nor tendered as exhibits to the trial court will not be considered, neither will the affidavits attached to the docketing statement. State v. Lucero, 90 N.M. 342, 563 P.2d 605 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Counsel may be held in contempt for inaccurate factual statement. — Trial counsel may be held in contempt for failing to take a timely appeal, and also for making inaccurate factual recitations in the docketing statement filed. State v. Fulton, 99 N.M. 348, 657 P.2d 1197 (Ct. App. 1983).

Facts that support the trial court's ruling must be stated. — The docketing statement must include all the facts material to the issues, including the facts that support the trial court's ruling. Thornton v. Gamble, 101 N.M. 764, 688 P.2d 1268 (Ct. App. 1984).

Unchallenged facts are accepted. — Facts in a docketing statement that are not challenged are to be accepted as the facts of the case. State v. Anaya, 98 N.M. 211, 647 P.2d 413 (1982).

Failure to provide all the facts can result in affirmance. — When the party appealing fails to provide a summary of all the facts material to consideration of an issue, affirmance is appropriate. State v. Chamberlain, 109 N.M. 173, 783 P.2d 483 (Ct. App. 1989).

Docketing statement is substitute for transcript. — The docketing statement is an adequate alternative to a complete transcript of proceedings. State v. Talley, 103 N.M. 33, 702 P.2d 353 (Ct. App. 1985).

Contentions must be supported by authorities. — Contentions not supported by citations to legal authorities may be ignored by the appellate court. State v. Boyer, 103 N.M. 655, 712 P.2d 1 (Ct. App. 1985); In re Adoption of Doe, 100 N.M. 764, 676 P.2d 1329 (1984).

Preservation of issues must occur in trial court. — Raising an issue in the docketing statement will not preserve it for appeal if the issue was not raised in the trial court and no ruling was invoked on the issue. State v. Barrera, 2001-NMSC-014, 130 N.M. 227, 22 P.3d 1177.

D. RESPONSIBILITIES OF COURT-APPOINTED COUNSEL WHEN CLIENT WISHES TO ADVANCE CONTENTIONS THAT COUNSEL BELIEVES ARE FRIVOLOUS.

Defendant's contentions in criminal case must be stated. — The docketing statement should state the contentions advanced by a defendant in a criminal case. This statement should include a statement of all facts material to the contentions, a statement of whether the contentions were raised in the trial court, and a statement of whether the contentions or facts will appear in the record made below. State v. Boyer, 103 N.M. 655, 712 P.2d 1 (Ct. App. 1985).

Respondent's contentions in termination case must be stated. — The docketing statement should state the contentions advanced by a defendant, should include a statement of all facts material to those contentions, should inform the court whether and how the contentions were raised in the trial court, and should inform the court whether the contentions or facts would appear in the record. State ex rel. Children, Youth & Families Dep't v. Alice P., 1999-NMCA-098, 127 N.M. 664, 986 P.2d 460, cert. denied, 127 N.M. 391, 981 P.2d 1209 (1999).

E. FORM.

Pagination is required. — As provided by Rule 12-305 NMRA, the docketing statement must be paginated. In re Reif, 1996-NMSC-026, 121 N.M. 758, 918 P.2d 344.

F. AMENDMENTS.

Allowance of amendment to initial docketing statement is discretionary with the appellate court on appeal. State v. Rael, 100 N.M. 193, 668 P.2d 309 (Ct. App. 1983).

Time for filing motion to amend is with or before first memorandum in opposition. — Motions to amend the docketing statement will be considered timely for cases assigned to the summary calendar when they are filed with the party's first memorandum in opposition to the proposed disposition in the calendar notice. State v. Moore, 109 N.M. 119, 782 P.2d 91 (Ct. App. 1989).

Preservation of issue to be added must be shown in motion to amend. — Motion to amend the docketing statement must show that the issue counsel seeks to add was properly preserved below or is one that can be raised for the first time on appeal. State v. Rael, 100 N.M. 193, 668 P.2d 309 (Ct. App. 1983).

Amendment not necessary in general calendar cases. — For appeals filed after July 1, 1990, there is no need to file motions to amend the docketing statement once the case is assigned to the general calendar. State v. Salgado, 112 N.M. 537, 817 P.2d 730 (Ct. App. 1991).

Timely motion to amend docketing statement. — A motion to amend a docketing statement will be considered timely when filed prior to the expiration of the original briefing time in cases assigned to a nonsummary calendar. State v. Rael, 100 N.M. 193, 668 P.2d 309 (Ct. App. 1983).

Statement supporting motion to amend docketing statement. — Issues sought to be added under a motion to amend a docketing statement shall be simply and concisely stated, supported by appropriate legal authority, together with any contrary authority known by appellant. Argument on the law shall not be included, but a short, simple statement of the rule for which the case or text is cited should accompany the citation. State v. Rael, 100 N.M. 193, 668 P.2d 309 (Ct. App. 1983).

Reason for recitation of why new issue was not originally raised. — The point of the requirement that the motion to amend recite the reason why the new issue was not originally raised is to allow the appellate court insight into trial counsel's evaluation of the issue, which may bear on the appellate court's own assessment of the issue's viability. State v. Moore, 109 N.M. 119, 782 P.2d 91 (Ct. App. 1989).

Good cause is a basic requirement for all docketing statement amendments. Good cause is established when the issue is demonstrated to be meritorious fundamental or jurisdictional error. Good cause may be established in other ways when the issue is not meritorious fundamental or jurisdictional error. State v. Moore, 109 N.M. 119, 782 P.2d 91 (Ct. App. 1989).

Good cause was not shown. — Defendant's assertion that an issue was omitted from the original docketing statement "due to inadvertence" was not "good cause shown" for granting a motion to amend the docketing statement. State v. Gallegos, 109 N.M. 55, 781 P.2d 783 (Ct. App. 1989).

12-209. The record proper (the court file).

A. **Composition.** The papers and pleadings filed in the district court (the court file), or a copy thereof shall constitute the record proper. Depositions shall not be copied. The original, if contained in the court file, shall be filed with the appellate court and shall not be sealed except upon the order of the district court or appellate court. The record

proper shall be prepared in the manner provided by Rule 22-301 NMRA of the Rules Governing the Recording of Judicial Proceedings.

B. **Transmission.** Upon receipt of a copy of the docketing statement or statement of issues, the district court clerk shall number consecutively the pages of the record proper and send it to the appellate court so that it will be filed in the appellate court not later than fourteen (14) days from the date the docketing statement or statement of issues is received by the district court. The first page, after the title page, of the record proper shall consist of a copy of the district court clerk's docket sheet with references to the page of the record proper for each entry. The district court clerk shall send a copy of this docket sheet to all counsel of record. The district court clerk shall include a statement of the costs of the record proper. The appellant shall pay for the record proper within ten (10) days of the filing of the docketing statement or statement of issues.

C. **Correction or modification of the record proper.** If anything material to either party is omitted from the record proper by error or accident, the parties by stipulation, or the district court or the appellate court on motion or on its own initiative, may direct that the omission be corrected, and a supplemental record proper transmitted to the appellate court.

D. **Documents filed during pendency of appeal.** Copies of all documents filed in the district court during the pendency of the appeal shall be transmitted to the appellate court for inclusion in the record proper, unless otherwise ordered by the appellate court.

E. **Return of record proper.** After final determination of the appeal, if the original of the record proper has been filed pursuant to Paragraph A of this rule, the appellate court clerk shall return the record proper to the district court clerk.

[As amended, effective July 1, 1990; January 1, 2000; July 29, 2005; as amended by Supreme Court Order 06-8300-21, effective December 18, 2006.]

ANNOTATIONS

The 1999 amendment, effective for cases filed on and after January 1, 2000, inserted "if the original of the record proper has been filed pursuant to Paragraph A of this rule" near the beginning of Paragraph E.

The 2005 amendment, approved by Supreme Court Order 05-8300-14, effective July 29, 2005, inserted "or statement of issues" in the first and last sentences of Paragraph B.

The 2006 amendment, approved by Supreme Court Order 06-8300-21, effective December 18, 2006, amended the first sentence of Paragraph B to provide the "so that" explanation at the end of the sentence.

Federal rules. — See Fed. R. App. P. Rule 10.

Reconstruction of missing portions of record. — Upon application of a party, the trial court may by order reconstruct missing portions of the record, based upon stipulated matters agreed to by the parties, from the trial judge's notes, from the trial judge's recollection of the testimony, or a combination of the above. Jeantete v. Jeantete, 111 N.M. 417, 806 P.2d 66 (Ct. App. 1990).

Duty of appellant to have record prepared. — It is duty of litigant seeking review to see that record is properly prepared and completed for review of any question by an appellate court. State ex rel. State Hwy. Comm'n v. Sherman, 82 N.M. 316, 481 P.2d 104 (1971); Westland Dev. Co. v. Saavedra, 80 N.M. 615, 459 P.2d 141 (1969).

It is the duty of an appellant to see to it that a proper record is made. General Servs. Corp. v. Board of Comm'rs, 75 N.M. 550, 408 P.2d 51 (1965).

Duty of having transcript properly prepared and certified, showing all matters necessary to review of questions presented on appeal, rests on appellant. In re Caffo, 69 N.M. 320, 366 P.2d 848 (1961).

It was the responsibility and duty of the appellant to see that the transcript was properly prepared and filed. Flores v. Duran, 68 N.M. 42, 357 P.2d 1091 (1960).

It is the duty of the appellant to see that a proper transcript is filed in the appellate court. Norment v. Mardorf, 26 N.M. 210, 190 P. 733 (1920).

It was the duty of appellant to file transcript of the record and proceedings in the case as perfect and complete as was necessary to properly review same, at his own expense in the first instance, along with additional matter asked for by appellees, but if such additional matter was found unnecessary, then appellees would be required to repay expenses. O'Neal v. Geo. E. Breece Lumber Co., 38 N.M. 94, 28 P.2d 523 (1933).

The primary burden of properly preparing the record on appeal is on the appellant. Nichols v. Nichols, 98 N.M. 322, 648 P.2d 780 (1982).

Record completed by appellee. — Although appellant requested less than the complete record and failed to include statement in praecipe required under former rules of the points upon which he would rely, it did not affect the jurisdiction of the supreme court where counter praecipe of appellee included such matters in the record and the appellee was not prejudiced by the action of the appellant. Chronister v. State Farm Mut. Auto. Ins. Co., 67 N.M. 170, 353 P.2d 1059 (1960).

Where appellant filed praecipe pursuant to former rule, calling for less than the entire record, and the appellee, without objection to the omission, filed praecipe for the omitted portions, the appeal would not be dismissed. Alexander Hamilton Inst. v. Smith, 33 N.M. 631, 274 P. 51 (1929).

Duty of appellant to include exhibits. — The appellant must insure that exhibits are part of the record on appeal. Luxton v. Luxton, 98 N.M. 276, 648 P.2d 315 (1982).

Failure to adopt statement of evidence and proceedings held harmless. — Although the district court erred in failing to adopt a statement of evidence and proceedings the error was harmless, as it is the responsibility of the appellant to perfect the record on appeal and he chose not to challenge the findings of fact. Barela v. Barela, 91 N.M. 686, 579 P.2d 1253 (1978).

Request for findings part of record. — Written request or application to the trial court to make findings of fact and conclusions of law was a motion or paper regularly filed in a cause, and a part of the record proper. Martin v. Village of Hot Springs, 33 N.M. 396, 268 P. 568 (1928); Vosburg v. Carter, 33 N.M. 86, 262 P. 175 (1927).

Opinion made part of decree in record proper. — Fact that opinion of trial court with findings of fact and conclusions of law was not annexed to, or transmitted with, the record was immaterial, where the opinion was made a part of the final decree and therefore appeared in the record proper. Mundy v. Irwin, 19 N.M. 170, 141 P. 877 (1914).

Record of first appeal before court. — Pleadings which constituted the record proper in the first transcript, which was properly docketed in the supreme court, were before the court in the second appeal under former Supreme Court Rules. State ex rel. State Hwy. Comm'n v. Gray, 81 N.M. 399, 467 P.2d 725 (1970).

Instructions to jury were not part of record, unless ordered by the court to be filed by the clerk, and would not be considered unless brought into the record by bill of exceptions, under former appellate procedure. Baca v. Ojo Del Espiritu Santo Co., 28 N.M. 499, 214 P. 764 (1923).

Review of propriety of instruction not denied. — Where the appellate transcript shows the giving of an approved instruction, review of the propriety of giving the instruction will not be denied because the instruction is not physically included in the appellate record. Trujillo v. Baldonado, 95 N.M. 321, 621 P.2d 1133 (Ct. App. 1980).

Taped statement included in transcript held part of record. — Appellate review would be easier if the trial court had filed a written statement of its reasons for alteration of a basic sentence, as part of the court file, but a taped statement preserved for review was part of the appellate record, because it was included in the transcript. State v. Bernal, 106 N.M. 117, 739 P.2d 986 (Ct. App. 1987).

Ordinance not included in transcript. — Where the record was silent respecting the ordinance violation of which was claimed to have been negligence per se, the ordinance having been neither pleaded, offered in evidence nor included in the transcript, could not be considered on appeal. McKeough v. Ryan, 79 N.M. 520, 445 P.2d 585 (1968).

Failure to indicate points relied on. — Under former rule, supreme court was precluded from a consideration of a question which appellant, who designated less than the complete record for inclusion in the transcript, failed to include in her praecipe as a statement of the points intended to be relied upon. City of Hobbs v. Chesport, Ltd., 76 N.M. 609, 417 P.2d 210 (1966); Robinson v. Black, 73 N.M. 116, 385 P.2d 971 (1963).

Failure of plaintiffs to request complete record of evidence or to include statement of points relied on in praecipe pursuant to former rule, where such points were included in brief, was not jurisdictional, and appeal would not be dismissed absent prejudice to defendants. Baca v. Ceballos, 81 N.M. 537, 469 P.2d 516 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Where no showing was made that appellee was prejudiced by appellant's failure to include any statement of the points upon which appellant would rely in praecipe, pursuant to former rules, jurisdiction of supreme court was not defeated. Chronister v. State Farm Mut. Auto. Ins. Co., 67 N.M. 170, 353 P.2d 1059 (1960).

Record may be corrected or modified by stipulation. — Paragraph C provides that the record proper may be corrected or modified by stipulation. The rule does not require the stipulated material to be certified by the district court clerk before the appellate court may consider it. Quintana v. University of Cal., 111 N.M. 679, 808 P.2d 964 (Ct. App. 1991).

Where defendant's appeal was based on double-jeopardy grounds, the case was remanded to permit him to perfect the record because trial court erred in denying his motion to introduce evidence relevant to his double-jeopardy claim. State v. Antillon, 2000-NMSC-014, 129 N.M. 114, 2 P.3d 315.

Courts look with favor upon stipulations designed to simplify, shorten or settle litigation and save time and costs to the parties, and such stipulations will be encouraged and enforced unless good cause is shown to do otherwise. Commercial Whse. Co. v. Hyder Bros., 75 N.M. 792, 411 P.2d 978 (1965).

Appellee not bound by agreement absent participation. — Transcript on appeal made up by agreement between appellant and one appellee, in which agreement another appellee did not participate, could not be considered for the purpose of determining the rights of the latter. Stoneroad v. Beck, 30 N.M. 202, 231 P. 642 (1923).

Record may be amended in trial court to correct defects and to insert matter omitted therefrom before transcript is filed in the supreme court. Heron v. Gaylor, 46 N.M. 230, 126 P.2d 295 (1942).

Appellee was deprived of right to suggest amendments or corrections to record, where he received no notice of time and place at which appellant would apply for transcript or statement of proceedings to be settled as bill of exceptions under former procedure, and was entitled to have transcript struck where he was prejudiced thereby.

Garcia v. Universal Constructors, Inc., 81 N.M. 703, 472 P.2d 668 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

Statement concerning unreported proceeding. — The fact that the transcript on appeal had already been filed in the supreme court did not prevent the appellant from preparing a statement concerning an unreported proceeding pursuant to former Rule 7(c), N.M.R. App. P. (Civ.); this correction of the record did not require leave of the appellate court under former Rule 60(a), N.M.R. Civ. P. (see now Rule 1-060A NMRA). Nichols v. Nichols, 98 N.M. 322, 648 P.2d 780 (1982).

Questions for review would be established only by the record, and any fact not so established would not be before appellate court. State ex rel. State Hwy. Comm'n v. Sherman, 82 N.M. 316, 481 P.2d 104 (1971); Westland Dev. Co. v. Saavedra, 80 N.M. 615, 459 P.2d 141 (1969).

To obtain a review, the record on appeal must show portions of the proceedings in the trial court necessary to raise claimed error on appeal; where record on appeal was devoid of any proceedings for which error was claimed, judgment would be affirmed. Attaway v. Jim Miller, Inc., 83 N.M. 686, 496 P.2d 746 (Ct. App. 1972).

Supreme court can properly consider only facts appearing in transcript on appeal; upon a doubtful or deficient record every presumption in support of the correctness and regularity of the trial court decision is indulged. State ex rel. Alfred v. Anderson, 87 N.M. 106, 529 P.2d 1227 (1974).

Where plaintiff failed to include facts and testimony in the record to support his contention of insufficiency of facts and evidence to support order vacating a default judgment, and did not request a transcript of the proceedings, the appellate court would follow the rule that upon a doubtful or deficient record, every presumption is indulged in favor of the correctness and regularity of the decision of the trial court. Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976).

Facts necessary to present a question for review by an appellate court are established only through a transcript of the record certified by the clerk of the trial court; any fact not so established is not before appellate court. Nix v. Times Enters., Inc., 83 N.M. 796, 498 P.2d 683 (Ct. App. 1972).

Review on appeal is limited to a consideration of the transcript of the record properly certified by the clerk of the trial court. Federal Nat'l Mtg. Ass'n v. Rose Realty, Inc., 79 N.M. 281, 442 P.2d 593 (1968).

Facts necessary to present a question for review by an appellate court are established only through a transcript of the record, and any fact not so established is not before the supreme court on appeal; hence, where there was nothing to show that complaint and judgment of prior proceeding attached to transcript were offered as exhibits in this case nor brought up as a part of the bill of exceptions pursuant to former Supreme Court

Rules, they could not be considered on appeal. Richardson Ford Sales v. Cummins, 74 N.M. 271, 393 P.2d 11 (1964).

In disposing of an appeal supreme court is limited to facts disclosed by the record; attempt to supply what was missing by attaching exhibits to the briefs was not permitted by the rules, and court would not consider the same. Porter v. Robert Porter & Sons, 68 N.M. 97, 359 P.2d 134 (1961).

Supreme court was bound by findings of trial court in order appealed from where record, filed under former rule, disclosed no testimony and contained no bill of exceptions or stipulations or statement of facts by trial court as part of record. In re Caffo, 69 N.M. 320, 366 P.2d 848 (1961).

A verbatim transcript is not necessary in most cases to permit meaningful appellate review. Jeantete v. Jeantete, 111 N.M. 417, 806 P.2d 66 (Ct. App. 1990).

Doubtful verdict interpreted by reference to entire record. — If there is any doubt about a verdict, the supreme court is entitled to interpret the verdict by reference to the whole record and particularly by reference to the instructions given by the lower court. State v. Cisneros, 77 N.M. 361, 423 P.2d 45 (1967).

Nonconsideration of part of record proper. — In a workers' compensation action, where documents contained in the supplemental record proper could have been admitted as evidence at the formal hearing but were not in fact admitted, the documents could not be considered by the district court as competent evidence in support of the formal hearing judge's decision. Although material is part of the record proper, a court may decide that it is not to be considered in determining whether substantial evidence in the whole record supports the decision below. Flowers v. White's City, Inc., 114 N.M. 73, 834 P.2d 950 (Ct. App. 1992).

Matters not of record will not be considered on appeal. Adams v. Loffland Bros. Drilling Co., 82 N.M. 72, 475 P.2d 466 (Ct. App. 1970).

Supreme Court of New Mexico is limited on review to what is disclosed by the record. Maryland Cas. Co. v. State Farm Mut. Auto. Ins. Co., 77 N.M. 21, 419 P.2d 229 (1966).

Matters outside record not reviewable. — Where the transcript of the hearing on a motion to suppress is not included in the record on appeal, the refusal of the court of appeals to consider the propriety of the trial court's failure to grant that motion is upheld, since matters outside the record present no issue for review. State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

Omitted portions of record presumed to be unnecessary. — Where appellant in praecipe for record called for by former rules, set forth desire for review on instructions given or refused, and called for portions of record, and appellee failed to call for additional parts of record, it would be conclusively presumed, in the absence of

certiorari for diminution of record, that omitted portions were unnecessary. Marcus v. St. Paul Fire & Marine Ins. Co., 35 N.M. 471, 1 P.2d 567 (1931).

Incomplete record assumed to support trial court. — As the burden is on appellant to insure that the appellate court has a record adequate to review the issues, when the record is incomplete, the appellate court will assume that the missing portions would support the trial court's determination. State v. Doe, 103 N.M. 233, 704 P.2d 1109 (Ct. App. 1985).

Appeal not dismissed for failure to comply with rules. — Even though appellants failed to file praecipe with the clerk of the district court specifying the record to be included in the transcript and settled as a bill of exceptions, nor filed certificates relating to arrangements with the clerk and court's stenographer for compensation, such failure to comply with former rules did not deny the right of appeal, and motion to dismiss would be denied. Alamogordo Fed. Sav. & Loan Ass'n v. Snow, 66 N.M. 216, 345 P.2d 746 (1959).

Noncompliance with rule must be raised before matter submitted. — Where the failure of appellant to comply with this rule was not raised until the matter was submitted for consideration, the supreme court did not dismiss the appeal but determined the merits where the issues had already been briefed. Flower v. Willey, 95 N.M. 476, 623 P.2d 990 (1981).

Arrangements for compensation. — Former supreme court rule required an appellant to furnish a copy of the praecipe to the court stenographer and to make satisfactory arrangements with him and the clerk for their compensation. Barelas Community Ditch Corp. v. City of Albuquerque, 61 N.M. 222, 297 P.2d 1051 (1956).

Law reviews. — For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 Nat. Resources J. 693 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 90 et seq.; 5 Am. Jur. 2d Appellate Review § 484 et seq.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Correction, modification, or supplementation of record on appeal under Rule 10(e) of Federal Rules of Appellate Procedure, 60 A.L.R. Fed. 183.

4 C.J.S. Appeal and Error § 440 et seq.

12-210. Calendar assignments.

A. **Calendar assignment; notice.** After the docket fee has been paid in accordance with Rule 12-208 NMRA, based upon the docketing statement or statement of the

issues and record proper, the court shall assign the case to either the general, legal or summary calendar. The assignment may be made by a single judge or justice. The appellate court clerk shall file and promptly serve notice of the assignment upon the parties and the district court clerk. The date stamped on the calendar notice is the date of service for purposes of Rule 12-308 NMRA. If the clerk mails the notice, Paragraph B of Rule 12-308 NMRA applies.

B. **General calendar.** If the case is placed on the general calendar:

(1) the transcript of proceedings shall be filed as provided in Rule 12-211 NMRA;

(2) the appellant shall serve and file a brief in chief within forty-five (45) days after the date [the transcript of proceedings is] all transcripts of proceedings, as designated by any party, are filed in the appellate court, or if no transcript is filed, within forty-five (45) days after the appellant's notice of nondesignation of transcript is filed in the appellate court. The appellee shall serve and file an answer brief within forty-five (45) days after service of the brief of the appellant. The appellant may serve and file a reply brief within twenty (20) days after service of the brief of the appellee. The time limits for briefs on cross-appeals are set forth in Rule 12-213 NMRA; and

(3) if filed in the Court of Appeals, the case shall be submitted for decision to a randomly chosen panel of three judges.

C. **Legal calendar.** If the case is placed on the legal calendar:

(1) a transcript of proceedings shall not be filed;

(2) the case will be submitted on legal issues;

(3) briefing time shall commence from the date of service of the appellate court clerk's notice of the calendar assignment; the appellant shall file and serve a brief in chief within thirty (30) days; the appellee shall serve and file an answer brief within thirty (30) days after service of the brief of the appellant; the appellant may serve and file a reply brief within twenty (20) days after service of the brief of the appellee. The time limits for briefs on cross-appeals are set forth in Rule 12-213 NMRA; and

(4) if filed in the Court of Appeals, the case shall be submitted for decision to a randomly chosen panel of three judges.

D. **Summary calendar.** If the case is placed on the summary calendar:

(1) a transcript of proceedings shall not be filed;

(2) the appellate court clerk's notice shall state the basis for proposed disposition;

(3) appellate counsel or trial counsel shall have twenty (20) days from date of service of the appellate court clerk's notice of proposed disposition to serve and file a memorandum setting forth reasons why the proposed disposition should or should not be made and why the case should or should not be assigned to the summary calendar, but the party shall be restricted to arguing only issues contained in the docketing statement. The docketing statement or statement of the issues may be amended at this time for good cause shown with the permission of the appellate court. A motion to amend the docketing statement or statement of the issues may be combined with a memorandum in opposition;

(4) no oral argument shall be allowed concerning the proposed disposition;

(5) after reviewing the memorandum or memoranda in support of or in opposition to the disposition proposed in the notice, the appellate court will either reassign the case to a nonsummary calendar, issue another notice of proposed summary disposition or proceed to decide the case by opinion or order. The Court's disposition of cases on the summary calendar may be in any form permitted under Rule 12-405 NMRA. In the Court of Appeals, every case decided on the summary calendar will be decided by a three-judge panel; and

(6) if there is no summary disposition, the case will be reassigned to the appropriate calendar.

[As amended, effective July 1, 1990; August 1, 1992; January 1, 1997; January 1, 2000; September 15, 2000.]

ANNOTATIONS

I. GENERAL CONSIDERATION.

The 1992 amendment, effective for cases filed in the supreme court and court of appeals on or after August 1, 1992, added the last two sentences in Paragraph A.

The 1997 amendment, effective January 1, 1997, in Subparagraph B(2), substituted "a brief in chief" for "his brief" and "forty-five (45) days" for "thirty (30) days" in the first sentence, substituted "an answer brief" for "his brief" and "forty-five (45) days" for "thirty (30) days" in the second sentence, and substituted "twenty (20) days" for "ten (10) days" in the last sentence; in Subparagraph C(3), substituted "a brief in chief" and "an answer brief" for "his brief", and substituted "twenty (20) days" for "ten (10) days"; and substituted "twenty (20) days" for "ten (10) days" in Subparagraph D(3).

The 1999 amendment, effective for cases filed on and after January 1, 2000, inserted at the beginning of Paragraph A, "After the docket fee has been paid in accordance with Rule 12-208", and "or statement of the issues" following "docketing statement", and added the second sentence; in Paragraph B(2), substituted "and file" for "file and"; added Paragraph B(3); in Paragraph C(3), substituted "thirty (30)" for "twenty (20)",

added Paragraph C(4); in Paragraph D(3), inserted "serve and" following "disposition to" in the first sentence, added "or statement of the issues" following "docketing statement" in the second sentence, added the last sentence, added Paragraph D(5) and redesignated former Paragraph D(5) as Paragraph D(6).

The 2000 amendment, effective September 15, 2000, substituted "all transcripts of proceedings, as designated by any party, are" for "the transcript of proceedings is" and added "or if no transcript is filed, within forty-five (45) days after the appellant's notice of nondesignation of transcript is filed in the appellate court" in the first sentence of Paragraph B(2).

Paragraph B(3) does not create substantive right to a panel of randomly chosen judges. Mannick v. Wakeland, 2005-NMCA-098, 138 N.M. 113, 117 P.3d 919, cert. granted, 2005-NMCERT-001.

Exception to panel of randomly chosen judges. — The consolidation of cases authorized by Paragraph F(2) of this rule would be an exception to the right to a panel of randomly chosen judges under Paragraph B(3) of Rule 12-210 NMRA. Mannick v. Wakeland, 2005-NMCA-098, 138 N.M. 113, 117 P.3d 919, cert. granted, 2005-NMCERT-001.

No right to assignment on a given calendar. — Neither equal protection clause nor due process clause requires assignment of a case to either the summary calendar or the general calendar, and is it necessary for the court to provide reasons for its assignment of a case to the general calendar. Udall v. Townsend, 1998-NMCA-162, 126 N.M. 251, 968 P.2d 341.

Citation in brief to calendar notice. — It is inappropriate to cite a calendar notice as controlling authority; however, if counsel concludes that language in a memorandum opinion or calendar notice is persuasive, we see no reason why it cannot be presented to the court for consideration if the language is presented without reference to its source. State v. Gonzales, 110 N.M. 218, 794 P.2d 361 (Ct. App. 1990), aff'd, 111 N.M. 363, 805 P.2d 630 (1991).

Contempt proceedings were deemed proper for a violation of former Rule 207, N.M.R. App. P. (Crim.) (see now this rule). In re Avallone, 91 N.M. 777, 581 P.2d 870 (1978).

Failure to file reply brief in timely manner excusable. — Where an attorney filed an answer brief eight days late due to a scheduling error after the birth of a baby, it was not appropriate to award costs and fees to the opposing party. Gill v. Pub. Employees Ret. Bd., 2003-NMCA-038, 133 N.M. 345, 62 P.3d 1227.

Law reviews. — For comment, "A Comment on State v. Montoya and the Use of Arrest Records in Sentencing," see 9 N.M.L. Rev. 443 (1979).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

For article, "New Mexico's Summary Calendar for Disposition of Criminal Appeals: An Invitation for Inefficiency, Ineffectiveness and Injustice," see 24 N.M.L. Rev. 27 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Acceptance by United States district court of notice of appeal in criminal case untimely filed, as grant of additional time to file notice, under Rule 4(b) of Federal Rules of Appellate Procedure, 43 A.L.R. Fed. 815.

5 C.J.S. Appeal and Error § 662 et seq.

II. LIMITED CALENDAR.

Where all facts of appealed case are undisputed, case should not be placed on "limited" calendar. — See Garrison v. Safeway Stores, 102 N.M. 179, 692 P.2d 1328 (Ct. App. 1984).

III. LEGAL CALENDAR.

Case on legal calendar reviewed on basis of facts stated in docketing statement. — Where a case was assigned to the legal calendar pursuant to former Rule 207, N.M.R. App. P. (Crim.) (see now this rule), the facts as stated in the docketing statement were the facts for purposes of review on appeal, unless the state objected to the recitation of facts contained therein. State v. Clark, 89 N.M. 695, 556 P.2d 851 (Ct. App. 1976).

And facts in docketing statement presumptively true. — When a cause was placed on the legal calendar pursuant to former Rule 207, N.M.R. App. P. (Crim.) (see now this rule), the facts set forth in the docketing statement were accepted as true unless challenged. State v. Rivera, 92 N.M. 155, 584 P.2d 202 (Ct. App. 1978).

IV. SUMMARY CALENDAR.

Summary calendar system of appeal constitutional. — There was no factual or legal basis for defendant's allegation of a due process violation due to New Mexico's summary calendar system of appeal, since assignment of a case to the summary calendar, which strictly limits the length of and time for submissions to the appellate court, does not violate due process as long as the defendant is able to properly present issues raised on appeal. State v. Ibarra, 116 N.M. 486, 864 P.2d 302 (Ct. App. 1993), cert. denied, 513 U.S. 1157, 115 S. Ct. 1116, 130 L. Ed. 2d 1080 (1995).

This rule does not violate N.M. Const., art. VI, § 28. That section does not require a full panel of judges to make a calendaring decision, it only requires a majority of judges to concur in a judgment of the court. Because three judges concurred in summary affirmance in this case, there was no violation. State v. Simpson, 116 N.M. 768, 867 P.2d 1150 (1993).

When assignment to summary calendar proper. — Assignment to the summary calendar, as provided for in Subdivision (d) of former Rule 207, N.M.R. App. P. (Crim.) (see now Paragraph E of this rule) was proper in cases where the application of legal principles to the facts involved was clear and where no genuine issue of substantial evidence was involved. State v. Anaya, 98 N.M. 211, 647 P.2d 413 (1982).

Matter of first impression or matter requiring formal opinion under former Rule 601, N.M.R. App. P. (Crim.) (see now Rule 12-405 NMRA) may be disposed of on a summary calendar. Garrison v. Safeway Stores, 102 N.M. 179, 692 P.2d 1328 (Ct. App. 1984).

Facts in docketing statement accepted unless challenged. — When a case is assigned to summary calendar, the facts in the docketing statement are accepted as true unless contested. State v. Sisneros, 98 N.M. 201, 647 P.2d 403 (1982).

Facts in a docketing statement which are not challenged are to be accepted as the facts of the case. State v. Anaya, 98 N.M. 211, 647 P.2d 413 (1982).

The party opposing summary disposition must come forward and specifically point out errors in fact and in law. State v. Sisneros, 98 N.M. 201, 647 P.2d 403 (1982).

Response to calendar assignment not required. — While this rule gives a party ten days to file a response to a calendar notice, it does not require the party to file a response. Thus, the Supreme Court was not required to remand the case to the Court of Appeals, and could review the calendar decision without the response. State v. Simpson, 116 N.M. 768, 867 P.2d 1150 (1993).

Failure to file memorandum in opposition in accordance with Paragraph D(3) constitutes acceptance of the disposition proposed in the calendar notice. Frick v. Veazey, 116 N.M. 246, 861 P.2d 287 (Ct. App. 1993).

Replies to memoranda. — These rules do not provide for the filing of responses and replies back and forth between the parties to their memoranda in support of, or in opposition to, a calendar notice. Landavazo v. New Mexico Dep't of Human Servs., 106 N.M. 715, 749 P.2d 538 (Ct. App. 1988).

Motion to amend docketing statement on summary calendar. — In cases assigned to a summary calendar, a motion to amend the docketing statement (when asserting other than fundamental error or jurisdictional issues) will be granted only if: (1) it is timely; (2) it states all facts material to a consideration of the new issues attempted to be raised; (3) it states those issues and how they were preserved or shows why they did not have to be preserved; (4) it states the reason why the issues were not originally raised and shows just cause or excuse for not originally raising them; and (5) it complies in other respects with the appellate rules insofar as necessary under the circumstances of the case. State v. Rael, 100 N.M. 193, 668 P.2d 309 (Ct. App. 1983).

Second motion held untimely where time to oppose summary calendar had expired. — Defendant's second motion to amend was untimely filed where the time to file a memorandum in opposition to the initially proposed summary calendar had expired. State v. Smith, 102 N.M. 350, 695 P.2d 834 (Ct. App. 1985), overruled on other grounds Gillespie v. State, 107 N.M. 455, 760 P.2d 147 (1988).

Summary affirmance due. — Summary affirmance was due an order transferring a juvenile from children's court to be tried as an adult even though juvenile filed a timely memorandum in opposition to affirmance, and, though continuing to contest summary disposition, he provided no reasons why the summary disposition should not be made. State v. Greg R., 104 N.M. 778, 727 P.2d 86 (Ct. App. 1986).

12-211. Transcript of proceedings.

A. **Transcript of proceedings.** As used in these rules:

(1) "transcript of proceedings" includes audio recordings of the proceedings and stenographic transcripts of the proceedings; and

(2) "audio recording" includes any tape, digital or other electronic recording of the proceedings. Audio recordings must comply with standards established by the Supreme Court.

B. **Audio recorded proceedings.**

(1) Where the transcript of proceedings is an audio recording, within fifteen (15) days after the receipt of the general calendar assignment, the district court clerk shall prepare and send the original and two (2) duplicates of the recording and index log to the appellate court and shall prepare and retain one (1) duplicate. Unless otherwise ordered by the appellate court, upon motion by the appellant, the transcript shall include the entire proceedings, including pretrial, trial and post-trial proceedings. The district court clerk shall include a statement of the cost of the audio recordings. After final determination of the appeal, the appellate court shall preserve the original audio recording for storage in accordance with approved retention schedules as maintained by the office of the appellate court clerk.

(2) The appellant shall make satisfactory arrangements with the district court clerk for the cost of the duplicate copies of the audio recording. Proof that satisfactory arrangements have been made shall be filed in the district court within five (5) days of service of the general calendar assignment. Such proof of satisfactory arrangements shall be by certificate of the district court clerk.

C. **Proceedings not audio recorded.**

(1) Where the proceedings are not audio recorded, and except for those cases described in subparagraph (5) of this paragraph, the appellant shall, within fifteen

(15) days after service of the general calendar assignment, file in the district court and serve on the appellate court and the other parties to the appeal a description of the parts of the proceedings which the appellant intends to include in the transcript. If the appellant does not intend to designate any part of the proceedings for inclusion in the transcript, the appellant shall, within fifteen (15) days after service of the general calendar assignment, file in the appellate court and serve on the other parties to the appeal a notice that a transcript will not be designated. The appellant shall designate all portions of the proceedings material to the consideration of the issues presented in the docketing statement or statement of the issues, but shall designate only those portions of the proceedings that have some relationship to the issues on appeal. If any other party to the appeal deems a transcript of other parts of the proceedings to be necessary, that party shall, within fifteen (15) days after the service of the designation or the notice of nondesignation of the appellant, file in the district court and serve on the appellant a designation of additional parts to be included or apply to the district court for an order requiring appellant to designate such parts.

(2) Each party designating a portion of the stenographic transcript of proceedings shall make satisfactory arrangements with the court reporter for payment of the cost of that portion of the transcript. Proof that satisfactory arrangements have been made shall be filed with the district court clerk within fifteen (15) days of the designation. Such proof of satisfactory arrangements shall be by certificate of the reporter.

(3) Except for computer-aided transcripts, within sixty (60) days after the filing of the last certificate of satisfactory arrangements, the court reporter shall file with the district court three (3) copies of the designated transcript of proceedings with a certificate of the court reporter that such copies are true and correct copies of the transcript of proceedings. If the transcript is a computer-aided transcript, the transcript shall be filed within thirty (30) days after the filing of the last certificate of satisfactory arrangements. The transcript shall be in the form required by Rule 12-305 NMRA of these rules and Rule 22-302 of the Rules Governing the Recording of Judicial Proceedings. The transcript of proceedings shall include a statement of the cost of the transcript. The district court clerk shall serve notice on all parties of the filing of the transcript.

(4) Within fifteen (15) days after service of the notice of filing of the transcript of proceedings, any party may file with the district court clerk, and serve on the opposing party, objections to the stenographic transcript. A hearing on the objections shall be held by the district court within fifteen (15) days after the filing of the objections. At the hearing the district court shall resolve the objections and, if necessary, order appropriate corrections to be made. If no objections are filed, the district court clerk shall send the three (3) copies of the transcript to the appellate court when the time for filing objections has expired. If objections are filed, the district court clerk shall send the three (3) copies of the transcript to the appellate court within ten (10) days after the hearing on the objections.

(5) If an appeal is taken from the district court in which a sentence of death or life imprisonment has been imposed and the proceedings are not audio recorded, the parties shall proceed in accordance with this rule, except that the designation of proceedings shall be filed at the same time as the notice of appeal. The proceedings beginning with the opening statement and ending with the return of the verdict on the guilt phase shall be deemed to be designated in every case. The appellant shall designate any other portions of the proceedings material to the consideration of the issues to be raised on appeal, but shall designate only those portions of the proceedings that have some relationship to those issues. If any other party to the appeal deems a transcript of other parts of the proceedings to be necessary, that party shall, within fifteen (15) days after the service of the designation of the appellant, file in the district court and serve on the appellant a designation of additional parts to be included or apply to the district court for an order requiring appellant to designate such parts.

D. **Disagreements over cost.** In case of disagreement over the cost of a stenographic transcript or duplicates of an audio recording, a party may file with the district court a motion for determination by the district court of the amount of compensation to be paid. The district court may order the payment or collateral to be deposited in the registry of the district court to secure payment of the cost.

E. **Extensions of time.** Each appellant shall be responsible for the timely preparation and filing of the transcript of proceedings. Any extension of time for filing a transcript of proceedings may be granted only by the appellate court. Any motion for extension of time must be supported by an affidavit from the responsible court reporter, court monitor, district court clerk or other party whose duty it is to prepare the transcript of proceedings or to duplicate the master audio recording unless this affidavit is waived by the appellate court for good cause shown. The affidavit shall set forth the pending cases in which the reporter or court monitor has transcripts ordered, the estimated dates on which such transcripts will be completed and the reasons an extension is necessary in this case. If the transcript is computer-aided, the motion shall also be accompanied by a written statement signed by the managing court reporter stating the reasons why the managing court reporter supports or opposes the requested extension.

F. **Failure to file transcript of proceeding.** If the appellant shall fail to cause the transcript of proceedings to be filed in the appellate court within the time limit prescribed by this rule, the district court or the appellate court, upon motion, shall make such orders as will prevent such default from prejudicing any other party's appeal in the same case.

G. **Filing in appellate court.** Upon receipt of the transcript of proceedings, the appellate court clerk shall serve notice of the filing on all parties and the district court clerk.

H. **Unavailability or inaudibility of transcript; statement of proceedings.** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript of

proceedings is unavailable or inaudible, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. If no court reporter or court monitor was present at the proceedings, the statement shall be prepared and filed in the district court within fifteen (15) days after service of the notice of a general calendar assignment. If a court monitor was present at the proceedings, but the audio recorded transcript is totally or partially unavailable or inaudible, the statement shall be filed in the district court within fifteen (15) days after the filing of an audio recorded transcript of proceedings in the appellate court or within thirty (30) days after service of the notice of a general calendar assignment, whichever is earlier. If a court reporter was present at the proceedings, but the stenographic transcript is totally or partially unavailable, the statement shall be filed in the district court within fifteen (15) days after the time the stenographic transcript of proceedings is due to be filed in the district court. The statement shall be served on the appellee, who may file objections or propose amendments thereto within fifteen (15) days after service. If there are any objections or proposed amendments thereto, the objections or amendments shall be submitted to the district court for settlement and approval. Within fifteen (15) days after filing of the objections or amendments, the district court shall settle and approve the transcript of proceedings. Upon approval, the district court clerk shall include the transcript of proceedings in the record proper and immediately transmit it to the appellate court. The appellate court may extend the time limits set forth in this paragraph for good cause shown.

I. **Stipulated transcript of proceedings.** The parties may agree upon a statement of facts and proceedings and stipulate that they deem the statement sufficient for purposes of review, and the statement shall be filed as a transcript of proceedings within sixty (60) days of service of the general calendar assignment, unless otherwise ordered by the appellate court.

J. **Separate appeals.** When separate appeals are taken by more than one party, only one transcript of proceedings shall be required.

K. **Supplemental transcript of proceedings.** After the transcript of proceedings has been filed, the appellate court may, upon its own motion or upon motion of either party and for good cause shown, order or allow a supplemental transcript of proceedings. The appellate court shall set the time for filing the supplemental transcript of proceedings in the appellate court.

L. **Designations in cases involving appointed appellate counsel.** In cases where counsel other than trial counsel is appointed to represent a party on appeal, trial counsel shall be responsible for designating the record on appeal and for performing all other duties of counsel in this rule.

[As amended, effective July 1, 1990; December 1, 1993; January 1, 1997; April 1, 1998; September 15, 2000; March 15, 2005; as amended by Supreme Court Order 06-8300-14, effective July 15, 2006.]

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — *See* 22-303 NMRA for procedures for storing and making copies of audio recordings of judicial proceedings.

See 22-206 NMRA of the Rules Governing the Recording of Judicial Proceedings for records of judicial proceedings.

See 22-303 NMRA for minimum standards for audio recordings.

See 5-111 NMRA for the definition of "record" in criminal proceedings.

Federal rules. *See* Fed. R. App. P. Rule 10 for the record on appeal in federal court appeals.

The 1993 amendment, effective December 1, 1993, in Paragraph A, deleted "permanent" preceding "storage" and added the language beginning "in accordance" in the last sentence; inserted "and except for those cases described in subsection (5) of this rule" and made gender neutral changes in Subparagraph C(1); inserted "of the Rules Governing the Recording of Judicial Proceedings" in Subparagraph C(3); and added Subparagraph C(5).

The 1997 amendment, effective January 1, 1997, substituted "fifteen (15) days" for "ten (10) days" throughout the rule.

The 1998 amendment, effective for pleadings due on and after April 1, 1998, inserted "or statement of the issues" following "docketing statements" in Paragraph C.

The 2000 amendment, effective September 15, 2000, in Paragraph C(1), added the second sentence, and inserted "or the notice of nondesignation" following "service of the designation" in the fourth sentence and in Paragraph C(5), substituted "at the same time as the notice of appeal" for "within fifteen (15) days after the judgment or order appealed from is filed in the district court" at the end of the first sentence.

The 2005 amendment, effective March 15, 2005, substituted "audio" and "audio recording" for "tapes" and "tape recordings" and added a new Subparagraph (2) to Paragraph A to define "audio recording" and provide for standards.

The 2006 amendment, approved by Supreme Court Order 06-8300-14, effective July 15, 2006, provided for service on the appellate court in Subparagraph (1) of Paragraph C and added Paragraph L providing for the duties of an appointed attorney on appeal.

Federal rules. — See Fed. R. App. P. Rule 10.

Appellant's duty to prepare record. — The primary burden of properly preparing the record on appeal is on the appellant. Nichols v. Nichols, 98 N.M. 322, 648 P.2d 780 (1982).

Clerk's obligation to transmit tapes does not alter appellant's burden. — The fact that it is now the obligation of the district court clerk to transmit the tapes to the court of appeals does not alter the general rule that the burden is on the appellant to insure that the court of appeals has a record adequate to review the issues. Berlint v. Bonn, 102 N.M. 394, 696 P.2d 482 (Ct. App. 1985).

Accused generally responsible for record. — Accused is responsible to see that a record is kept of any supposed errors and that the same is certified so that the point he wants reviewed may be properly presented. State v. Walker, 54 N.M. 302, 223 P.2d 943 (1950).

Burden is on defendant to bring up a record sufficient for review of the issues he raises on appeal; if he does not, all inferences will be resolved in favor of the trial court's ruling. State v. Padilla, 95 N.M. 86, 619 P.2d 190 (Ct. App. 1980).

It is the defendant's burden to provide a record sufficient to demonstrate reversible error in refusing self-defense instructions. State v. Gonzales, 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

And to provide necessary transcript. — The burden is on the appellant to provide the necessary appellate record of the transcript and exhibits. State v. Garcia, 92 N.M. 730, 594 P.2d 1186 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979); State v. Baca, 92 N.M. 743, 594 P.2d 1199 (Ct. App. 1979).

Appellate court has authority, on own motion, to have exhibits sent to it for review when those exhibits have been introduced, and relied on, before the trial court. State v. Garcia, 92 N.M. 730, 594 P.2d 1186 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

A failure to include the transcript of a motion hearing would normally preclude review. However, the appellate court may order records to consider the merits of a motion, where the issue is jurisdictional. State v. Gilbert, 98 N.M. 77, 644 P.2d 1066 (Ct. App. 1982).

Insufficient transcript. — Even though transcript was insufficient, supreme court still had jurisdiction of appeal. O'Neal v. Geo. E. Breece Lumber Co., 38 N.M. 94, 28 P.2d 523 (1933).

When problems with an unintelligible or missing portion of a transcript are not timely called to the attention of the proper court under Paragraphs C(4) and E, the appellate court may refuse to consider contentions relating to that portion of the transcript. State

ex rel. Educ. Assmts. Sys. v. Cooperative Educ. Servs., 110 N.M. 331, 795 P.2d 1023 (Ct. App. 1990).

If the transcript is inaccurate, counsel may object and the district court must resolve the objections. Thus, problems with the transcript can be caught and corrected (by a judge familiar with the proceedings) in a timely fashion before briefing time commences. State ex rel. Educ. Assmts. Sys. v. Cooperative Educ. Servs., 110 N.M. 331, 795 P.2d 1023 (Ct. App. 1990).

Filing of too few copies not ground for dismissal. — Failure to file a sufficient number of copies of the transcript was not ground for dismissal of a writ of error. Farmers' Cotton Fin. Corp. v. Green, 34 N.M. 206, 279 P. 562 (1929); Blanchard v. State ex rel. Wallace, 29 N.M. 584, 224 P. 1047 (1924).

Deposition never offered may not be used on appeal. — In a summary judgment hearing the trial court may properly consider only those depositions before it. Where a deposition is never offered to the trial court, it cannot be relied upon on appeal. Roberts v. Piper Aircraft Corp., 100 N.M. 363, 670 P.2d 974 (Ct. App. 1983).

Defendant may not be prejudiced by trial court's limitation of record, in light of the evidence and stipulations of the parties. State v. Martin, 94 N.M. 251, 609 P.2d 333 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Review of propriety of instruction. — Where the appellate transcript shows the giving of an approved instruction, review of the propriety of giving the instruction will not be denied because the instruction is not physically included in the appellate record. Trujillo v. Baldonado, 95 N.M. 321, 621 P.2d 1133 (Ct. App. 1980).

Omitted objections on file from previous appeals. — Where the original objections to a final account and report of the administration of an estate are not included in the transcript for an appeal, but are on file with the court from previous appeals, neither the parties nor the appellate court shall be prevented from relying on those objections. Aikens v. Hamilton, 97 N.M. 111, 637 P.2d 542 (1981).

Party's motion to strike district judge's explanatory letter, not part of record supplied by district court clerk, from consideration on appeal was denied where letter was properly included at end of trial transcript made part of record and was useful to disposition of issues on appeal, even though party did not specifically refer to the letter in its citations to the transcript. Robinson v. Campbell, 101 N.M. 393, 683 P.2d 510 (Ct. App.), cert. denied, 101 N.M. 362, 683 P.2d 44 (1984).

Inability to prepare transcript basis for new trial. — Where the defendant gives timely notice of appeal, but due to unexplained technical difficulties, the court reporter is unable to prepare an audible transcript of proceedings in the cause, the fault for the tapes' inaudibility cannot be assessed against the defendant, and where it is impossible to reconstruct a record of the proceedings because of the trial counsel's inability to

recall the events at trial, to deny the defendant a new trial would be to deny him his right of appeal guaranteed by the New Mexico Constitution. State v. Moore, 87 N.M. 412, 534 P.2d 1124 (Ct. App. 1975).

Contempt proceedings were deemed proper for violation of former Rule 208, N.M.R. App. P. (Crim.) (see now this rule). In re Avallone, 91 N.M. 777, 581 P.2d 870 (1978).

Dismissal upheld. — An appeal would be dismissed on a motion by the state for noncompliance with former Rule 208, N.M.R. App. P. (Crim.) (see now this rule) when an indigent defendant did not respond to the motion or appear at a hearing to show cause why the appeal should not be dismissed, where there was nothing showing that the defendant had sought an order for free process to meet the cost of the production of the transcript and no steps had been taken for the preparation of a transcript for use in the appeal. State v. Laran, 90 N.M. 295, 562 P.2d 1149 (Ct. App. 1977).

Court must obtain transcript before deciding case. — Proper action of appellate court, when not receiving all of the transcript of proceedings from the lower court, is, prior to deciding the case, to obtain the transcript itself or to notify counsel to call to the district court clerk's attention the fact that some of the transcript was not received. Schneider, Inc. v. Shadbolt, 103 N.M. 467, 709 P.2d 189 (1985).

Taped statement included in transcript held part of record. — Appellate review would be easier if the trial court had filed a written statement of its reasons for alteration of a basic sentence, as part of the court file, but a taped statement preserved for review was part of the appellate record, because it was included in the transcript. State v. Bernal, 106 N.M. 117, 739 P.2d 986 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 492 et seq.

Determination of indigency of accused entitling him to transcript or similar record for purposes of appeal, 66 A.L.R.3d 954.

Failure or refusal of state court judge to have record made of bench conference with counsel in criminal proceeding, 31 A.L.R.5th 704.

4 C.J.S. Appeal and Error § 506 et seq.

II. PROCEEDINGS NOT ON TAPE.

Requires designation of portions of proceedings. — The first clause of the sentence in Paragraph C(1) of this rule, discussing designating portions of the proceedings, requires that the appellant must designate all portions of the proceedings bearing on the propositions that the appellant will be challenging, and the appellant cannot rely solely

on the portions of the proceedings that favor its position. Jones v. Schoellkopf, 2005-NMCA-124, 138 N.M. 477, 122 P.3d 844.

Cost of transcript. — Where plaintiff challenged the basis of the trial court's decision and specifically challenged findings of fact, defendants were properly proceeding in accordance with Paragraph C(1) of this rule to ask the trial court to require plaintiff to designate the entire transcript, and the trial court's ruling, requiring plaintiff to pay half the transcript, was within its authority because the trial court could not be certain whether the entire transcript was necessary and because the appellate court will determine who shall pay the cost of the transcript in any event. Jones v. Schoellkopf, 2005-NMCA-124, 138 N.M. 477, 122 P.3d 844.

Typewritten transcript cannot show allegedly erroneous trial court mannerisms. — Where the transcript is typewritten, it does not show any alleged erroneous mannerisms of the trial court, and the appellate court cannot determine either whether the trial court has indulged in any such asserted mannerisms or whether counsel has made improper charges against the trial court. State v. Herrera, 90 N.M. 306, 563 P.2d 100 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

III. FILING TRANSCRIPT.

A. IN GENERAL.

Failure to file transcript within time allowed was not fatal to jurisdiction of supreme court under former rules. Pankey v. Hot Springs Nat'l Bank, 42 N.M. 674, 84 P.2d 649 (1938).

Untimely transcript filing held not grounds for dismissal. — Where technical violations of procedural rules regarding the timely filing of the transcript are perpetrated by the defendant's attorney, not the defendant, there is no prejudice to the state in permitting the appeal, especially since the state itself has moved to have the case taken from the summary reversal calendar, and the probable incarceration of the defendant without an appellate court having considered the issues raised on appeal outweighs any prejudice to the state. Linam v. State, 90 N.M. 302, 563 P.2d 96 (1977).

Waiver. — By inaction, until after default was cured, a party waived the benefit of former rule limiting time within which printed transcripts and briefs were to be filed. Dailey v. Foster, 17 N.M. 377, 128 P. 71 (1912).

Default cured. — Where defendant did not move for affirmance of judgment for failure of plaintiff to file transcript on time until after filing thereof, default, if any, had already been cured. Garcia v. Universal Constructors, Inc., 81 N.M. 703, 472 P.2d 668 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

Under former rules, motion to dismiss for failure to file a transcript in time, not made until after the appellant had cured the default, would be denied. Collins v. Unknown

Heirs, 27 N.M. 222, 199 P. 362 (1921); Abo Land Co. v. Dunlavy, 27 N.M. 202, 199 P. 479 (1921).

B. EXTENSION OF TIME.

District judge has power to extend time to file transcript. Massengill v. City of Clovis, 33 N.M. 318, 267 P. 70 (1928).

District court retained jurisdiction to extend the time within which to file the transcript and bill of exceptions under former rule after the original return date therefor. New Jersey Zinc Co. v. Local 890 Int'l Mine, Mill & Smelter Workers, 57 N.M. 617, 261 P.2d 648 (1953).

Under former rules, district judge had jurisdiction to extend the time to perfect the record and file the transcript in the supreme court, although time for perfecting appeal had already elapsed when formal motion to extend was filed. National Mut. Sav. & Loan Ass'n v. McGhee, 38 N.M. 442, 34 P.2d 1093 (1934).

Deadline for filing requests for extension. — Requests for extensions of time should ordinarily be filed by the pertinent deadline. State ex rel. Educ. Assmts. Sys. v. Cooperative Educ. Servs., 110 N.M. 331, 795 P.2d 1023 (Ct. App. 1990).

Extension for good cause. — Extension could be granted under former rule only on a showing of good cause and diligence. Barelas Community Ditch Corp. v. City of Albuquerque, 61 N.M. 222, 297 P.2d 1051 (1956).

Failure to make timely filing of praecipe under former rules was significant only when the applicant or plaintiff in error desired an extension of time, as extension of time for settling, signing and sealing the bill of exceptions or case stated, or for filing the transcript of record, could be granted only on showing of good cause and diligence. Flinn v. Burrow, 66 N.M. 210, 345 P.2d 418 (1959).

Once it became apparent that the complete transcript was not going to be filed by its due date, counsel should have moved for an extension of time pursuant to Paragraph E and, if unable to obtain the reporter's affidavit stating the reasons for delay, should have moved the court to waive the affidavit requirement. State ex rel. Educ. Assmts. Sys. v. Cooperative Educ. Servs., 110 N.M. 331, 795 P.2d 1023 (Ct. App. 1990).

Notice and hearing required for extension. — Appellee who has moved dismissal of appeal under former rules on ground of failure to make timely filing of the praecipe must be given notice and opportunity to be heard on request for extension of time for settling, signing and sealing a bill of exceptions or case stated, or for filing the transcript of record. Flinn v. Burrow, 66 N.M. 210, 345 P.2d 418 (1959).

Court abused discretion in failing to grant extension for filing of transcript in custody case involving welfare of two children and parental custody and visitation rights, where

no appreciable prejudice to appellee was involved. Baker v. Baker, 83 N.M. 290, 491 P.2d 507 (1971).

Dismissal improper. — Where appellant was seeking an extension of time because of the failure of the court reporter to complete the transcript, it was error for the court to dismiss the appeal in view of the force of Rule 16(4) of former Supreme Court Rules, relating to dismissal of appeal on nonjurisdictional grounds only where ends of justice required or prejudice was shown, and the announced policy of the court to dispose of causes on the merits. Barelas Community Ditch Corp. v. City of Albuquerque, 61 N.M. 222, 297 P.2d 1051 (1956).

IV. CORRECTION OF RECORD ON APPEAL.

Omission "by error or accident". — Omission of deposition which was not in existence at the time the transcript and record proper came to the appellate court was not omission by error or accident under Subdivision (f) of former Rule 8, N.M.R. App. P. (Civ.). Catalano v. Lewis, 90 N.M. 215, 561 P.2d 488 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Plaintiff 's motion to remand for correction of the record by inclusion of a deposition of defendant taken in a separate suit filed by defendant against plaintiff one month after the summary judgment was entered came too late to merit consideration, and did not fall within the meaning of Subdivision (f) of former Rule 8, N.M.R. App. P. (Civ.). Catalano v. Lewis, 90 N.M. 215, 561 P.2d 488 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Affidavit properly before court. — An affidavit presented on the day of a summary judgment hearing is properly before the district court and, when subsequently made a part of the corrected record on appeal, is properly before the appellate court. Hunick v. Orona, 99 N.M. 306, 657 P.2d 633 (1983).

V. SUPPLEMENTAL TRANSCRIPTS.

Supplemental transcript filed without permission of the court is not considered. State v. Robertson, 90 N.M. 382, 563 P.2d 1175 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

12-212. Exhibits and depositions; general calendar cases.

A. **Depositions and documentary exhibits.** A designation of depositions and exhibits that are documents, maps, charts, photographs, recordings, videotapes or the like, shall be made by the appellant within fifteen (15) days of the assignment of the case to the general calendar. Within fifteen (15) days of service of appellant's designation, appellee may designate further depositions and documentary exhibits. The designations shall be filed with the district court clerk. The district court clerk shall send

to the appellate court all the designated depositions and documentary exhibits with the transcript of proceedings.

B. **Non-documentary exhibits.** The appellate court shall designate non-documentary exhibits upon the request of either party made on or before the time for filing designations of documentary exhibits. The request shall be filed in the appellate court and shall concisely set forth the reason why each exhibit is necessary for the appeal. The appellate court shall determine which exhibits shall be included and shall notify the parties and the district court clerk. At the time the transcript of proceedings is sent to the appellate court, the district court clerk shall also send all non-documentary exhibits designated by the appellate court.

C. **Supplemental exhibits.** The appellate court may, upon its own motion or upon motion of any party and for good cause shown, order or allow additional exhibits to be forwarded to the appellate court.

D. **Return of exhibits.** After final determination of the appeal, the appellate court clerk shall cause the exhibits to be returned to the district court.

[As amended, effective July 1, 1990; September 1, 1990; January 1, 1997.]

ANNOTATIONS

The 1997 amendment, effective January 1, 1997, substituted "fifteen (15) days" for "ten (10) days" in two places in Paragraph A.

Burden is on appellant to provide necessary appellate record of transcript and exhibits. State v. Garcia, 92 N.M. 730, 594 P.2d 1186 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

But court of appeals may send for exhibits. — The court of appeals has authority, on its own motion, to have exhibits sent to it for its review when those exhibits have been introduced, and relied on, before the trial court. State v. Garcia, 92 N.M. 730, 594 P.2d 1186 (Ct. App. 1978), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979).

Nondesignation of records as part of exhibits. — Because certain psychological records were not designated as part of the exhibits for an appeal from a murder conviction, they were not before the appellate court for review to determine if the trial court correctly denied access to them. State v. Sacoman, 107 N.M. 588, 762 P.2d 250 (1988).

Where exhibits not in record, appellate court will not consider suppression motion. — The court of appeals will not consider defendant's motion to suppress where the pertinent exhibits are not a part of the record on appeal, nor were they designated as a part of the record on appeal. State v. Duncan, 95 N.M. 215, 619 P.2d 1259 (Ct. App. 1980).

Affidavits not brought to trial court's attention will not be considered when they are attached to the docketing statement. State v. Lucero, 90 N.M. 342, 563 P.2d 605 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Technical violation may be disregarded. — Although the defendant failed to designate the necessary exhibits for his appeal, the appellate court declined to dismiss the appeal for such a technical violation, when the state ensured the proper exhibits were before the court. State v. Manes, 112 N.M. 161, 812 P.2d 1309 (Ct. App. 1991), cert. denied, 112 N.M. 77, 811 P.2d 575 (1991), cert. denied, 502 U.S. 942, 112 S. Ct. 381, 116 L. Ed. 2d 332 (1991).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 484 et seq.

4 C.J.S. Appeal and Error § 440 et seq.

12-213. Briefs.

A. **Brief in chief.** The brief in chief of the appellant, under appropriate headings and in the order herein indicated, shall contain:

(1) a table of contents, which shall list each section heading and the page on which that section begins. The appellant may raise issues in addition to those raised in the docketing statement or statement of the issues unless the appellee would be prejudiced.

(a) When the transcript of proceedings is an audio recording, following the listing of section headings, the table of contents shall include either a statement of the name of the manufacturer and model of the device used in citing references to the transcript, together with a statement of how many counters or units are on one side of a tape when that tape is played on the device (e.g., Sony BM-25 with 730 counters per tape side), or a statement that the transcript citations conform to the official log.

(b) When the transcript of proceedings is a digital or other electronic recording, following the listing of section headings, the table of contents shall include a statement that references to the recorded transcript are by elapsed time from the start of the recording (e.g., "Tr. 10:25" indicates a point occurring ten minutes and twenty-five seconds after the start of the recording)

(c) If the brief exceeds the page limitations contained in subparagraph (2) of Paragraph F of this rule, following any statement regarding the method of citing the transcript, the table of contents shall include a statement of compliance as required by Paragraph G of this rule.

(2) a table of authorities, arranged in separate headings for each type of authority cited, listing cases alphabetically (New Mexico decisions separately from decisions from other jurisdictions), statutes and other authorities, with page references;

(3) a summary of proceedings, briefly describing the nature of the case, the course of proceedings and the disposition in the court below, and including a summary of the facts relevant to the issues presented for review. Such summary shall contain citations to the record proper, transcript of proceedings or exhibits supporting each factual representation. A contention that a verdict, judgment or finding of fact is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing upon the proposition;

(4) an argument which, with respect to each issue presented, shall contain a statement of the applicable standard of review, the contentions of the appellant and a statement explaining how the issue was preserved in the court below, with citations to authorities, record proper, transcript of proceedings or exhibits relied on. Applicable New Mexico decisions shall be cited. The argument shall set forth a specific attack on any finding, or such finding shall be deemed conclusive. A contention that a verdict, judgment or finding of fact is not supported by substantial evidence shall be deemed waived unless the argument identifies with particularity the fact or facts that are not supported by substantial evidence; and

(5) a conclusion containing a precise statement of the relief sought.

B. **Answer brief.** The answer brief of the appellee shall conform to the requirements of the brief in chief, except that a summary of proceedings shall not be included unless deemed necessary.

C. **Reply brief.** The appellant may file a brief in reply to the answer brief. Such brief shall conform to the requirements of Subparagraphs (1), (2) and (4) of Paragraph A, and shall reply only to arguments or authorities presented in the answer brief.

D. **Supplemental briefs and authorities.**

(1) Except for those briefs specified in this rule, no briefs may be filed without prior approval of the appellate court.

(2) When pertinent and significant authorities come to the attention of counsel after counsel's brief has been filed, or after oral argument but before decision, counsel shall promptly advise the appellate court clerk, by letter and without argument, with a copy to all counsel, setting forth the citations and attaching a copy thereto, if available. The letter shall refer either to the page of the brief or to a point argued orally to which the citations pertain.

E. **Citations.** All authorities shall be cited in accordance with Rule 23-112 NMRA.

F. **Length, preparation and service of briefs.** The requirements of Rule 12-305 NMRA apply to briefs.

(1) Body of the brief defined. The body of the brief in chief, answer brief, amicus brief, or reply brief consists of headings, footnotes, quotations and all other text except the cover page, caption, table of contents, table of authorities, signature blocks and certificate of service.

(2) Page limitation. Except by permission of the court, or unless it complies with Subparagraph (3) of Paragraph F of this rule, the body of a brief in chief, answer brief or amicus brief shall not exceed thirty-five (35) pages. Except by permission of the court, or unless it complies with Subparagraph (3) of Paragraph F of this rule, the body of the reply brief shall not exceed fifteen (15) pages.

(3) Type-volume limitation. Except by permission of the court, the body of a brief in chief, answer brief, or amicus brief shall not exceed eleven thousand (11,000) words, if the party uses a proportionally-spaced type style or typeface, such as Times New Roman, or one thousand two hundred (1,200) lines, if the party uses a monospaced type style or typeface, such as Courier. The body of a reply brief shall not exceed four thousand four hundred (4,400) words, if the party uses a proportionally-spaced type style or typeface, or four hundred eighty (480) lines, if the party uses a monospaced type style or typeface.

(4) Attachments prohibited. No documents shall be attached to briefs.

(5) Service. Briefs shall be served in accordance with Rule 12-307 NMRA.

G. **Statement of compliance.** Pursuant to Sub-subparagraph (c) of Subparagraph (1) of Paragraph A of this rule, if a brief exceeds the page limitations of Subparagraph (2) of Paragraph F of this rule, then the brief shall contain a statement that it complies with the limitations of Paragraph F of this rule. If the brief is prepared using a proportionally-spaced type style or typeface, such as Times New Roman, the statement shall specify the number of words contained in the body of the brief. If the brief is prepared using a monospaced type style or typeface, such as Courier, the statement shall specify the number of lines contained in the body of the brief. If the word-count or line-count information is obtained from a word-processing program, the statement shall identify the program and version used.

H. **Time of filing.** Unless otherwise ordered by the appellate court or as these rules prescribe, Rule 12-210 NMRA governs the time and order of filing briefs.

I. **Cross-appeals.** In cross-appeals, the brief in chief, the answer brief and the reply brief shall comply with this rule. The party who first files a notice of appeal or, if both parties file on the same day, the plaintiff in the proceedings below, shall be the appellant. The appellant's brief in chief shall be filed as provided in Rule 12-210 NMRA. The appellee's answer brief and brief in chief on cross-appeal shall be filed

simultaneously as separate documents and shall be filed within forty-five (45) days after service of the brief in chief of the appellant in cases assigned to the general calendar and within twenty (20) days after such service in cases assigned to the legal calendar. The appellant's reply brief and answer brief to the brief in chief on cross-appeal shall be filed simultaneously as separate documents within forty-five (45) days after service of the answer brief and brief in chief on cross-appeal in cases assigned to the general calendar and within twenty (20) days after such service in cases assigned to the legal calendar. A cross-appellant may file a reply brief within twenty (20) days after service of the answer brief responding to cross-appellant's brief in chief.

[As amended, effective July 1, 1990; September 1, 1991; September 1, 1993; January 1, 1997; July 1, 1998; January 1, 2000; November 1, 2003; March 15, 2005; as amended by Supreme Court Order 07-8300-24 effective November 1, 2007.]

ANNOTATIONS

Commentary for 2007 Amendments

In an effort to provide additional options for producing more readable documents, the 2007 amendments to this rule allow practitioners to exceed the traditional page limitations for a brief if the brief complies with the type-volume limitations set forth in the new Subparagraph (3) of Paragraph F of the rule. Specifically, briefs in chief, answer briefs, and amicus briefs that exceed the traditional thirty-five (35) page limit may not contain more than eleven thousand (11,000) words or one thousand two hundred (1,200) lines in the body of the brief, depending on whether a proportionally-spaced or monospaced type style or typeface is used. See Subparagraph (1) of Paragraph F for a definition of the body of the brief. Similarly, if the body of the reply brief exceeds the traditional fifteen (15) page limit, the body of the brief may not contain more than four thousand four hundred (4,400) words or four hundred eighty (480) lines, again depending on whether a proportionally-spaced or monospaced type style or typeface is used. If a proportionally-spaced type style or typeface is used, the word-count limit applies. If a monospaced type style or typeface is used, the line-count limit applies. In either case, if the traditional page limit is exceeded, a statement of compliance must be included as provided by Paragraph G of this rule to show that the brief complies with the applicable type-volume limitation.

Cross references. — For docketing statement, see Rule 12-208 NMRA.

For number of copies, see Rule 12-306 NMRA.

For citations to appellate opinions, New Mexico Statutes Annotated, Court Rules and Uniform Jury Instructions, see Supreme Court Order dated January 12, 1998 following rule set 23, Supreme Court General Rules.

For citations in pleadings and other papers filed in appellate and other New Mexico courts, *see* Rule 23-112 NMRA.

For the definition and related discussion of "proportionally-spaced" type style or typeface, *see* Rule 12-305(C)(1) NMRA and commentary.

For the definition and related discussion of "monospaced" type style or typeface, *see* Rule 12-305(C)(2) NMRA and commentary.

The 1991 amendment, effective for cases filed in the supreme court and court of appeals on and after September 1, 1991, in Subparagraph (3) of Paragraph A, substituted "unless the summary of proceedings includes" for "unless the party so contending shall have included in his summary of proceedings", "the argument" for "in his argument" and "facts which are not supported by substantial evidence" for "facts not proved which require the relief sought".

The 1993 amendment, effective September 1, 1993, substituted "after counsel's" for "after his" in the first sentence of Subparagraph (2) of Paragraph D; and deleted "his" preceding "brief in chief" in the second sentence of Paragraph H.

The 1997 amendment, effective January 1, 1997, rewrote Subparagraph A(1) to delete the former Subparagraph (a) designation and added the last sentence, redesignated former Subparagraph A(1)(b) as Subparagraph A(2); deleted former Subparagraph A(1)(c) relating to transcripts as audio recordings, redesignated former Subparagraphs A(2) to A(4) as Subparagraphs A(3) to A(5); added the last sentence in Subparagraph A(3); in Subparagraph A(4), inserted "with respect to each issue presented" and "a statement of the standard of review" and substituted "and a statement explaining how the issue was preserved" for "with respect to each issue presented and how preserved" in the first sentence, and deleted "the summary of proceedings includes the substance of the evidence hearing upon the proposition, and" following "unless" in the last sentence; and substituted "Subparagraphs (2) and (4)" for "Subparagraphs (1) and (3)" in Paragraph C.

The 1998 amendment, effective for cases filed on and after July 1, 1998, in Paragraph H, deleted "and shall be due at the time set forth herein" at the end of the first sentence, added the second and third sentences, and substituted "forty-five (45) days" for "thirty (30) days" in two places.

The 1999 amendment, effective for cases filed on and after January 1, 2000, in Paragraph A(1), added the second sentence.

The 2003 amendment, effective November 1, 2003, substituted “twenty (20)” for “ten (10)” in the last sentence of Paragraph H.

The 2005 amendment, effective March 15, 2005, added the last sentence of Subparagraph (1) of Paragraph A for transcript references when the transcript is a digital trancripts and other electronic recording.

Federal rules. — See Fed. R. App. P. Rules 28 and 31.

I. GENERAL CONSIDERATION.

Appellate rules do not address footnotes. Murken v. Solv-Ex Corp., 2005-NMCA-137, 138 N.M. 653, 124 P.3d 1192.

Footnotes. — A brief violates the rules where the footnotes do not consist of permissible type size and are not double spaced, and because if the footnotes were placed in the text of the brief, it would undoubtedly exceed 35 pages. Murken v. Solv-Ex Corp., 2005-NMCA-137, 138 N.M. 653, 124 P.3d 1192.

Compliance with rule required. — Where defendants have failed to comply with this rule, or to indicate that the issue sought to be argued on appeal is jurisdictional, or that the issue was properly preserved for appellate review, an appellate court may decline to address such contention on appeal. State v. Goss, 111 N.M. 530, 807 P.2d 228 (Ct. App. 1991).

Once a case is assigned to a nonsummary calendar, the parties are expected to comply fully with the appellate rules with respect to briefs. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991).

Noncompliance with this rule does not require the appellate court to disregard an issue. State v. Martinez, 1996-NMCA-109, 122 N.M. 476, 927 P.2d 31.

Excessive use of footnotes, where much of the argument and most of the case citations are contained in footnotes rather than in the body of the brief, is not encouraged, because it violates the spirit of the page-limitation requirement of this rule. Schmidt v. St. Joseph's Hosp., 105 N.M. 681, 736 P.2d 135 (Ct. App. 1987).

Appeal by gas utility. — Gas utility which filed brief prior to the filing of brief by the public service commission was the appellant and the commission was the appellee in view of former 62-11-7 NMSA 1978 (prior to 1965 amendment) (see now 62-11-1 NMSA 1978) and the order in which the parties appealed and filed briefs, on appeal after gas utility secured reversal and remand of order of commission pursuant to 62-11-5 NMSA 1978. Moyston v. New Mexico Pub. Serv. Comm'n, 76 N.M. 146, 412 P.2d 840 (1966).

Contempt proceedings were deemed proper for a violation of former Rule 501, N.M.R. App. P. (Crim.) (see now this rule). In re Avallone, 91 N.M. 777, 581 P.2d 870 (1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review §§ 684 to 701.

Briefs and other appellate costs as chargeable to defendant in criminal prosecution, 65 A.L.R.2d 912.

Consequences of prosecution's failure to file timely brief in appeal by accused, 27 A.L.R.4th 213.

4 C.J.S. Appeal and Error § 605 et seq.

II. BRIEF IN CHIEF.

A. STATEMENT OF PERTINENT FACTS.

Duty of party to indicate all relevant evidence. — A party is required to point out all evidence bearing on a proposition. Luxton v. Luxton, 98 N.M. 276, 648 P.2d 315 (1982).

Brief must contain references to record and standard of review. — Motor vehicle division's failure to include in its brief references to the record to support its factual allegations and its failure to state the applicable standard of review were in violation of this rule. Medrow v. State Taxation & Revenue Dep't, 1998-NMCA-173, 126 N.M. 332, 968 P.2d 1195.

Purpose of stating facts. — Purpose of the statement of facts required under former rule was to make known to the appellate court the trial court's appraisal of the facts and disposition of the issues and to aid the court in determining the questions at issue in the appeal; all pertinent facts were to be included in this statement. Stanton v. Bokum, 66 N.M. 256, 346 P.2d 1039 (1959).

Facts on which case to be determined. — Statement of facts required to be incorporated in appellant's brief under former rule had reference to the facts upon which the case was to be determined in the supreme court. Cullender v. Doyal, 44 N.M. 491, 105 P.2d 326 (1940).

Ultimate facts found in trial to court. — Statement of facts required to be incorporated in an appellant's brief under former rule if the issue had been tried to the court, related to the ultimate facts found in the decision of the court, which possibly could be better stated in narrative form than by merely copying the findings into the brief. Hopkins v. Martinez, 73 N.M. 275, 387 P.2d 852 (1963); Provencio v. Price, 57 N.M. 40, 253 P.2d 582 (1953).

Evidentiary facts supporting jury verdict. — In causes tried to a jury, only such evidentiary facts as tended to support the verdict were to be incorporated into statement of facts required by former rule. Provencio v. Price, 57 N.M. 40, 253 P.2d 582 (1953).

Brief and concise summary of facts. — By the statement of the facts former rule contemplated a brief and concise summary of facts essential to aiding the court and counsel to understand at the outset the questions at issue together with the appraisal of facts and disposition of the issues by the lower court, and ordinarily the testimony was not to be reviewed at this point in the brief. Henderson v. Texas-New Mexico Pipe Line Co., 46 N.M. 458, 131 P.2d 269 (1942).

Facts in conflict pertinent to the appeal were to be summed up in statement of proceedings, but not to be set forth either verbatim or in narrative form. Allen v. Williams, 77 N.M. 189, 420 P.2d 774 (1966).

Statement of the material facts in conflict, not a detailed or argumentative description of the evidence, was all that was required or permitted in the statement of proceedings under former rule. Allen v. Williams, 77 N.M. 189, 420 P.2d 774 (1966).

When precisely followed format not necessary. — Where defendant had not followed precisely the format of former Rule 9(m)(2), N.M.R. App. P. (Civ.) (see now this rule), but the brief in chief clearly defined the matters appealed, the supreme court reviewed on the merits a workman's compensation award. Fitch v. Sam Tanksley Trucking Co., 95 N.M. 477, 623 P.2d 991 (Ct. App. 1980).

Statement adequate for review of legal questions. — Although appellants failed to include a statement of facts in brief, as required by former rule, where questions raised by the appeal were almost exclusively legal ones, statement which was included in brief, denominated "Statement of Facts," served the necessary purpose of placing material facts before court. New Jersey Zinc Co. v. Local 890 Int'l Mine, Mill & Smelter Workers, 57 N.M. 617, 261 P.2d 648 (1953).

Where the transcripts and briefs in a case were sufficient to present the essential question for review on the merits, notwithstanding a technical violation of former Rule 9, N.M.R. App. P. (Civ.) (see now this rule), that issue was reviewed. Huckins v. Ritter, 99 N.M. 560, 661 P.2d 52 (1983).

Substantial compliance with requirements. — Although plaintiff did not expressly challenge certain of the defendant's stated findings of fact in his brief-in-chief, the fact that he did so in his reply brief was adequate to preserve the contested findings for review. Johnsen v. Allsup's Convenience Stores, Inc., 1998-NMCA-097, 125 N.M. 456, 963 P.2d 533, cert. denied, 125 N.M. 322, 961 P.2d 167 (1998).

B. ATTACK ON FINDINGS.

Multiple convictions supported by indicia of separateness. — Where the testimony of the prosecution's witnesses supported viewing defendant's acts as separate and defendant offered no witnesses to rebut such testimony, having held that defendant's three convictions were supported by sufficient indicia of separateness, it was not incompetent for counsel to argue otherwise at trial. State v. Boergadine, 2005-NMCA-028, 137 N.M. 92, 107 P.3d 532, cert. denied, 2005-NMCERT-003.

Generalized attack on findings of fact is not proper. Kerr v. Akard Bros. Trucking Co., 73 N.M. 50, 385 P.2d 570 (1963).

Generalized attack on the findings must fail under the provisions of the rules and decisions. State ex rel. Thornton v. Hesselden Constr. Co., 80 N.M. 121, 452 P.2d 190 (1969).

Generalized attack on findings of trial court made by appellants in brief on appeal from judgment quieting title, amounting for the most part only to a statement that the court's findings were wrong while those proposed by appellants were correct, was in direct violation of the rules governing preparation of briefs. Giovannini v. Turrietta, 76 N.M. 344, 414 P.2d 855 (1966).

Where plaintiff's challenge to the sufficiency of the evidence amounted to a generalized attack upon a county board's property valuation, failing to specifically refer to the board's findings or the substance of the evidence contained in the record, but merely urging the court to find her cited testimony as more accurate, plaintiff was bound by the county board's findings on appeal. Maloof v. San Juan County Valuation Protests Bd., 114 N.M. 755, 845 P.2d 849 (Ct. App. 1992).

Direct attack required. — Findings of fact by district court will not be set aside on appeal unless there is a direct attack upon same following applicable rule. Arias v. Springer, 42 N.M. 350, 78 P.2d 153 (1938).

Precise ground for challenge to be stated. — Mere challenge of a finding by parenthetical note in the statement of proceedings was not sufficient to raise an issue on appeal; the burden was on appellant to state in argument the precise ground or grounds for challenging the findings. McLam v. McLam, 85 N.M. 196, 510 P.2d 914 (1973).

Findings refused below to be set out. — Where appellant desires supreme court to review requested findings refused by the trial court, the substance thereof must be set out in appellant's brief; otherwise, the court cannot consider an assignment of error based on that ground. Hugh K. Gale Post No. 2182 VFW v. Norris, 53 N.M. 58, 201 P.2d 777 (1949).

But not for summary judgment. — Since no findings of fact were required on entry of summary judgment, requirement under former rule of summary of requested findings was not applicable; but if reasons for grant of summary judgment were known, reference to transcript to show proof of asserted facts and statement of substance of evidence bearing upon proposition would be called for. Wilson v. Albuquerque Bd. of Realtors, 81 N.M. 657, 472 P.2d 371 (1970), overruled on other grounds Garrett v. Nissen Corp., 84 N.M. 16, 498 P.2d 1359 (1972).

Or attack on legal issues. — Points relied on by appellants were in the nature of attacks on the trial court's rulings on legal issues, and accordingly could be advanced without findings or requested findings with reference thereto. State ex rel. Garcia v. Martinez, 80 N.M. 659, 459 P.2d 458 (1969).

Applicability of Subparagraph A(4) to rulings on matters of law. — Subparagraph A(4) of this rule did not apply where the rulings by the trial court were matters of law, and there were no factual findings the appellants were required to specifically attack. Bernal v. Nieto, 1997-NMCA-067, 123 N.M. 621, 943 P.2d 1338.

Citation of objectionable testimony necessary. — Where the brief does not cite the objectionable testimony, the court is unable to determine whether it is prejudicial. Montgomery v. Karavas, 45 N.M. 287, 114 P.2d 776 (1941); Williams v. Selby, 37 N.M. 474, 24 P.2d 728 (1933).

Failure to sustain burden. — Where taxpayer faults the hearing officer for determining that taxpayer's failure to apply on time under 7-9F-9 NMSA 1978 was due to negligence and not malfeasance and criminal conduct, because the hearing officer determined that while employee's acts of embezzlement and forgery were crimes, his failure to file the tax credit application was merely negligent, and taxpayer, not the department, had to bear the responsibility for that negligence, taxpayer did not sustain his burdens under Paragraph A(3) and (4) of this rule. Team Specialty Products, Inc v. Taxation & Revenue Dep't., 2005-NMCA-020, 137 N.M. 50, 107 P.3d 4.

Challenge to sufficiency of evidence. — A challenge to the sufficiency of the evidence under a whole record review involves a two-step process. The party challenging the sufficiency of the evidence supporting a proposition must set forth substance of all evidence bearing upon the proposition. Once the challenging party has set forth the substance of all the pertinent evidence, the party must then demonstrate why, unbalanced, the evidence fails to support the finding made. Martinez v. Southwest Landfills, Inc., 115 N.M. 181, 848 P.2d 1108 (Ct. App. 1993).

Substantial evidence claims are reviewed only if the appellant apprises the court of all evidence bearing upon the issue, both that which is favorable and that which is contrary to appellant's position. Chavez v. S.E.D. Labs., 2000-NMCA-034, 128 N.M. 768, 999 P.2d 412.

Failure to include in briefs the substance of the evidence bearing on a proposition can result in a finding that the challenging party has waived the contention. Murillo v. Payroll Express, 120 N.M. 333, 901 P.2d 751 (Ct. App. 1995).

Substance of pertinent evidence to be stated. — Party contending that findings of fact are not supported by substantial evidence must state the substance of all evidence bearing upon the proposition. Rael v. Cisneros, 82 N.M. 705, 487 P.2d 133 (1971); Blake v. Blake, 102 N.M. 354, 695 P.2d 838 (Ct. App. 1985); Kincaid v. Wek Drilling Co., 109 N.M. 480, 786 P.2d 1214 (Ct. App. 1989).

A party contending that a finding of fact was not supported by substantial evidence complied with former Rule 9(d), N.M.R. App. P. (Civ.) (see now this rule) by referring to only a substantial portion of the material evidence in the transcript bearing on the proposition. Danzer v. Professional Insurors, Inc., 101 N.M. 178, 679 P.2d 1276 (1984).

In an attack on the findings, the party must copy the findings setting out the substance of all the evidence, or note the pages of the transcript where such evidence as is mentioned can be found. Bogle v. Potter, 68 N.M. 239, 360 P.2d 650 (1961).

Where appellants did not point out the facts on which their claim that the amount of punitive damages was excessive was based, supreme court would not consider that portion of the judgment. Hudson v. Otero, 80 N.M. 668, 459 P.2d 830 (1969).

Where brief failed to state substance of all evidence of significance with reference to the transaction involved in the suit, it did not comply with requirements of former rule. Davis v. Campbell, 52 N.M. 272, 197 P.2d 430 (1948).

The supreme court need not entertain a challenge to a trial court's finding of fact where the party challenging the finding fails to set out the substance of the evidence bearing upon the proposition. Homes ex rel. Marilynn v. Robinson, 111 N.M. 517, 807 P.2d 215 (1991).

With references to transcript. — Assertions of fact must be accompanied by references to transcript. Wilson v. Albuquerque Bd. of Realtors, 81 N.M. 657, 472 P.2d 371 (1970), overruled on other grounds Garrett v. Nissen Corp., 84 N.M. 16, 498 P.2d 1359 (1972).

Where appellant totally failed to accompany assertions of fact with transcript references as required by former rule, the findings of the trial court on that issue would not be disturbed. Gonzales v. Gonzales, 85 N.M. 67, 509 P.2d 259 (1973).

Where defendant did not state the substance of all the evidence bearing upon their claimed issue, with proper references to the transcript, the trial court's findings would be deemed to be supported by substantial evidence. General Foods Corp. v. Henderson, 84 N.M. 508, 505 P.2d 851 (1973).

Where plaintiff sued board of realtors alleging a combination in restraint of trade, but made no reference in the transcript to items which tended to show or raise a factual issue as to lack of justification for the board's practices, trial court's summary judgment would be affirmed on procedural grounds by the court of appeals. Wilson v. Albuquerque Bd. of Realtors, 82 N.M. 717, 487 P.2d 145 (Ct. App. 1971).

Court would not consider contention which was not supported by transcript references to evidence. Bank of N.M. v. Rice, 78 N.M. 170, 429 P.2d 368 (1967).

Failure to comply with requirement that substance of all pertinent evidence be stated in brief with proper references to transcript, would result in trial court findings being left undisturbed. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968); Davis v. Rayburn, 51 N.M. 309, 183 P.2d 615 (1947); Scott v. Homestake-Sapin, 72 N.M. 268, 383 P.2d 239 (1963); Mountain States Tel. & Tel. Co. v. Suburban Tel. Co., 72 N.M. 411, 384 P.2d

684 (1963), appeal dismissed and cert. denied, 376 U.S. 648, 84 S. Ct. 982, 11 L. Ed. 2d 979 (1964); Giovannini v. Turrietta, 76 N.M. 344, 414 P.2d 855 (1966).

Where defendant failed to make reference to the trial transcript to support asserting that administrator had authority to endorse trust fund checks, it failed to comply with former appellate rule and court could disregard asserted fact. Cooper v. Bank of N.M., 77 N.M. 398, 423 P.2d 431 (1966).

Court was bound by trial court's findings, where claimant's brief did not refer to transcript to show proof of facts asserted and did not state substance of all evidence pertinent to the particular issues raised. Ledbetter v. Lanham Constr. Co., 76 N.M. 132, 412 P.2d 559 (1966).

Where appellant failed to make specific references in record to recorded agreement relied on to establish lien interest, it would not be considered by the supreme court on appeal from judgment quieting title. Bintliff v. Setliff, 75 N.M. 448, 405 P.2d 931 (1965).

Attack on the finding of the trial court would not be considered on appeal because of the failure to make references to the record where the testimony pertaining thereto was found. Irwin v. Lamar, 74 N.M. 811, 399 P.2d 400 (1964).

Where appellant's counsel conceded in oral argument that all of the evidence, or the substance thereof, bearing upon the findings had not been included in the brief, and transcript references were not made to such evidence, the decision of the supreme court would be based on trial court's findings. Mountain States Tel. & Tel. Co. v. Suburban Tel. Co., 72 N.M. 411, 384 P.2d 684 (1963), appeal dismissed and cert. denied, 376 U.S. 648, 84 S. Ct. 982, 11 L. Ed. 2d 979 (1964).

Where counsel fails to make a resume of the evidence, which statements of evidence should be supported by proper references to transcript, the supreme court will not ordinarily entertain a claim challenging the sufficiency of the evidence to support the trial court's findings. Loveridge v. Loveridge, 52 N.M. 353, 198 P.2d 444 (1948).

Evidence supporting verdict to be discussed. — Court would not disturb trial court's findings, where brief directed attention to contrary evidence, but neglected to point out the evidence tending to support findings in the trial court. Gish v. Hart, 75 N.M. 765, 411 P.2d 349 (1966); Mountain States Tel. & Tel. Co. v. Suburban Tel. Co., 72 N.M. 411, 384 P.2d 684 (1963), appeal dismissed and cert. denied, 376 U.S. 648, 84 S. Ct. 982, 11 L. Ed. 2d 979 (1964).

When there was no discussion by claimant of the evidence which sustained the verdict, the claimant would fail, because he had not complied with former Rule 9, N.M.R. App. P. (Civ.) (see now this rule). Minor v. Homestake-Sapin Partners Mine, 69 N.M. 72, 364 P.2d 134 (1961).

Where a party only referred to sections of a transcript where evidence could be found which was contrary to the trial court's findings, she did not comply with former Rule 9(d), N.M.R. App. P. (Civ.) (see now this rule), since she did not set out all the evidence "bearing upon the proposition" in the brief, and, therefore, her exception cannot be entertained. Henderson v. Henderson, 93 N.M. 405, 600 P.2d 1195 (1979).

Appellant is bound by findings not properly attacked in brief. State ex rel. Thornton v. Hesselden Constr. Co., 80 N.M. 121, 452 P.2d 190 (1969).

Where no proper attack is directed at the findings of fact made by the trial court, such findings are the facts upon which the appeal must be determined. State ex rel. State Hwy. Comm'n v. Pelletier, 76 N.M. 555, 417 P.2d 46 (1966).

Failure of plaintiff to set out substance of evidence bearing upon findings of fact attacked, requested findings and conclusions and allegedly erroneous findings of trial court, and use of generalized attack on court's findings and conclusions, was in direct violation of the decisions interpreting the rules governing the preparation of briefs; facts not properly attacked would remain as the basis upon which court would determine the issues presented. Michael v. Bauman, 76 N.M. 225, 413 P.2d 888 (1966).

In workman's compensation case, where the only effort made to attack the findings was to relate a portion of the testimony which according to the claimant required different findings, there was no compliance with former rule, and therefore, the findings made by the trial court were the findings before the reviewing court. Scott v. Homestake-Sapin, 72 N.M. 268, 383 P.2d 239 (1963).

Where appellant did not call attention to other evidence with proper references to the transcript, the court would consider the statement of the relevant testimony complete. State ex rel. State Hwy. Comm'n v. Atchison, T. & S.F. Ry., 76 N.M. 587, 417 P.2d 68 (1966).

Where brief makes no effort to review evidence, trial court findings accepted. — Where the defendant's brief makes no effort to review the evidence, merely stating that the defendant wished without briefing the matter to have the court of appeals decide whether or not there was sufficient evidence to support his conviction, the court of appeals will not review the evidence, but rather, will accept the findings of the trial court. City of Farmington v. Sandoval, 90 N.M. 246, 561 P.2d 945 (Ct. App. 1977).

When the brief fails to review or provide transcript references to the evidence, the court of appeals will accept the findings of the trial court. Olguin v. Manning, 104 N.M. 791, 727 P.2d 556 (Ct. App. 1986).

Defendant was precluded from questioning trial court's findings of fact by reason of failure to challenge such findings on appeal as required. Macnair v. Stueber, 84 N.M. 93, 500 P.2d 178 (1972).

Where plaintiff failed to attack any challenged findings in his brief, his appeal was not meritorious, as he failed to comply with former Rule 9, N.M.R. App. P. (Civ.) (see now this rule). Martinez v. Driver Mechenbier, Inc., 90 N.M. 282, 562 P.2d 843 (Ct. App. 1977).

Failure of district court to incorporate requested findings of fact in decision was not properly before appellate court, where appellant neglected to follow up assignment of such error and totally disregarded former Rule 9, N.M.R. App. P. (Civ.) (see now this rule). Floeck v. Bureau of Revenue, 44 N.M. 194, 100 P.2d 225 (1940).

Requested findings contrary to unchallenged findings and conclusions cannot raise issue on appeal. Trujillo v. Tanuz, 85 N.M. 35, 508 P.2d 1332 (Ct. App. 1973); Prager v. Prager, 80 N.M. 773, 461 P.2d 906 (1969).

Findings not attacked on appeal are accepted by supreme court as the basis for decision. Kerr v. Akard Bros. Trucking Co., 73 N.M. 50, 385 P.2d 570 (1963); 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).

Where none of the facts found by the trial court as recited were directly attacked, they would be accepted as true by court on appeal. In re City of Roswell, 86 N.M. 249, 522 P.2d 796 (1974).

Facts found by the trial court and not challenged become the facts in appellate court. Ojinaga v. Dressman, 83 N.M. 508, 494 P.2d 170 (Ct. App. 1972); Scott v. Jordan, 99 N.M. 567, 661 P.2d 59 (Ct. App. 1983).

Where appellant has not attacked any of the findings of fact made by the trial court, said findings must be accepted by the appellate court and are the facts upon which the case rests in that court. Cooper v. Bank of N.M., 77 N.M. 398, 423 P.2d 431 (1966).

Where record on appeal did not contain a bill of exceptions required by former rules and was devoid of any evidence, injunction challenged for insufficiency of evidence would be affirmed. General Servs. Corp. v. Board of Comm'rs, 75 N.M. 550, 408 P.2d 51 (1965).

Where extensive findings of fact made by trial court were not attacked either by point or argument on grounds of lack of substantial evidence, the facts so found would be accepted by the supreme court as the basis for decision. Petty v. Williams, 71 N.M. 338, 378 P.2d 376 (1962).

Where appellant's proposed finding directly conflicted with that of the trial court, which was not attacked and was supported by substantial evidence, trial court's finding would be accepted by appellate court. Hyde v. Anderson, 68 N.M. 50, 358 P.2d 619 (1960).

And conclusive on appeal. — Where there is no attack on the findings, direct or otherwise, and appellants do not raise the question of the sufficiency of the evidence, trial court's findings are conclusive on appeal. Swallows v. Sierra, 68 N.M. 338, 362 P.2d 391 (1961).

Since defendant did not challenge any findings of the trial court pursuant to former Rule 9, N.M.R. App. P. (Civ.) (see now this rule), the trial court's findings were conclusive on appeal. American Gen. Cos. v. Jaramillo, 88 N.M. 182, 538 P.2d 1204 (Ct. App. 1975).

Where appellant failed in brief to make reference to a finding of fact of the trial court which was challenged, or did not intend to challenge any finding, the trial court's findings would be conclusive on appeal. Springer Corp. v. American Leasing Co., 80 N.M. 609, 459 P.2d 135 (1969).

Where appellants do not question or attack findings made by the trial court, they are the facts of the case binding on supreme court. Webb v. Hamilton, 78 N.M. 647, 436 P.2d 507 (1968), overruled on other grounds American Tank and Steel Corp. v. Thompson, 90 N.M. 513, 565 P.2d 1030 (1977).

Findings not objected to are facts upon which case rests on appeal. Lerma v. Romero, 87 N.M. 3, 528 P.2d 647 (1974); Cochran v. Gordon, 77 N.M. 358, 423 P.2d 43 (1967); Reed v. Nevins, 77 N.M. 587, 425 P.2d 813 (1967); Gallegos v. Kennedy, 79 N.M. 590, 446 P.2d 642 (1968); Vaughan v. Wolfe, 80 N.M. 141, 452 P.2d 475 (1969); Armijo v. Via Dev. Corp., 81 N.M. 262, 466 P.2d 108 (1970); Begay v. First Nat'l Bank, 84 N.M. 83, 499 P.2d 1005 (Ct. App.), cert. denied, 84 N.M. 77, 499 P.2d 999 (1972).

Unless findings are directly attacked, they are facts in appellate court. State ex rel. State Hwy. Comm'n v. Sherman, 82 N.M. 316, 481 P.2d 104 (1971); Hutchison v. Boney, 72 N.M. 194, 382 P.2d 525 (1963); Morris v. Merchant, 77 N.M. 411, 423 P.2d 606 (1967); Wood v. Citizens Std. Life Ins. Co., 82 N.M. 271, 480 P.2d 161 (1971).

Where the facts found by the trial court were not attacked on appeal they were considered as the facts before appellate court. Torris v. Dysart, 72 N.M. 26, 380 P.2d 179 (1963).

Facts found by the trial court ordinarily are not disturbed on appeal in the absence of a direct attack upon them. Witherspoon v. Brummett, 50 N.M. 303, 176 P.2d 187 (1946).

Findings in original case not appealed from are binding on the second appeal. Van Orman v. Nelson, 80 N.M. 119, 452 P.2d 188 (1969).

Technical violation overcome by attacks on related conclusions. — Although appellant's failure to refer specifically to a finding regarding the effect of a condition subsequent in a deed was a technical violation of this rule, the court of appeals was not bound by the finding, where appellant directly attacked a conclusion that partial

reversion should have occurred, as well as a finding on the parties' intent. Thomas v. City of Santa Fe, 112 N.M. 456, 816 P.2d 525 (Ct. App. 1991).

Party cannot challenge a conclusion of law, nor claim error for the failure or refusal of the trial court to adopt a conclusion of law. Newman v. Basin Motor Co., 98 N.M. 39, 644 P.2d 553 (Ct. App. 1982).

Substantial compliance with rule. — Reference to errors set forth separately under "Assignment of Errors" along with separate arguments under "Arguments and Authorities," constituted a substantial compliance with former rule. Reed v. Fish Eng'r Corp., 74 N.M. 45, 390 P.2d 283 (1964).

Where city, appealing from a workmen's compensation award, actually attacked the trial court's findings, even though point relied upon for reversal referred only to the court's refusal to adopt the conclusion of law which it had requested, it complied with former rule. Sanchez v. City of Albuquerque, 75 N.M. 137, 401 P.2d 583 (1965).

Where defendants set out considerable amount of plaintiff 's testimony concerning the oral agreement in their brief, with proper transcript references, it was clear that they were complaining of court's finding of an "enforceable oral contract for the conveyance of land," and they were in compliance with former rule. Alvarez v. Alvarez, 72 N.M. 336, 383 P.2d 581 (1963).

Failure of employer in brief challenging workmen's compensation award to specifically indicate findings charging him with payment of part of employee's medical expenses, where he specifically challenged other findings relating specifically to liability for medical expenses, did not amount to waiver. Beckwith v. Cactus Drilling Corp., 84 N.M. 565, 505 P.2d 1241 (Ct. App. 1972), cert. denied, 84 N.M. 560, 505 P.2d 1236 (1973).

Although cross-appellants who alleged that findings of fact were not supported by substantial evidence failed to quote evidence or refer to transcript in support of findings on motion for rehearing, former Rule 9, N.M.R. App. P. (Civ.) (see now this rule) was complied with by reference to cross-appellants' original brief, and entitled them to a review of the alleged error. Cullender v. Doyal, 44 N.M. 491, 105 P.2d 326 (1940).

Review not denied. — Although plaintiff, in his statement of proceedings, did not specifically challenge the findings of fact and was therefore in technical violation of former Rule 9, N.M.R. App. P. (Civ.) (see now this rule), where he set forth requested findings and specifically challenged certain of the trial court's conclusions of law and made it clear in wording of the statement of proceedings that certain findings were challenged, review of the issues, on the merits, would not be denied. Ortiz v. Ortiz & Torres Dri-Wall Co., 83 N.M. 452, 493 P.2d 418 (Ct. App. 1972).

Court may decide case on merits despite failure of appellant to include a summary of the findings of the trial court in statement of proceedings, or to accompany assertions of

fact with reference to the trial court's findings or refusal to make same, if it so desires. Trujillo v. Tanuz, 85 N.M. 35, 508 P.2d 1332 (Ct. App. 1973).

Under certain circumstances, such as where the state is involved in a suit, the court may undertake the task of reading the entire transcript to determine whether the appellant's assertions were merited, notwithstanding former Rule 9, N.M.R. App. P. (Civ.) (see now this rule). State ex rel. State Hwy. Comm'n v. Tanny, 68 N.M. 117, 359 P.2d 350 (1961).

Supreme Court would decide a case on the merits of contentions made even though brief failed to state the substance of all evidence bearing upon the proposition, where appeal was from denial of workmen's compensation claim. Henderson v. Texas-New Mexico Pipe Line Co., 46 N.M. 458, 131 P.2d 269 (1942).

Appeal not considered. — Where appellant's brief fell far short of compliance with Rule 15 of former Supreme Court Rules, court would not consider the matter further. Lacy v. Holiday Mgt. Co., 85 N.M. 460, 513 P.2d 394 (1973).

C. ARGUMENT AND CITATION OF AUTHORITY.

Citation to specific pages of record. — Although this rule contemplates, and appellate courts generally require, citation to specific pages of the record proper, where the record is quite small and the appellate court can easily find defendant's references, the court can choose to decline to strike portions or require defendant to submit another, proper brief. State v. Tarver, 2005-NMCA-030, 137 N.M. 115, 108 P.3d 1.

Effect on issues properly raised of assignment to nonsummary calendar. — When a case is assigned to a nonsummary calendar, the calendar notices previously issued are superceded by the assignment to a nonsummary calendar, so that all issues properly raised in the docketing statement are revived and may be briefed regardless of whether they appeared to be abandoned by failure to argue them in the memorandum in opposition. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991).

Court determines matter on arguments presented in briefs. — Rather than go outside the briefs and the pleadings themselves, the supreme court will determine the matter on the arguments therein presented. State v. Thomson, 79 N.M. 748, 449 P.2d 656 (1969).

And issues not handled in brief deemed abandoned. — Where as part of his statement of proceedings the defendant claims certain rulings of the trial court to be error, but there is no further mention of these allegations of error elsewhere throughout the brief, these points will be considered abandoned. State v. Sandoval, 88 N.M. 267, 539 P.2d 1029 (Ct. App. 1975).

As are issues argued unclearly, without authority. — Where the defendant's argument of trial court error is less than clear and he cites no authority either to support

the argument or to give the court a hint as to what he is arguing, the point has been abandoned. State v. Padilla, 88 N.M. 160, 538 P.2d 802 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

No review of unbriefed issues. — Issues which are not briefed will not be reviewed. Aragon v. Rio Costilla Coop. Livestock Ass'n, 112 N.M. 89, 812 P.2d 1300 (1991).

Where several developers failed to cite any authority in their brief concerning their allegation that opponents of a shopping center engaged in an abuse of process by filing an appeal of a city's approval of a development plan, the issue was not considered by an appellate court. Saylor v. Valles, 2003-NMCA-037, 133 N.M. 432, 63 P.3d 1152.

Issues not briefed deemed abandoned. — Issues listed in the docketing statement but not briefed on appeal are deemed abandoned. State v. Scott, 90 N.M. 256, 561 P.2d 1349 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 486 (1977); State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977); State v. Herrera, 90 N.M. 306, 563 P.2d 100 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977); State v. Ortiz, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Nature of claimed error must be specifically stated and argued; a generalized attack is not enough. Perez v. Gallegos, 87 N.M. 161, 530 P.2d 1155 (1974).

On appeal, errors claimed must be specifically stated and argued. Alfred v. Anderson, 86 N.M. 227, 522 P.2d 79 (1974).

Theory that was not stated as a point relied on by defendant, nor developed or argued in defendant's brief, would not be considered on appeal. 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). See also Sierra Blanca Sales Co. v. Newco Indus., Inc., 88 N.M. 472, 542 P.2d 52 (Ct. App. 1975), rev'd on other grounds sub nom. Fortuna Corp. v. Sierra Blanca Sales Co., 89 N.M. 187, 548 P.2d 865 (1976).

Appellant must call any error committed against him to court's attention and demonstrate same by argument, citing authorities in support of position. Petty v. Williams, 71 N.M. 338, 378 P.2d 376 (1962).

Technical violations not fatal. — Although a technical violation of Paragraph A(3) may have occurred, the transcripts and briefs sufficiently present the issue to allow review on the merits. Montgomery v. United Servs. Auto. Ass'n, 118 N.M. 742, 886 P.2d 981 (Ct. App. 1994).

Unsupported allegations not reviewed. — Where an assignment of error is made but left unsupported by point and argument it will not be considered by reviewing court. Chavez v. Trujillo, 47 N.M. 19, 132 P.2d 713 (1942).

Argument and citation of authority required. — Points on appeal not argued and not supported with citation to authority are deemed abandoned and will not be reviewed. Wilson v. Albuquerque Bd. of Realtors, 81 N.M. 657, 472 P.2d 371 (1970), overruled on other grounds Garrett v. Nissen Corp., 84 N.M. 16, 498 P.2d 1359 (1972).

Defendant's challenge to admission of "medical" testimony by the state's accident reconstruction expert was improper under Subparagraphs (4) and (5) of Paragraph A of this rule where his brief in chief cited no standard of review, pointed to no specific error, and requested no particular relief. State v. Laney, 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2003-NMCERT-003.

Findings of fact not directly attacked on appeal by argument and citation of authorities become findings in reviewing court. Perez v. Gallegos, 87 N.M. 161, 530 P.2d 1155 (1974).

Where appellant included in brief eight numbered subdivisions, but presented no propositions of law in connection with them, he made no points as basis for argument contemplated under former rule. Lea County Fair Ass'n v. Elkan, 52 N.M. 250, 197 P.2d 228 (1948).

Argument without a point or legal proposition as a basis was not a compliance with former rule. Robinson v. Mittry Bros., 43 N.M. 357, 94 P.2d 99 (1939).

Where appellant provided no citations to the parts of the record and transcript he relied upon, a technical violation of Paragraphs A(1)(c) and A(2), the court of appeals had no duty to entertain any of his contentions on appeal. Fenner v. Fenner, 106 N.M. 36, 738 P.2d 908 (Ct. App. 1987).

Issue which was briefed without cited authority would not be reviewed by the supreme court. Roselli v. Rio Communities Serv. Station, Inc., 109 N.M. 509, 787 P.2d 428 (1990).

Mere reference in a concluding statement will not suffice, and is in violation of our rules of appellate procedure. The Supreme Court will not review issues raised in appellate briefs that are unsupported by cited authority. State v. Clifford, 117 N.M. 508, 873 P.2d 254 (1994).

Brief in chief which contains only a sprinkling of citations to a portion of the record does not comply with Paragraph A(3) of this rule. Murphy v. Strata Production Co., 2006-NMCA-008, 138 N.M. 809, 126 P.3d 1173.

Docketing statement. — Following the 1990 amendment, the docketing statement no longer governs the issues that may be raised in briefs on a nonsummary calendar. State v. Salgado, 112 N.M. 537, 817 P.2d 730 (Ct. App. 1991).

On general calendar, the appellate court can consider any evidence in the record on appeal even if not noted in the docketing statement, and does not consider factual assertions in the docketing statement that are not supported by the record on appeal. State v. Salgado, 112 N.M. 537, 817 P.2d 730 (Ct. App. 1991).

For appeals filed after July 1, 1990, there is no need to file motions to amend the docketing statement once the case is assigned to the general calendar. However, issues not raised in the trial court are still subject to Rule 12-216 NMRA, requiring preservation. Also, when the absence of the issue in the docketing statement results in the omission of pertinent matters from the record on appeal, prejudice to the appellee may cause the appellate court to refuse to review an issue appearing for the first time in the brief-in-chief. State v. Salgado, 112 N.M. 537, 817 P.2d 730 (Ct. App. 1991).

Unacceptable briefing practice. — Stating, in a brief-in-chief, that the brief incorporates all arguments and authority included in the docketing statement is not an acceptable briefing practice, and does not operate to preserve any of the issues not specifically argued in the briefs. State v. Aragon, 109 N.M. 632, 788 P.2d 932 (Ct. App. 1990); State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Unsupported attack deemed abandoned. — Appeal of summary judgment would be considered abandoned where plaintiff's brief offered no arguments or authorities to support his contention of error. Novak v. Dow, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970); Moreno v. Marrs, 102 N.M. 373, 695 P.2d 1322 (Ct. App. 1984).

Where plaintiffs did not attack the denial of injunctive relief by either point relied upon for reversal or by argument, they abandoned their appeal. Aguayo v. Village of Chama, 79 N.M. 729, 449 P.2d 331 (1969).

Failure to cite authority considered in awarding attorneys' fees. — Where appellee's briefs in a number of places asserted propositions without citing authority, the court would take such omission into consideration in its determination of attorneys' fees award. Maynard v. Western Bank, 99 N.M. 135, 654 P.2d 1035 (1982).

III. ANSWER BRIEF.

State entity should file answer brief. — Although former Rule 9, N.M.R. App. P. (Civ.) (see now this rule) did not require appellees to file an answer brief, when the defendant was an entity of the state, such as a county, a brief should have been submitted to the court. Cobb v. Otero County Assessor, 100 N.M. 207, 668 P.2d 323 (Ct. App. 1983).

Raising of objection in answer brief improper. — Objection to the trial court's instructions cannot be properly raised for consideration by way of appellee's answer brief. Chavira v. Carnahan, 77 N.M. 467, 423 P.2d 988 (1967).

Point-for-point responses unnecessary. — Significant portions of wife's answer brief were not stricken even though the brief did not respond to husband's issues in point-for-

point narratives; the current rules of appellate procedure simply require the answer brief, like the brief in chief, to contain an argument, which shall contain the contentions. Hall v. Hall, 114 N.M. 378, 838 P.2d 995 (Ct. App. 1992).

IV. REPLY BRIEF.

Reply brief is not proper place to attack findings of fact. Kerr v. Akard Bros. Trucking Co., 73 N.M. 50, 385 P.2d 570 (1963).

Reply brief is not the proper place to request a review of findings of fact, the finding of which is claimed as error, nor will the supreme court search the record for evidence on which such findings are based where appellant has failed to set out the substance of the evidence in his briefs. Heron v. Garcia, 52 N.M. 389, 199 P.2d 1003 (1948).

Or to first outline arguments or issues. — A reply brief is not the place to outline, for the first time, the basis for arguing insufficient evidence or to set forth the substance of the evidence on the issues attempted to be raised. Doe v. City of Albuquerque, 96 N.M. 433, 631 P.2d 728 (Ct. App. 1981).

Reply brief is not proper place to broach omitted jury instruction. State v. Fairweather, 116 N.M. 456, 863 P.2d 1077 (1993).

In limited circumstances, new arguments allowed. — This rule expressly allows an appellant to address in its reply brief arguments not addressed in its brief in chief but asserted in the appellee's answer brief; therefore, if an appellee raises an argument not addressed by the appellant in its opening brief, the appellant may reply. Brashear v. Baker Packers, 118 N.M. 581, 883 P.2d 1278 (1994).

Reply brief not considered. — Where appellant’s reply brief failed to set out a table of authorities as required under Paragraph C of this rule, and his reply brief consisted of approximately one page of introductory comments, and then twenty one-half pages of argument, including nine footnotes, and he did not seek or obtain permission to file a reply brief with the argument portion in excess of fifteen pages as specified in Paragraph F of this rule, the reply brief that was filed will not be considered. Crutchfield v. Taxation & Revenue Dep’t., 2005-NMCA-022, 137 N.M. 36, 106 P.3d 1273.

V. SUPPLEMENTAL BRIEFS.

Supplementing briefs. — Former Supreme Court Rules made no provision for the furnishing of material supplemental to briefs, except upon motion properly made; the court had no objection to being advised through the clerk of the citations of cases decided since the argument on the merits, but disapproved of and will disregard attempts by counsel to supplement briefs in a manner not authorized by those rules. Lance v. New Mexico Military Inst., 70 N.M. 158, 371 P.2d 995 (1962).

In disposing of an appeal the supreme court is limited to facts disclosed by the record; to attempt to supply what is missing by attaching exhibits to the briefs is not permitted. Porter v. Robert Porter & Sons, 68 N.M. 97, 359 P.2d 134 (1961).

Contentions made for first time in supplemental brief. — Appellate court will not consider contentions made for the first time in a supplemental brief. Yount v. Millington, 117 N.M. 95, 869 P.2d 283 (Ct. App. 1993).

VI. TIME OF FILING.

Filing motion to dismiss appeal tolled limitations on filing brief on merits under former rule. State ex rel. Burg v. City of Albuquerque, 30 N.M. 424, 234 P. 1012 (1925).

Failure to notify opponent of extension not fatal. — Failure to notify adverse party of granting of extension of time to file brief was not ground for dismissal under former rule. Farmers' Cotton Fin. Corp. v. Green, 34 N.M. 206, 279 P. 562 (1929).

Failure to file briefs in time authorized dismissal of appeal or writ of error under former rule. Deal v. Western Clay & Gypsum Prods. Co., 18 N.M. 70, 133 P. 974 (1913).

Busy schedule no excuse. — Fact that attorney for appellant had been engaged in the trial of cases almost continuously was not sufficient excuse for failure to file and serve briefs within the time required. Young v. Kidder, 35 N.M. 20, 289 P. 69 (1930); Hilliard v. Insurance Co. of N. Am., 117 N.M. 665, 132 P. 249 (1913).

VII. LIMITS ON COURT REVIEW.

Court to be spared necessity of examining entire record. — Purpose of Rule 15 of former Supreme Court Rules was to spare appellee and supreme court the necessity of examining the entire record in order to ascertain whether somewhere therein there might be found evidence which would support a finding said not to be supported by substantial evidence. Hobbs Water Co. v. Madera, 42 N.M. 373, 78 P.2d 1118 (1938).

Purpose of former rule was to relieve reviewing court of duty to examine trial record to see if support for finding was present; where appellant failed to show how trial court's finding lacked support, no issue was raised for appeal. Nance v. Dabau, 78 N.M. 250, 430 P.2d 747 (1967).

Former rule was promulgated to insure that where findings were attacked, the briefs would set forth any fact pertinent to the same, and relieve supreme court of duty to examine a trial record to see if support was present. Alvarez v. Alvarez, 72 N.M. 336, 383 P.2d 581 (1963).

Court will not search record to find facts with which to overturn lower court's findings. Totah Drilling Co. v. Abraham, 64 N.M. 380, 328 P.2d 1083 (1958); Rhodes v. First Nat'l

Bank, 35 N.M. 167, 290 P. 743 (1930); Richards v. Wright, 45 N.M. 538, 119 P.2d 102 (1941); Sands v. Sands, 48 N.M. 458, 152 P.2d 399 (1944); Gore v. Cone, 60 N.M. 29, 287 P.2d 229 (1955); Cross v. Ritch, 61 N.M. 175, 297 P.2d 319 (1956).

Supreme court will not search the record in an attempt to discover errors committed by the trial court. Petty v. Williams, 71 N.M. 338, 378 P.2d 376 (1962).

Court would not search record for evidence relating to allegedly objectionable findings copied into appellant's brief, where appellant failed to set forth such evidence. Chavez v. Potter, 58 N.M. 662, 274 P.2d 308 (1954), overruled on other grounds State ex rel. Gary v. Fireman's Fund Indem. Co., 67 N.M. 360, 355 P.2d 291 (1960).

If an appellant in challenging the court's findings failed to comply with former rule, the court would indulge all presumption in favor of the judgment, since it would not search the record to ascertain whether findings were supported by substantial evidence. Lea County Fair Ass'n v. Elkan, 52 N.M. 250, 197 P.2d 228 (1948); Sands v. Sands, 48 N.M. 458, 152 P.2d 399 (1944).

Where appellees failed to file a brief in response, court would accept portion of the record pointed out by the appellants' brief and would not search the record to attempt to find other evidence. Louis Lyster, Gen. Contractor v. Town of Las Vegas, 75 N.M. 427, 405 P.2d 665 (1965).

A reviewing court will not ordinarily search the record to determine claims involving the sufficiency of the evidence. Poorbaugh v. Mullen, 99 N.M. 11, 653 P.2d 511 (Ct. App. 1982).

Points of error not properly briefed or argued will not be considered on appeal; rather, the appellate court will indulge all presumptions in favor of the correctness of the procedures in the trial court. Doe v. City of Albuquerque, 96 N.M. 433, 631 P.2d 728 (Ct. App. 1981).

Supreme court will not try case de novo in actions of an equitable nature; findings must be attacked for lack of substantial evidence to support them. Koran v. White, 69 N.M. 46, 363 P.2d 1038 (1961).

Matters not disclosed by record fall outside scope of appellate review and will not be considered. Southern Union Gas Co. v. Taylor, 82 N.M. 670, 486 P.2d 606 (1971).

Exhibits to briefs not used at trial not considered on appeal. — Exhibits to briefs neither identified nor tendered as exhibits to the trial court will not be considered, nor will affidavits attached to the docketing statement which were not brought to the trial court's attention. State v. Lucero, 90 N.M. 342, 563 P.2d 605 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Issues not included in docketing statement not before court for review. — Where an accused fails to include an issue as to whether he was entitled to an instruction on a lesser-included offense in the docketing statement, it is not before the court of appeals for review. State v. Hernandez, 95 N.M. 125, 619 P.2d 570 (Ct. App. 1980).

Court will not undertake general review of evidence for the discovery of error not specially pointed out. Rhodes v. First Nat'l Bank, 35 N.M. 167, 290 P. 743 (1930).

Unclear arguments inserted in reply brief not considered. — An appellant who fails to include an argument in his brief in chief and then inserts it in his reply brief without clear formulation and the support of any authority cannot complain when the reviewing court fails to consider the argument. Santistevan v. Centinel Bank, 96 N.M. 734, 634 P.2d 1286 (Ct. App. 1980), aff'd in part, rev'd on other grounds, 96 N.M. 730, 634 P.2d 1282 (1981).

Nor are facts not included in stipulation. — Where the only "facts" in an appeal are those found by the trial court on the basis of a stipulation of the parties, asserted facts not included in the findings will not be considered. Romero v. J.W. Jones Constr. Co., 98 N.M. 658, 651 P.2d 1302 (Ct. App. 1982).

Inquiry restricted to substantiality of evidence. — Supreme court will not review a point or search the record when findings of fact are not set out and accompanied by the substance of all evidence adduced thereon; findings of fact not directly attacked become the facts in the reviewing court, which restricts inquiry into the substantiality of the adduced evidence to that pertinent to findings of fact. Hutchison v. Boney, 72 N.M. 194, 382 P.2d 525 (1963).

It is the province of the court, not counsel, to determine whether or not testimony is substantial or improbable. Drake v. Rueckhaus, 68 N.M. 209, 360 P.2d 395 (1961).

Sufficiency of facts to support judgment determined. — In the case where none of the trial court's findings are attacked, either by argument or point, as not being supported by substantial evidence, appellate court can only determine if the conclusions of law find support in the findings of fact. Cooper v. Bank of N.M., 77 N.M. 398, 423 P.2d 431 (1966).

Although supreme court is bound by unchallenged findings, dismissal of the appeal is not required because of this fact; appellant may argue such legal issues as whether findings support the conclusions of law adopted or the judgment based thereon. Garcia v. Garcia, 81 N.M. 277, 466 P.2d 554 (1970).

Supreme Court would be required to determine if the ultimate facts, as found, supported the conclusions of the court that claimant was not entitled to workmen's compensation for the death of appellant's husband, where appellant failed to attack trial court's findings. Kerr v. Akard Bros. Trucking Co., 73 N.M. 50, 385 P.2d 570 (1963).

On plaintiff 's appeal, supreme court could consider question of law going to the sufficiency of the facts to support the judgment, where the proposition was supported and argued in plaintiff 's brief in chief. Burlingham v. Burlingham, 72 N.M. 433, 384 P.2d 699 (1963).

Findings supported by evidence binding on court. — If the supreme court finds there is substantial evidence to support the finding of the trial court it is bound thereby. Everett v. Gilliland, 47 N.M. 269, 141 P.2d 326 (1943).

In reviewing an attack upon a finding it is the supporting evidence, not that adverse to the finding, that ordinarily determines the issue. Sundt v. Tobin Quarries Inc., 50 N.M. 254, 175 P.2d 684 (1946).

Findings of fact made by the trial court are the findings upon which case must rest; if the findings are supported by substantial evidence, they will be sustained on appeal. Entertainment Corp. of Am. v. Halberg, 69 N.M. 104, 364 P.2d 358 (1961); Totah Drilling Co. v. Abraham, 64 N.M. 380, 328 P.2d 1083 (1958).

12-214. Oral argument.

A. **Oral argument.** All matters and causes will be decided without oral argument, unless the appellate court, in its discretion, determines otherwise, either on its own motion or on written request of a party.

B. **Request for oral argument.** Any party may file a written request for oral argument by separate pleading. A request for oral argument shall state, in a concise, specific and nonargumentative manner, why oral argument would be helpful to a resolution of the issues. In the absence of any such request, oral argument will be deemed waived and the cause will stand submitted on written documents unless the appellate court shall otherwise direct. No request for oral argument shall be filed in a case placed upon the summary calendar. Unless otherwise prescribed by these rules, a request for oral argument shall be made at or before the times specified herein:

(1) Appeals and proceedings on writ of certiorari or writ of error: The time for filing a reply brief has expired; and

(2) Motions: The time for filing the response to the motion.

C. **Settings.** Settings for oral argument will be fixed by the appellate court and notice thereof given by the appellate court clerk.

D. **Order of argument.** Unless otherwise ordered, the petitioner, movant or party first filing a notice of appeal shall open and close the argument.

E. **Time for argument.** The time for oral argument shall not exceed twenty (20) minutes on each side for motions, petitions or applications and thirty (30) minutes on

each side as to all other matters unless the time is extended or restricted by the appellate court.

F. **Nonappearance of parties.** If a party fails to appear to present argument, the court may, in its discretion, hear argument on behalf of the opposing party.

G. **Joint argument.** Two or more cases involving the same or related questions may be heard together by leave of the appellate court.

H. **Reargument.** Reargument shall not be required to enable a justice or judge who did not hear the original argument to participate in the decision of any cause.

[As amended, effective December 1, 1993; May 1, 2003.]

ANNOTATIONS

The 1993 amendment, effective December 1, 1993, rewrote Paragraph E, which read "Oral argument of thirty (30) minutes will be allowed to each side as to all matters unless the time is extended or restricted by the appellate court."

The 2003 amendment, effective May 1, 2003, in Subparagraph B(1), inserted "and proceeding on writ of certiorari or writ of error" and substituted "and" for "or" following the semicolon.

Federal rules. — See Fed. R. App. P. Rule 34.

Law reviews. — For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 579 et seq.

5 C.J.S. Appeal and Error § 668 et seq.

12-215. Brief of an amicus curiae.

A brief of an amicus curiae may be filed only upon order of the appellate court. A motion for leave to file an amicus brief shall identify the interest of the amicus curiae and shall state the reasons why a brief of an amicus curiae is desirable. The brief may be conditionally filed with the motion for leave. An amicus curiae shall file its brief within the time allowed the party whose position it supports. An opposing party may file a brief in response to the amicus brief within the time allowed for filing a brief in response to the party whose position amicus supports. If the court, for cause shown, grants leave for amicus to file a brief after the time allowed for the party whose position amicus supports, the court shall specify within what period an opposing party may file a brief in response to the amicus brief. Except by the court's permission, an amicus curiae may

not file a reply brief. The party whose position is supported by amicus curiae may share the party's allotted time for oral argument with amicus, but no additional time shall be granted. Briefs of the amicus curiae and response briefs shall be prepared in accordance with Rules 12-213 and 12-305 NMRA and filed and served in accordance with these rules.

[As amended, effective July 1, 1990; September 1, 1993; as amended by Supreme Court Order 06-8300-14, effective July 15, 2006.]

ANNOTATIONS

The 1993 amendment, effective September 1, 1993, substituted "the party's allotted" for "his allotted" in the last sentence.

The 2006 amendment, approved by Supreme Court Order 06-8300-14, effective July 15, 2006, provided for an opposing party filing of a response to an amicus brief and for cause shown the filing of a reply by the amicus.

Federal rules. — See Fed. R. App. P. Rule 29.

Amicus curiae must accept case on issues as raised by parties, and cannot assume functions of a party. State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n, 79 N.M. 357, 443 P.2d 850 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Amicus Curiae § 8 et seq.; 5 Am. Jur. 2d Appellate Review § 540.

4 C.J.S. Appeal and Error § 605 et seq.

12-216. Scope of review.

A. **Preserving questions for review.** To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked, but formal exceptions are not required, nor is it necessary to file a motion for a new trial to preserve questions for review. Further, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

B. **Exceptions.** This rule shall not preclude the appellate court from considering jurisdictional questions or, in its discretion, questions involving:

(1) general public interest; or

(2) fundamental error or fundamental rights of a party.

[As amended, effective September 1, 1993.]

ANNOTATIONS

I. GENERAL CONSIDERATION.

The 1993 amendment, effective September 1, 1993, substituted "the party" for "him" at the end of Paragraph A.

Opinion of the court in former appeal is binding upon appellate court on a second appeal. Van Orman v. Nelson, 80 N.M. 119, 452 P.2d 188 (1969).

Preservation of error. — Where defense counsel objected to the first of a series of questions by the prosecuting attorney that continued in the same line of questioning as the first question, the defendant preserved his arguments concerning the impropriety of the subsequent questions. State v. Soto, 142 N.M. 32, 162 P.3d 187, cert. denied, 2007-NMCERT-006.

Distinction between preservation and reservation. — One preserves an issue for appeal by invoking a ruling from the court on the question; one reserves an issue for appeal by specifying the issue as a condition to a plea of guilty or nolo contendere. Because counsel may have thought it unnecessary to preserve an issue that the court and the prosecution had agreed could be reserved for appeal, particularly since the court had ruled adversely on the same issue in other cases, the fundamental error standard must apply to prevent a miscarriage of justice. Accordingly, preservation of the issue was not necessary and, because defendant properly reserved the issue for appeal, she entered a valid conditional plea and the issue was reviewable on appeal. State v. Hodge, 118 N.M. 410, 882 P.2d 1 (1994).

Law reviews. — For article, "The Writ of Prohibition in New Mexico," see 5 N.M.L. Rev. 91 (1974).

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

For note, "Constitutional Law - The Effect of State Constitutional Interpretation on New Mexico's Civil and Criminal Procedure - *State v. Gomez*," see 28 N.M.L. Rev. 355 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 690 et seq.

Will questions which might have been, but were not, raised on prior appeal or error, be considered on subsequent appeal or error, 1 A.L.R. 725.

Relaxation in favor of infant of rule regarding condition of raising question on appeal or error, or on motion for new trial, 87 A.L.R. 672.

Appellate review of trial court's discretion upon motion for new trial in criminal case because of newly discovered evidence as to sanity of prosecution witness, 49 A.L.R.2d 1247.

Participation in, acceptance of, or submission to new trial as precluding appellate review of order granting it, 67 A.L.R.2d 191.

When will federal court of appeals review issue raised by party for first time on appeal where legal developments after trial affect issue, 76 A.L.R. Fed. 522.

5 C.J.S. Appeal and Error § 702 et seq.

II. PRESERVATION OF QUESTIONS FOR REVIEW.

A. IN GENERAL.

Multiple theories. — While the state may have a number of different theories as to why evidence should not be suppressed to preserve its arguments for appeal, the state must have alerted the court as to which theories it was relying on in support of its argument to allow the court to make a ruling thereon. State v. Janzen, 2007-NMCA-134, 142 N.M. 638, 168 P.3d 768.

Necessity for proper preservation. — Question not properly preserved below will not be reviewed on appeal. Barnett v. Cal M, Inc., 79 N.M. 553, 445 P.2d 974 (1968); State v. Gonzales, 110 N.M. 218, 794 P.2d 361 (Ct. App. 1990), aff'd, 111 N.M. 363, 805 P.2d 630 (1991).

A claim that an officer was acting out of ulterior motives in making an investigatory vehicle stop, thereby invoking N.M. Const. art II, § 10, was not preserved under this rule where the district court did not find anything pretextual about the stop; even assuming that a pretextual stop would invoke that section, there was no factual foundation for the claim. State v. Vandenberg, 2003-NMSC-030, 134 N.M. 566, 81 P.3d 19.

Purpose of preservation rule. — The principal purpose of the rule requiring a party to preserve error in the trial court of issues sought to be asserted on appeal is to alert the mind of the trial judge to the claimed error and to accord the trial court an opportunity to correct the matter. Madrid v. Roybal, 112 N.M. 354, 815 P.2d 650 (Ct. App. 1991).

Mind of trial court must be clearly alerted to a claimed nonjurisdictional error in order to preserve it for appeal; questions not so presented to the trial court cannot be raised for the first time on appeal. Marquez v. Marquez, 74 N.M. 795, 399 P.2d 282 (1965); Shelley v. Norris, 73 N.M. 148, 386 P.2d 243 (1963).

Matter not brought to the attention of the trial court cannot be raised for the first time on appeal. Chrysler Credit Corp. v. Beagles Chrysler-Plymouth, 83 N.M. 272, 491 P.2d 160 (1971); Barnett v. Cal M, Inc., 79 N.M. 553, 445 P.2d 974 (1968).

Generally, a failure to call the trial court's attention to the possibility that error has been committed results in waiver of the right to object or request review of alleged error. Mitchell v. Allison, 54 N.M. 56, 213 P.2d 231 (1949).

Where appellant did nothing to call claimed error to the attention of the trial court so as to preserve it for review, and theory was not even included in his motion for a new trial following the entry of judgment, it could not be first raised in the supreme court. City of Albuquerque v. Ackerman, 82 N.M. 360, 482 P.2d 63 (1971).

Where objection as worded did not call the trial court's attention to the matter complained of, it would be treated as if no objection had been made. Hill v. Burnworth, 85 N.M. 615, 514 P.2d 1312 (Ct. App. 1973).

Contention not raised in trial court cannot be raised on appeal for the first time. Neece v. Kantu, 84 N.M. 700, 507 P.2d 447 (Ct. App.), cert. denied, 84 N.M. 696, 507 P.2d 443 (1973); Entertainment Corp. of Am. v. Halberg, 69 N.M. 104, 364 P.2d 358 (1961); Batchelor v. Charley, 74 N.M. 717, 398 P.2d 49 (1965); Wynne v. Pino, 78 N.M. 520, 433 P.2d 499 (1967); DeVilliers v. Balcomb, 79 N.M. 572, 446 P.2d 220 (1968); Tafoya v. Whitson, 83 N.M. 23, 487 P.2d 1093 (Ct. App.), cert. denied, 83 N.M. 22, 487 P.2d 1092 (1971); Gurule v. Albuquerque-Bernalillo County Economic Opportunity Bd., 84 N.M. 196, 500 P.2d 1319 (Ct. App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972); Edwards v. First Fed. Sav. & Loan Ass'n, 102 N.M. 396, 696 P.2d 484 (Ct. App. 1985); State ex rel. Bardacke v. Welsh, 102 N.M. 592, 698 P.2d 462 (Ct. App. 1985).

Arguments which were not made below will not be considered on appeal. G.M. Shupe, Inc. v. Bureau of Revenue, 89 N.M. 265, 550 P.2d 277 (Ct. App.), cert. denied, 89 N.M. 321, 551 P.2d 1368 (1976).

Where there was nothing in the record before appellate court to indicate that question was ever presented to or passed upon by the trial court, and it was not jurisdictional, it may not properly be raised for the first time on appeal. Perry v. Staver, 81 N.M. 766, 473 P.2d 380 (Ct. App. 1970); Woolwine v. Furr's, Inc., 106 N.M. 492, 745 P.2d 717 (Ct. App. 1987).

Attempt to raise matter before supreme court which was not raised in trial court and is not jurisdictional will not be considered. State ex rel. Brown v. Hatley, 80 N.M. 24, 450 P.2d 624 (1969); Koran v. White, 69 N.M. 46, 363 P.2d 1038 (1961); Roseberry v. Phillips Petroleum Co., 70 N.M. 19, 369 P.2d 403 (1962); Drink, Inc. v. Babcock, 77 N.M. 277, 421 P.2d 798 (1966).

Except for jurisdictional matters, issues not urged in the trial court may not be raised for the first time on appeal. State ex rel. State Hwy. Comm'n v. Pelletier, 76 N.M. 555, 417

P.2d 46 (1966); In re Caffo, 69 N.M. 320, 73 N.M. 188, 366 P.2d 848, 386 P.2d 708 (1963); McDonald v. Artesia Gen. Hosp., 73 N.M. 188, 386 P.2d 708 (1963).

Where a contention appears to have been urged for the first time on appeal, it cannot be considered, no proper foundation for review having been laid by requested findings and appropriate objections to the court's findings. Cross v. Ritch, 61 N.M. 175, 297 P.2d 319 (1956).

Because the argument raised on appeal was not raised below, no error was preserved. Cisneros v. Molycorp, Inc., 107 N.M. 788, 765 P.2d 761 (Ct. App. 1988).

Res judicata defense may not be raised for first time on appeal. — In New Mexico action on New York judgment awarding plaintiff only the principal and interest due on a note, defendant could not raise the affirmative defense of res judicata as barring recovery of attorney's fees in New Mexico default judgment for the first time on appeal. Xorbox, Div. of Green & Kellogg, Inc. v. Naturita Supply Co., 101 N.M. 337, 681 P.2d 1114 (1984).

Objection required. — 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 defendant did not object to action at trial, he cannot complain at supreme court level. Sullivan v. Sullivan, 82 N.M. 554, 484 P.2d 1264 (1971).

Defendant who failed to object to prosecution's repeated references to a violent film, failed to preserve the issue for review upon appeal; moreover, even if the references were error, the totality of the record failed to show that the error prejudiced defendant's fundamental rights so as to merit reversal. State v. Begay, 1998-NMSC-029, 125 N.M. 541, 964 P.2d 102.

Objection made for first time on appeal will not be entertained, except for questions of jurisdiction. Montano v. Saavedra, 70 N.M. 332, 373 P.2d 824 (1962).

Ruling to be invoked below. — Issue was not before appellate court for review where no ruling of the trial court was invoked. Somerstein v. Gutierrez, 85 N.M. 130, 509 P.2d 897 (Ct. App. 1973); McNabb v. Warren, 83 N.M. 247, 490 P.2d 964 (1971).

Matters not brought into issue by the pleadings and upon which no decision of the trial court was sought or fairly invoked cannot be raised on appeal. Security Ins. Co. v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975); Groendyke Transp., Inc. v. New Mexico SCC, 85 N.M. 718, 516 P.2d 689 (1973).

Issues not properly raised in the trial court and on which a ruling by the trial court was not properly invoked will not be considered on appeal. In re Will of Skarda, 88 N.M. 130, 537 P.2d 1392 (1975).

Question is not before court of appeals for review where the trial court did not rule on the motion. Yucca Ford, Inc. v. Scarsella, 85 N.M. 89, 509 P.2d 564 (Ct. App.), cert. denied, 85 N.M. 86, 509 P.2d 561 (1973).

Nonjurisdictional question cannot be raised for the first time in the supreme court where no ruling was invoked in the trial court. Drink, Inc. v. Babcock, 77 N.M. 277, 421 P.2d 798 (1966); Davis v. Severson, 71 N.M. 480, 379 P.2d 774 (1963).

Where appellants did not invoke a ruling by the trial court on question, it was not one for review; nothing but jurisdictional questions may be raised in supreme court for the first time. Danz v. Kennon, 63 N.M. 274, 317 P.2d 321 (1957).

A party must fairly invoke a ruling from the trial court in order to preserve a question for appeal. State v. Wacey C., 2004-NMCA-029, 135 N.M. 186, 86 P.3d 611.

Burden is on appellant to show that question was ruled upon by the trial court. Batchelor v. Charley, 74 N.M. 717, 398 P.2d 49 (1965); Entertainment Corp. of Am. v. Halberg, 69 N.M. 104, 364 P.2d 358 (1961).

Incomplete record. — Plaintiff failed to establish that the issue of erroneously given instructions was properly preserved for appellate review because of the incompleteness of the record before the court of appeals. Woolwine v. Furr's, Inc., 106 N.M. 492, 745 P.2d 717 (Ct. App. 1987).

Plaintiff cannot change argument on appeal, much less claim for relief. Rust Tractor Co. v. Consolidated Constructors, Inc., 86 N.M. 658, 526 P.2d 800 (Ct. App. 1974).

Party cannot change his theory on appeal, nor can the fact that appellant, some three months after trial, submitted requested findings on the theories of larceny and false pretenses, aid his position. American Bank of Commerce v. United States Fid. & Guar. Co., 85 N.M. 478, 513 P.2d 1260 (1973).

Where appellant on appeal changed his theory presented to the hearing officer, his new theory would not be considered by an appellate court. Musgrove v. Department of Health & Social Servs., 84 N.M. 89, 499 P.2d 1011 (Ct. App.), cert. denied, 84 N.M. 77, 499 P.2d 999 (1972).

Party will not be permitted to change his theory of the case on appeal; principle applies on review by courts of administrative determinations so as to preclude from consideration questions or issues which were not raised in the administrative proceedings. Board of Educ. v. State Bd. of Educ., 79 N.M. 332, 443 P.2d 502 (Ct. App. 1968).

Party on appeal is in no position to attack a finding which he specifically requested below. Cochran v. Gordon, 77 N.M. 358, 423 P.2d 43 (1967).

Contention that the evidence showed contributory negligence as a matter of law could not first be made on appeal, particularly where appellant had procured submission of the question to the jury through interrogatories. Rheinboldt v. Fuston, 34 N.M. 146, 278 P. 361 (1929).

Issues are preserved for review where, although a responsive pleading is not filed, both parties to an action file briefs and argue before the district court. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Application of fundamental error to review state's unpreserved questions. — The state's failure to preserve error by drawing the court's attention to the fact this was a single prosecution, rather than successive prosecutions for the same crime, does not itself constitute a miscarriage of justice. Rather, a miscarriage of justice must exist notwithstanding the failure to preserve error. Only when a miscarriage of justice results can the principle of fundamental error afford review of the state's unpreserved questions. State v. Alingog, 117 N.M. 756, 877 P.2d 562 (1994).

Use of fundamental error. — The doctrine of fundamental error should be applied sparingly, and then only to prevent miscarriages of justice. State v. Glen Slaughter & Assocs., 119 N.M. 219, 889 P.2d 254 (Ct. App. 1994).

Confrontation clause claim preserved. — The defendant was not required to expressly cite the confrontation clause or use the phrase "motive to lie" in order to preserve his constitutional claim. State v. Martinez, 1996-NMCA-109, 122 N.M. 476, 927 P.2d 31.

Issue before court. — Where issue of city's negligence, liability or possession of cave, collapse of which killed four boys, was mentioned in pretrial order, defendant's opening statement, motion for directed verdict and objection to instructions, question of possession of dedicated area was before appellate court for review. Williams v. Town of Silver City, 84 N.M. 279, 502 P.2d 304 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

Question of liability preserved. — Where the requested findings of both parties presented the question of what, if anything, had been done by codefendant, and defendants' requested findings raised the issue of whether plaintiff suffered any damage as a result of actions by codefendant, the issue of codefendant's liability was presented to the trial court and preserved for review. Eslinger v. Henderson, 80 N.M. 479, 457 P.2d 998 (Ct. App. 1969).

Appellant was not barred from claiming that trial court erred in rendering judgment on verdict, merely because of failure to move for a new trial or judgment n.o.v. Transwestern Pipe Line Co. v. Yandell, 69 N.M. 448, 367 P.2d 938 (1961).

Argument sufficient to preserve issue. — A due process challenge was preserved since, although the plaintiffs' arguments were not a model of clarity, and certainly could

have been made with more specificity, they were sufficient to alert the trial court and opposing counsel to the substance of the argument being made. Garcia ex rel. Garcia v. La Farge, 119 N.M. 532, 893 P.2d 428 (1995).

Issue of exigent circumstances in warrantless search preserved. — In his motion to suppress evidence based on unlawful search and seizure in violation of N.M. Const., art. II, § 10, the defendant need not have asserted that the state constitution should be interpreted differently than the Fourth Amendment since there is established state law interpreting the former more expansively than the latter; the defendant had adequately developed facts on the issue of exigent circumstances, and the trial court had made a ruling thereon, preserving the issue for review. State v. Gomez, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

B. TRIAL COURT RULING REQUIREMENT.

1. GENERALLY.

Generally, no appeal from anything other than formal written order or judgment. — In the absence of an express provision or rule, no appeal will be from anything other than a formal written order or judgment signed by the judge and filed in the case or entered upon the records of the court and signed by the judge thereof. State v. Morris, 69 N.M. 89, 364 P.2d 348 (1961).

Oral ruling by trial judge is not a final judgment; it is merely evidence of what the court has decided to do, as the judge can change such a ruling at any time before the entry of a final judgment. State v. Morris, 69 N.M. 89, 364 P.2d 348 (1961).

Claims previously disposed of in prior appeal are not considered. Roessler v. State, 79 N.M. 787, 450 P.2d 196 (Ct. App.), cert. denied, 395 U.S. 967, 89 S. Ct. 2115, 23 L. Ed. 2d 754 (1969).

And failure to appeal original conviction bars subsequent post-conviction review. — The question of error in a preliminary hearing is foreclosed from review in an appeal from an order denying a motion for post-conviction relief by the failure to take an appeal from the original conviction. State v. Anderson, 84 N.M. 786, 508 P.2d 1019 (Ct. App. 1973).

A claim that the trial record is not truthful, based on the defendant's view of his trial and his view as to what the witnesses knew and testified about, when not raised before the trial court, will not be considered for the first time in post-conviction proceedings. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Ruling specifically requested by defendant not fairly invoked. — Where defendant himself requested a specific finding, a trial court ruling on the issue was not fairly invoked, as required by former Rule 308, N.M.R. App. P. (Crim.) (see now this rule). State v. Miranda, 100 N.M. 690, 675 P.2d 422 (Ct. App. 1983).

2. APPLICABILITY OF REQUIREMENT.

Application of preservation rule is limited to alleged errors by the district court. Piano v. Premier Distributing Co., 2005-NMCA-018, 137 N.M. 57, 107 P.3d 11, cert. denied, 2005-NMCERT-002.

Rule applies to state as well as to defendant. So where the prosecutor fails to contest an arrest date or to ask for an evidentiary hearing on the issue of whether the defendant was denied a speedy trial, these issues will not be considered on appeal. State v. Tafoya, 91 N.M. 121, 570 P.2d 1148 (Ct. App. 1977).

And applies to appeal from proceeding for post-conviction relief. — Where no issues are presented in an earlier motion for post-conviction relief, such issues may not be raised in a later appeal from the denial of the earlier motion. State v. Flores, 79 N.M. 412, 444 P.2d 597 (Ct. App. 1968).

Where no appeal is taken from an order revoking a suspended sentence, the sufficiency of the evidence on which the revocation is based is not before the court of appeals on direct review and cannot be raised for the first time in the court of appeals in an appeal from a denial of post-conviction relief. State v. Gonzales, 79 N.M. 414, 444 P.2d 599 (Ct. App. 1968).

Where matters are not raised in a post-conviction motion, the trial court has no knowledge of them and, thus, cannot err in not considering them. These matters, being raised for the first time on appeal, are not before the appellate court for review. State v. Carr, 85 N.M. 463, 513 P.2d 397 (Ct. App. 1973).

3. SPECIFICITY OF OBJECTION.

Sixth Amendment objection not preserved. — Where the state’s key witness made inconsistent statements in a deposition and at trial; defense counsel objected to the state’s direct examination of the witness about which version of the witness’s testimony was true on the grounds that the witness should be provided an attorney to advise him about his Fifth Amendment rights against self-incrimination; the state responded that it did not intend to prosecute the witness for perjury even if he had lied during his deposition and that the trial court could grant the witness immunity from future perjury prosecution; the trial court decided against immunity and requiring the witness to consult with an attorney; during direct examination, the witness testified that he had not been promised anything in exchange for his testimony; and defense counsel asked the trial court to permit defense counsel to cross-examine the witness about the state’s non-prosecution promise made during the discussion of the witness’s Fifth Amendment rights, defense counsel did not alert the trial court to the fact that the defendant was raising his Sixth Amendment right to cross-examine the witness concerning whether the state had promised the witness immunity in exchange for his testimony. State v. Silva, 2008-NMSC-051, ____ N.M. ____, 192 P.3d 1192.

Objection must be specific. — The purpose of an objection or motion is to invoke a ruling of the court upon a question or issue, and it is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked. State v. Lopez, 84 N.M. 805, 508 P.2d 1292 (1973).

And clearly stated. — The rule is well established that the ground of an objection to the introduction of evidence must be clearly stated so that the court may intelligently rule upon the objection. State v. Clarkson, 42 N.M. 289, 76 P.2d 1161 (1938); State v. Compton, 57 N.M. 227, 257 P.2d 915 (1953); State v. Heisler, 58 N.M. 446, 272 P.2d 660 (1954); State v. La Boon, 67 N.M. 466, 357 P.2d 54 (1960); State v. Miller, 79 N.M. 117, 440 P.2d 792 (1968).

The trial court must be clearly alerted to nonjurisdictional error if the point is to be preserved on appeal. State v. Paul, 80 N.M. 521, 458 P.2d 596 (Ct. App. 1968), rev'd on other grounds, 80 N.M. 746, 461 P.2d 228 (1969), cert. denied, 397 U.S. 1044, 90 S. Ct. 1354, 25 L. Ed. 2d 654 (1970).

General objection provides no basis for relief. — Where the record discloses that the objection is general, namely, "as being irrelevant and immaterial," it specifies no basis upon which the answer to a question would be inadmissible. State v. Zarafonetis, 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

The claim of a denial of a fair trial is too general to provide a basis for relief and presents no issue to review. State v. Paul, 83 N.M. 527, 494 P.2d 189 (Ct. App. 1972).

And will be ignored on appeal. — The rule is well established that 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. State v. Zarafonetis, 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

A general objection cannot be fairly read as alerting the trial judge to a claim that certain testimony is inadmissible; therefore, such a contention is not properly before the appellate court for review. State v. Duran, 83 N.M. 700, 496 P.2d 1096 (Ct. App.), cert. denied, 83 N.M. 699, 496 P.2d 1095 (1972).

Unless precise point to be considered previously called to trial court's attention. — Where the precise point considered by the appellate court has been called to the trial court's attention previously, and ruled on, the appellate court will decline to hold that the ambiguity of a second motion at the close of all evidence waived that point. State v. Vallo, 81 N.M. 148, 464 P.2d 567 (Ct. App. 1970).

Defendant preserved constitutional claim where, in his motion for reconsideration, he specifically alleged that distinct language within the state constitutional provision

justified interpreting it differently than the federal double jeopardy clause, he quoted the final clause of N.M. Const., art. II, § 15, which is distinct from the federal double jeopardy clause, and provided the factual basis necessary for the trial court to rule on the issue. State v. Lynch, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73.

Illegally seized evidence issue preserved though not specifically argued. — Where the defendant contended that the warrant held by police officers who searched a vehicle at the defendant's residence was overbroad and was not supported by probable cause and the search was invalid because the vehicle searched did not belong to defendant, defendant adequately preserved the issue by objecting at trial to the evidence obtained from the search of the vehicle, even though he had not included this argument in his motion to suppress. State v. Ortega, 114 N.M. 193, 836 P.2d 639 (Ct. App. 1992), aff'd, 117 N.M. 160, 870 P.2d 122 (1994).

Mere statement of conclusion does not suffice to present question for review. State v. Holly, 79 N.M. 516, 445 P.2d 393 (Ct. App. 1968); 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).

It is incumbent upon appellant to affirmatively demonstrate what error, if any, it is contended was committed by the trial court. The mere statement of a conclusion does not suffice to present a question for review. State v. Reyes, 78 N.M. 527, 433 P.2d 506 (Ct. App. 1967).

Objection that questions on prior misdemeanor convictions are "irrelevant" deemed substantially specific. — Defense counsel's objection to the prosecutor's questions as to the defendant's prior 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 former Rule 609, N.M.R. Evid. (see now Rule 11-609 NMRA), 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).

But not objection to exhibits without claim that jury would be prejudiced. — Where in a motion to suppress the defendant objects to all exhibits on the basis of an asserted illegal search and seizure but he does not, in the motion, claim that the exhibits would inflame or prejudice the jury, the objection as to these exhibits cannot be raised before the appellate court for the first time. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

4. TIMELINESS OF OBJECTION.

One cannot claim error in absence of timely objection. State v. Trimble, 78 N.M. 346, 431 P.2d 488 (1967).

Objection to sufficiency of evidence required at close of all evidence. — Where the defendant challenges identification testimony at the close of the state's case in chief, but does not do so at the close of all the evidence, the question of the sufficiency of the evidence is not properly before the appellate court. State v. Hunt, 83 N.M. 546, 494 P.2d 624 (Ct. App. 1972).

Objection to improper closing argument must be made before argument continues. — In order to preserve claimed error for review, an objection to improper closing argument must be timely made. The burden is on the appellant to make his objections known to the court at the earliest time in order to afford the court the opportunity to rule on the matter before allowing the argument to continue. State v. Montoya, 80 N.M. 64, 451 P.2d 557 (Ct. App. 1968), aff'd sub nom. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969).

Where the defendant fails to object to claimed prejudicial remarks of the state during closing argument to the jury, the claimed error is not subject to review. State v. Barboa, 84 N.M. 675, 506 P.2d 1222 (Ct. App. 1973).

Objection to improper court remarks after deliberation commences not timely. — Where defendant's counsel does not object to allegedly improper trial court remarks until after the jury has begun its deliberations, his motion for a mistrial is not timely, and this issue may not be raised on appeal. State v. Wilson, 86 N.M. 348, 524 P.2d 520 (Ct. App. 1974).

Question or objection must be raised at trial before appellate court may review. — While questions involving fundamental error may be raised for the first time on appeal, a question as to the sufficiency of the evidence authorizing the submission of the case to the jury, or for supporting the verdict, must be raised at the trial. State v. Nuttal, 51 N.M. 196, 181 P.2d 808 (1947).

There must be an objection to incorrect, inconsistent or confusing instructions before the appellate court may review them. State v. Tucker, 86 N.M. 553, 525 P.2d 913 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

And trial court ruling must be invoked. — To preserve a question for review it must appear that a ruling or decision by the trial court has been fairly invoked. State v. Garcia, 83 N.M. 262, 490 P.2d 1235 (Ct. App. 1971).

But formal assignments not required. — Where an attempt has been made to present points relied on for reversal, an omission to make formal assignments is not jurisdictional. State v. Apodaca, 42 N.M. 544, 82 P.2d 641 (1938).

Duty of counsel to preserve question for review. — This rule imposes on counsel the duty to preserve a question for appellate review by affirmatively showing in the record that a ruling or decision by the trial court was fairly invoked on the point. State v. Casteneda, 97 N.M. 670, 642 P.2d 1129 (Ct. App. 1982).

5. SPECIFIC APPLICATIONS.

a. EVIDENCE.

Although the defendant failed to object to the admission of evidence of notice of alibi under Rule 5-508(E) NMRA, the defendant’s later arguments concerning whether the trial court could properly cure its own error under the rule, and the court’s response to those arguments, sufficiently preserved the issue for review on appeal. State v. O’Neal, 2008-NMCA-022, 143 N.M. 437, 176 P.3d 1169.

Ground for objection to be specified. — 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. Williams v. Vandenhoven, 82 N.M. 352, 482 P.2d 55 (1971); Ash v. H.G. Reiter Co., 78 N.M. 194, 429 P.2d 653 (1967).

Renewal of motion for directed verdict. — Defendant who, at the close of evidence, renewed its motion for directed verdict on punitive damages, causing the district court to again deny the motion, fairly invoked a ruling on the renewed motion, and therefore did not waive its right to challenge the sufficiency of the evidence on the punitive damages issue. Gillingham v. Reliable Chevrolet, 1998-NMCA-143, 126 N.M. 30, 966 P.2d 197.

Absent offer of proof, exclusion of evidence cannot be attacked on appeal. State ex rel. State Hwy. Comm'n v. Steinkraus, 76 N.M. 617, 417 P.2d 431 (1966).

Proper tender or offer of proof is essential to the preservation of error in improperly excluding evidence. Wood v. Citizens Std. Life Ins. Co., 82 N.M. 271, 480 P.2d 161 (1971); Williams v. Yellow Checker Cab Co., 77 N.M. 747, 427 P.2d 261 (1967).

Where testimony excluded when defendant's objections were sustained was not preserved by exceptions to the trial court's rulings, and plaintiff neither made offer of proof to preserve the claimed error nor identified or offered in evidence claimed exhibits, his claim of error was not subject to review. Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972).

Purpose of proffered evidence to be indicated. — Defendant who claimed that trial court refused portions of a deposition which contained inconsistencies, but failed to alert court that she was introducing inconsistencies for impeachment purposes, could not first raise issue on appeal. Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

Request for findings required for review of evidence. — Where a defendant made no request for findings nor objections to the court's findings, he was not entitled to a review of the evidence on appeal. Citty v. Citty, 86 N.M. 345, 524 P.2d 517 (1974); Van Orman v. Nelson, 78 N.M. 11, 427 P.2d 896 (1967).

Where appellant did not submit a requested finding, no error was preserved for review by supreme court. Nosker v. Western Farm Bureau Mut. Ins. Co., 81 N.M. 300, 466 P.2d 866 (1970).

Appellant who fails to timely request findings cannot obtain a review of the evidence on appeal. Ellis v. Parmer, 76 N.M. 626, 417 P.2d 436 (1966).

Along with requested conclusions. — There can be no review of the evidence on appeal where the party seeking the review has failed to submit requested findings of fact and conclusions of law. Wagner Land & Inv. Co. v. Halderman, 83 N.M. 628, 495 P.2d 1075 (1972); McNabb v. Warren, 83 N.M. 247, 490 P.2d 964 (1971).

And challenge to objectionable findings and conclusions. — Where appellants cited as error the trial court's refusal of certain findings and conclusions along with a certain conclusion of law made by the court, but did not question or challenge the findings which supported the challenged conclusion, they made a fatal error. Lerma v. Romero, 87 N.M. 3, 528 P.2d 647 (1974).

Where finding that service by mail was necessary was not excepted to, an assignment that the affidavit of mailing did not support the finding did not present a jurisdictional question. Miera v. Sammons, 31 N.M. 599, 248 P. 1096 (1926).

Sua sponte exclusion of evidence. — Although an appellate court is not required to review every sua sponte exclusion of evidence that is made without a timely objection of counsel, Rule 11-103 and Paragraph A of this rule clearly permit review of 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.

Evidence concerning character for untruthfulness. — Where there was no objection on the grounds that a specific instance of the defendant's conduct was inadmissible concerning character for untruthfulness, this matter, raised for the first time on appeal, was not considered. State v. Sacoman, 107 N.M. 588, 762 P.2d 250 (1988).

Substantiality of evidence only considered when raised below. — Appellate court will not determine whether a finding or judgment of the court is supported by substantial evidence, unless the question has been submitted to or decided by the trial court. State v. Board of Trustees, 32 N.M. 182, 253 P. 22 (1927); Blacklock v. Fox, 25 N.M. 391, 183 P. 402 (1919); Grant v. Booker, 31 N.M. 639, 249 P. 1013 (1926).

In order to have question of whether a finding of fact made by district court was supported by substantial evidence reviewed on appeal, attention of district court must be called thereto by an exception or objection to such finding or by request of the objecting party for a finding of fact upon the same subject. Wells v. Gulf Ref. Co., 42 N.M. 378, 79 P.2d 921 (1938).

Requested finding sufficient preservation of issue. — Defendant's requested finding of fact, which presented issue in manner contrary to court's finding, sufficiently called attention of court to her theory of case and preserved the issue for review. Crosby v. Helmstetler, 46 N.M. 129, 123 P.2d 384 (1941).

Exception to legal conclusion based upon admitted facts was sufficient to present the question to the supreme court for review. Bays v. Albuquerque Nat'l Bank, 34 N.M. 20, 275 P. 769 (1929).

Request for findings and conclusions is not required upon summary judgment to preserve points for review. DeArman v. Popps, 75 N.M. 39, 400 P.2d 215 (1965).

Evidence not presented to trial judge not reviewable. — A judicial review of an order from which a claimant appeals cannot be based on evidence in a supplemental record on appeal containing evidence that had not been presented to the worker's compensation judge at the time the order was issued. Gallegos v. City of Albuquerque, 115 N.M. 461, 853 P.2d 163 (Ct. App. 1993).

Question as to right to confront witness not preserved for review. — See 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).

Defendant failed to preserve Miranda issue where the issue was not raised in defendant's suppression motion, defendant did not alert the state or the court that this was an issue before he presented his witnesses, defendant mentioned the testimony in closing argument citing no authority for the point and then abruptly changed the subject, and never asked for a ruling on the matter. State v. Ponce, 2004-NMCA-137, 136 N.M. 614, 103 P.3d 54, cert. granted, 2004-NMCERT-012.

Issue of whether victim falls within statutory definition of "household member" was fairly presented below where the district court was alerted to the question of whether victim meets the definition of "household member," the state had an opportunity to respond and argue evidence relating to the issue and the district court ruled on the issue by finding evidence to support each element of the offense beyond a reasonable doubt. State v. Montoya, 2005-NMCA-005, 136 N.M. 674, 104 P.3d 540, cert. granted, 2005-NMCERT-001.

b. INSTRUCTIONS.

Two methods of preserving error. — In order to preserve error to a given instruction, a party is required either to tender a correct instruction and alert the trial court to the fact that the tendered instruction corrected the defect complained of, or point out the specific vice in the instruction given by proper objection. Lewis v. Rodriguez, 107 N.M. 430, 759 P.2d 1012 (Ct. App. 1988).

Objection to instructions required for review. — Appellant may not challenge on review the correctness of instructions to which he took no exceptions or only a general exception. Gerety v. Demers, 86 N.M. 141, 520 P.2d 869 (1974).

Where neither party objected to the instruction, the court would not consider alleged error therein. Panhandle Irrigation, Inc. v. Bates, 78 N.M. 706, 437 P.2d 705 (1968).

At least as to nonfundamental matters. — Error in failure to give incidental instructions, even from Uniform Jury Instruction, and even though mandatory, must be brought to attention of trial court in timely fashion if it is to be preserved as error, at least as to instructions which do not cover the fundamental law applicable to the facts of the case. City of Albuquerque v. Ackerman, 82 N.M. 360, 482 P.2d 63 (1971).

Objection to instruction must be specific. — Where the substance of the only objection made to the court's instructions cannot reasonably be construed as an objection to a specific instruction, this objection will not be heard for the first time on appeal. State v. Flowers, 83 N.M. 113, 489 P.2d 178 (1971).

Defect in instructions must be specified. — Objections to instructions which fail to point out specifically the claimed vice or defect are insufficient to preserve the error for review. McBee v. Atchison, T. & S.F. Ry., 80 N.M. 468, 457 P.2d 987 (Ct. App. 1969); Gonzales v. Allison & Haney, Inc., 71 N.M. 478, 379 P.2d 772 (1963).

Supreme court could not review the form of the instruction where no specific objection was made to alert the mind of the trial court to the specific defects contained therein. Horrocks v. Rounds, 70 N.M. 73, 370 P.2d 799 (1962).

To preserve error on appeal as to an instruction, the objection must specifically guide the mind of the trial court to the claimed vice. Objections in general terms are not sufficient to advise the court of the particular claim of error so that it may be corrected. Poorbaugh v. Mullen, 99 N.M. 11, 653 P.2d 511 (Ct. App. 1982).

In an action by a tenant against a landlord for violation of the Owner-Resident Relations Act, since the landlord did not tender correct or adequate instructions on his theory that the act did not apply because the tenant was an employee, and since the amendment making the act applicable to written agreements only was not brought to the attention of the court, unpreserved errors in the jury instructions that were given covering these matters were not reviewable since they were not fundamental and did not involve the public interest. Gracia v. Bittner, 120 N.M. 191, 900 P.2d 351 (Ct. App. 1995).

Objection to instructions required for review. — In prosecution for criminal sexual contact and penetration of a minor, although the defendant asked the court for a clarification of the instruction, this request was insufficient to make the court aware of the defendants objection that he did not receive fair notice of the charges because of the long span of time in the elements of the instruction during which the offenses were committed. State v. Nichols, 2006-NMCA-017, 139 N.M. 72, 128 P.3d 500.

Tender of proper instruction required to preserve error for review. — In order to preserve error for review because of the failure of the trial court to instruct upon a specific issue or defense, the defendant must tender a proper instruction on the issue. State v. Gonzales, 82 N.M. 388, 482 P.2d 252 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

By tendering a proposed jury instruction to the court, defendant adequately preserved his right to appeal on the grounds that the instructions ultimately used violated his right to due process under the state constitution. State v. Sarracino, 1998-NMSC-022, 125 N.M. 511, 964 P.2d 72.

As court alerted by tender of proper instruction. — Where the court's instruction fails to cover the elements of insanity and the defendant's requested instruction contains those elements, the submission of a proper instruction by the defendant alerts the trial court to the omission in its instruction. State v. Montano, 83 N.M. 523, 494 P.2d 185 (Ct. App. 1972).

Failure to instruct on element of offense. — The failure of a trial court to properly instruct a jury on the essential elements of an offense constitutes fundamental error which may be raised for the first time on appeal. State v. Peterson, 1998-NMCA-049, 125 N.M. 55, 956 P.2d 854.

6. WAIVER OF QUESTIONS NOT RAISED.

Lay opinion testimony of police officer. — Because under Paragraph A of this rule, an issue may not be raised for the first time on appeal, where review of the record indicates that defendant did not raise any objection concerning the lay opinion testimony of police officer nor did she claim fundamental or plain error, the appellate court may not address this issue. State v. Watchman, 2005-NMCA-125, 138 N.M. 488, 122 P.3d 855, cert. denied, 2005-NMCERT-011.

Award of attorney fees under Insurance Code. — Because the issue was not preserved for review, whether attorney fees were properly awarded under the Insurance Code would not be considered on appeal. Chavarria v. Fleetwood Retail Corp., 2005-NMCA-082, 137 N.M. 783, 115 P.3d 799, cert. granted, 2005-NMCERT-006.

Claim not raised in trial court is not properly before court of appeals for review. State v. Raburn, 76 N.M. 681, 417 P.2d 813 (1966); State v. Martinez, 77 N.M. 745, 427 P.2d 260 (1967); State v. Lujan, 79 N.M. 525, 445 P.2d 749 (Ct. App. 1968); State v. Faulkenberry, 82 N.M. 553, 484 P.2d 773 (Ct. App. 1971); State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971); State v. Duran, 83 N.M. 700, 496 P.2d 1096 (Ct. App.), cert. denied, 83 N.M. 699, 496 P.2d 1095 (1972); State v. Martinez, 84 N.M. 766, 508 P.2d 36 (Ct. App. 1973); State v. Dutchover, 85 N.M. 72, 509 P.2d 264 (Ct. App. 1973); State v. Puga, 85 N.M. 204, 510 P.2d 1075 (Ct. App. 1973); State v. Jordan, 85 N.M. 125, 509 P.2d 892 (Ct. App. 1973); State v. Grijalva, 85 N.M. 127, 509 P.2d 894 (Ct. App. 1973); State v. O'Dell, 85 N.M. 536, 514 P.2d 55 (Ct. App. 1973); State v. Romero,

86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974); State v. Bolen, 88 N.M. 647, 545 P.2d 1025 (Ct. App.), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976); 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. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978); 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); Gutierrez v. Albertsons, Inc., 113 N.M. 256, 824 P.2d 1058 (Ct. App. 1991).

The failure of the defendant to point out claimed errors and to bring them to the attention of the trial court prevents his relying on them for the first time on appeal. State v. Lott, 73 N.M. 280, 387 P.2d 855 (1963).

An appellate court only reviews adverse rulings and decisions protested below in a manner which alerts the mind of the trial court to the claimed error. The failure of the defendant to point out claimed errors and to bring them to the attention of the trial court prevents his relying on them for the first time on appeal. State v. Tapia, 79 N.M. 344, 443 P.2d 514 (Ct. App. 1968).

Where no objection on given grounds is ever made, and no ruling or decision of the trial court thereon is ever fairly invoked, these questions cannot be first raised on appeal. State v. Gray, 79 N.M. 424, 444 P.2d 609 (Ct. App. 1968).

Where the objections made at trial fail to include some of the grounds urged on appeal, these grounds cannot properly be first urged in the appellate court. State v. Sisneros, 79 N.M. 600, 446 P.2d 875 (1968).

Where a claim of error is not included in the grounds for objection in the trial court, it will not be considered in the appellate court. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

Where the state did not argue for a good-faith exception to the exclusionary rule, the issue was not addressed on appeal. State v. Therrien, 110 N.M. 261, 794 P.2d 735 (Ct. App. 1990), overruled in part on other grounds, State v. Barker, 114 N.M. 589, 844 P.2d 839 (Ct. App. 1992).

Thus, unraised question deemed spurious. — When no question of the defendant's competency was ever raised in the case being appealed, the issue is spurious. State v. Burrell, 89 N.M. 64, 547 P.2d 69 (Ct. App. 1976).

The defendant's contention on appeal that a continuation of the trial in his absence constituted error because the trial court did not conduct an inquiry into the reason for his absence is spurious where no such contention was raised in the trial court. State v. Burrell, 89 N.M. 64, 547 P.2d 69 (Ct. App. 1976).

As, where no court ruling, no error preserved for review. — Where no objection is made and no ruling of the trial court is invoked as to claimed errors, they are not preserved for review. State v. Reynolds, 79 N.M. 195, 441 P.2d 235 (Ct. App. 1968).

And this includes claimed errors of constitutionality. — The failure of the defendant to point out claimed errors of constitutionality and to bring them to the attention of the trial court prevents his relying on them for the first time on appeal. The sole exceptions to this rule are questions of jurisdiction and fundamental error. City of Portales v. Shiplett, 67 N.M. 308, 355 P.2d 126 (1960); State ex rel. Human Servs. Dept. v. Martin, 104 N.M. 279, 720 P.2d 314 (Ct. App. 1986).

Supreme court would refuse to consider the constitutionality of licensing act where such matter was raised neither in the trial court nor in the brief in chief. Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449 (1960).

Where the issue of constitutionality was not raised in the trial court nor in the supreme court until permission was sought to file the second motion for rehearing, question would not be permitted on review. State Hwy. Comm'n v. Southern Union Gas Co., 65 N.M. 217, 334 P.2d 1118 (1959).

Plaintiff's claim that, if the applicable limitation period expired before an alleged injury developed or manifested itself, then the limitation statute violated either due process or equal protection was not considered on appeal because it was not raised in the trial court. Irvine v. St. Joseph Hosp., 102 N.M. 572, 698 P.2d 442 (Ct. App. 1984), cert. quashed, 102 N.M. 564, 698 P.2d 434 (1985).

Challenge to constitutionality of statute as being a rule of evidence outside the purview of the legislature's power, which was not raised before the trial court, would not be considered upon review. Keeth Gas Co. v. Jackson Creek Cattle Co., 91 N.M. 87, 570 P.2d 918 (1977).

Proposition that construction of statutes approved by district court would violate certain constitutional provisions was not subject to appellate review, where ruling thereon had not been invoked in trial court. In re Estate of Reilly, 63 N.M. 352, 319 P.2d 1069 (1957).

And violations of constitutional rights. — Where record did not indicate that contention that dismissal of case after demand for jury trial constituted violation of constitutional rights was raised in trial court or passed on thereby, it would not be considered by the supreme court. Reger v. Preston, 77 N.M. 196, 420 P.2d 779 (1966).

The defendant's claims concerning double jeopardy, raised for the first time on appeal, not having been presented to the trial court, will not be considered. State v. Tafoya, 81 N.M. 686, 472 P.2d 651 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

The defendant who seeks to raise an alleged search and seizure issue for the first time in the appellate court cannot do so. State v. Colvin, 82 N.M. 287, 480 P.2d 401 (Ct. App. 1971).

Where the defendant's claims that his constitutional rights were violated were neither presented to nor ruled on by the trial court, they may not be raised for the first time on appeal. City of Hobbs v. Sparks, 85 N.M. 277, 511 P.2d 763 (Ct. App.), cert. denied, 85 N.M. 265, 511 P.2d 751 (1973).

An issue of illegal search and seizure not presented to the trial court cannot be raised for the first time on appeal. State v. Aragon, 84 N.M. 254, 501 P.2d 698 (Ct. App. 1972).

Where the defendant's motion to suppress is directed to a premises search, and defendant never raises, and does not invoke, a ruling of the trial court concerning the search of his closed suitcase, he may not raise that issue for the first time on appeal. State v. Mascarenas, 86 N.M. 692, 526 P.2d 1285 (Ct. App. 1974).

Where the defendant's contention that the manner in which police officers executed a search warrant was improper is never brought to the attention of the trial court, the defendant may not raise it in the 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, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975).

Where the defendant at the hearing on his motion to suppress does not contend that the officers had no reason or no probable cause to seize contraband because its identity was not apparent on a mere surface inspection, the appeals court cannot properly consider the question without that evidence being before it for review. State v. Alderete, 88 N.M. 619, 544 P.2d 1184 (Ct. App. 1976).

Where a claim that an item which was seized did not appear to be contraband, evidence or fruits of the crime, and that the police may not seize an article or item which does not appear to be such prior to arrest, is not raised before the children's court, it will not be considered on appeal. In re Doe, 89 N.M. 83, 547 P.2d 566 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

When a theory supporting a warrantless search is not relied upon by the state in the trial court, it will not be considered on appeal. State v. White, 94 N.M. 687, 615 P.2d 1004 (Ct. App. 1980), overruled on other grounds, State v. Apodaca, 112 N.M. 302, 814 P.2d 1030 (Ct. App. 1991).

The defendant may not raise the issue of the waiver of his rights to remain silent for the first time on appeal. State v. Sexton, 82 N.M. 648, 485 P.2d 982 (Ct. App.), cert. denied, 82 N.M. 639, 485 P.2d 973 (1971).

Arguments raised only in docketing statement of interlocutory appeal. — Where a party raised arguments in a docketing statement submitted to the court of appeals,

which was filed after the district court first entered partial summary judgment in favor of the opposing party, but the court of appeals refused to hear the appeal at that time because no final order had been issued, the party failed to preserve the arguments because the district court was not required to respond to arguments raised before the court of appeals, and therefore the district court never ruled upon them. Maralex Resources, Inc. v. Gilbreath, 2003-NMSC-023, 134 N.M. 308, 76 P.3d 626.

Ineffective assistance of counsel. — Where mother’s attorney raised due process claim at the final termination hearing, and at closing, argued that termination was improper because mother was denied her due process right to participate in the earlier hearings, and the court ruled that the claim was precluded by the fact that mother was present at the termination hearing to defend against the charges, and because mother’s absence was based on ineffective assistance of counsel, not due process, under these facts, the appellate court was sufficiently alerted to the claimed error and mother preserved her claim. State ex rel. Children, Youth & Families Dep’t. v. Maria C., 2004-NMCA-083, 136 N.M. 53, 94 P.3d 796.

Defendant abandoned his conditional pretrial request to bar television coverage of his allocution by failing to pursue the issue and by later failing to mention any potential problem with media coverage in his motion to allocute. State v. Clark, 108 N.M. 288, 772 P.2d 322, cert. denied, 493 U.S. 923, 110 S. Ct. 291, 107 L. Ed. 2d 271 (1989), overruled on other grounds, State v. Henderson, 1996-NMCA-089, 109 N.M. 655, 789 P.2d 603.

Objection to confession's admission cannot be considered if not made in trial court. State v. Layton, 32 N.M. 188, 252 P. 997 (1927).

Nor contention that admission procured by deception. — Where the defendant's contention that the police told him "it might go easier" if he would admit to the crime is never raised or ruled on by the trial court, it will not be considered on appeal. State v. Williams, 83 N.M. 477, 493 P.2d 962 (Ct. App. 1972).

Nor claim of custodial interrogation without consent. — Where the defendant's claim that an arresting officer engaged in custodial interrogation following a clear indication from the defendant that he did not wish to make a statement is never presented to the trial court, it is not properly before the appellate court for review. State v. Rhea, 86 N.M. 291, 523 P.2d 26 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974).

Nor contention that waiver of counsel invalid. — Where the contention that defendant's waiver form as to the presence of counsel was not countersigned by a district public defender is neither raised in the trial court nor briefed and supported by authority on appeal, it will not be considered by the appellate court. 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).

Nor issue of psychological coercion. — Where the defendant does not invoke a ruling of the trial court on the issue of psychological coercion, no issue for review is presented on appeal. State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

Nor issue of delay. — Where no issue is raised in the trial court concerning delay, it is not preserved for review. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970).

Nor reasons opposing joinder. — Where the defendant asserts and relies upon as the basis for his opposition to joinder the claim that confessions, particularly his own, were involuntarily made, he cannot later assert other and distinct grounds in opposition to joinder. State v. Fagan, 78 N.M. 618, 435 P.2d 771 (Ct. App. 1967).

Where a claim of misjoinder is not presented to the trial court, it cannot be raised on appeal for the first time. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Nor contentions as to severance. — Where the contentions of defendants for a severance have not been presented to the trial court and are raised at appellate level for the first time, these contentions have not been preserved for review. State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct. App. 1970).

Nor right to disqualify judge. — Not having taken precaution to preserve his right to disqualify the judge by timely filing an affidavit of disqualification, the defendant cannot complain on appeal. State v. Lucero, 82 N.M. 367, 482 P.2d 70 (Ct. App. 1971).

Nor claim of unauthorized participation of attorney general in prosecuting case. — Where the defendant makes no objection during the trial to the attorney general's participation, the defendant's claim that the attorney general has no authority to prosecute cases that arise in a particular county is without merit on appeal. State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (1972), aff'd, 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).

Nor claim that written jury waiver required. — Where the defendant does not claim in his motion for a new trial that his waiver of a 12-person jury was ineffective because not in writing, and where his claim that a written waiver is required is asserted for the first time on appeal, the claim is not entitled to appellate review because the claim that the waiver be in writing is not a question which can be raised for the first time on appeal. State v. Pendley, 92 N.M. 658, 593 P.2d 755 (Ct. App. 1979).

Nor irregularities in empaneling juries. — The appellant cannot raise for the first time on appeal the disqualification of a juror on the grounds of nonresidence unless it appears this was not known to him at the time of trial; irregularities in empaneling of juries, not objected to in the trial court, cannot be reviewed on appeal. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968).

Nor claim of privilege. — The defendant cannot on appeal be heard to complain that a communication made by him to a probation and parole officer in the course of a presentence investigation was privileged, when no claim of privilege was ever raised in the trial court. State v. Silva, 78 N.M. 286, 430 P.2d 783 (Ct. App. 1967).

Issue of witness intimidation by trial court cannot initially be raised on appeal. — The defendant cannot raise the issue of witness intimidation by the trial court for the first time upon appeal. State v. Martinez, 99 N.M. 48, 653 P.2d 879 (Ct. App. 1982).

Nor question of competency of witness. — The question of the competency of a witness cannot be raised for the first time on appeal. State v. Manlove, 79 N.M. 189, 441 P.2d 229 (Ct. App.), cert. denied, 79 N.M. 159, 441 P.2d 57 (1968).

Burden on defendant to make objection to improper remarks in trial court. — If a defendant is of the opinion remarks by the prosecutor exceed the bounds of propriety, the burden is on him to make objection and call the objectionable matter to the attention of the trial court. Failure to do so results in failure to preserve the error, if the error was committed. State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971); 404 U.S. 1015, 92 S. Ct. 688, 30 L. Ed. 2d 662 (1972); State v. Riggsbee, 85 N.M. 668, 515 P.2d 964 (1973).

And failure to object waives erroneous trial remarks. — The failure to make a timely objection concerning an alleged error because of erroneous remarks made during the trial will prevent the defendant from forming a basis for errors at the appellate level. State v. Montoya, 80 N.M. 64, 451 P.2d 557 (Ct. App. 1969), aff'd sub nom. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969).

Even if it is conceded that the prosecutor's argument in some particulars exceeded the bounds of propriety, the defendant is in no position to complain where no objections were made to any of the arguments about which he complains on appeal. If he feels the remarks by the prosecutor exceeded the bounds of propriety, the burden is on him to make objection at the time the remarks were made, and not wait until the trial was concluded and then seek relief by asking that the verdict be set aside or that the judgment entered thereon be reversed on appeal. State v. Victorian, 84 N.M. 491, 505 P.2d 436 (1973); State v. Seaton, 86 N.M. 498, 525 P.2d 858 (1974).

Errors in admission of evidence not raised in trial court not renewable. — The general rule is that issues not raised in the trial court will not be considered on appeal. This rule applies to evidence which is "erroneously" admitted at trial without objection and then is complained of on appeal. State v. Lopez, 84 N.M. 402, 503 P.2d 1180 (Ct. App. 1972).

Nor claim that questions were improper. — The defendant cannot raise for the first time on appeal his claim that the questions to which he did not object and which he answered were prejudicial. State v. Sharpe, 81 N.M. 637, 471 P.2d 671 (Ct. App. 1970).

A defendant who exercises his right not to incriminate himself by his silence has no obligation to make any explanation of his activities to the police, and the prosecutor's questions at trial as to whether he has given exculpatory information to the police are clearly improper but is not reversible error where no issue is raised as to their propriety at trial. State v. Lopez, 84 N.M. 402, 503 P.2d 1180 (Ct. App. 1972).

Nor claim that nonadmitted evidence was considered by court. — Where workmen's compensation claimant made no objection to trial court's reading of depositions not admitted into evidence, he was not in position to raise the issue for the first time on appeal; in any event, no prejudice was shown. Hay v. New Mexico State Hwy. Dep't, 66 N.M. 145, 343 P.2d 845 (1959).

Nor lack of proper foundation for admitting expert testimony. — Where the issue of lack of proper foundation for the admission of the testimony of a doctor is raised for the first time on appeal, not having been called to the attention of the trial court, it is therefore not properly preserved and may not be raised for the first time on appeal. State v. Sweat, 78 N.M. 512, 433 P.2d 229 (Ct. App. 1967).

Where the testimony of police officers concerning their identification of the odor of marijuana emanating from the defendant's vehicle is not the subject of objection or question by the defendant and there is not the slightest suggestion at the hearing on a motion to suppress or at trial that the officers lacked the ability, or qualifications, to identify marijuana by odor, the court of appeals errs in ruling on the lack of foundation as to the officer's expertise, since only jurisdictional or fundamental errors will be considered on appeal, unless raised or presented in the trial court. State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975).

Nor claim that foundational requirements for admitting inculpatory statements not met. — Absent some contemporaneous challenge to the foundational requirements for the admission of inculpatory statements in the trial court, an appellate claim that foundational requirements were not met will not be reviewed. State v. Gallegos, 92 N.M. 336, 587 P.2d 1347 (Ct. App. 1978).

Nor error in admitting extrajudicial identification. — Where the appellant does not move to suppress evidence concerning extrajudicial identification, does not object to this testimony at trial, does not move to strike this testimony and in no way invokes a ruling of the trial court on the admissibility of this testimony, he cannot rely on such claimed error for the first time on appeal. State v. Tapia, 79 N.M. 344, 443 P.2d 514 (Ct. App. 1968).

Nor question on identification of felony relied upon in prosecution for felony-murder. — Where the defendant makes no requests at the trial level for further identification or definition of the felony relied upon by the state in its prosecution for felony-murder, he cannot be heard on that question on appeal. State v. Flowers, 83 N.M. 113, 489 P.2d 178 (1971).

Nor error as to testimony pertaining to previous criminal behavior. — Where no objection is made to testimony pertaining to a previous criminal offense, the error is 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).

Where the defendant makes no objection to a reference in the testimony of a witness to the fact that the defendant has been previously confined in a penitentiary, he cannot be heard to complain for the first time on appeal. State v. Webb, 81 N.M. 508, 469 P.2d 153 (Ct. App. 1970).

Nor error as to witnesses' answers. — Where the defendant at no time objects to any answer given by witnesses, no error is preserved for review. State v. Sedillo, 81 N.M. 47, 462 P.2d 632 (Ct. App.), cert. denied, 81 N.M. 40, 462 P.2d 625 (1969).

Nor error in admitting statements made in police custody. — The defendant's contentions that it was error for the trial court to admit various oral and written statements made by him after he was in the custody of the police cannot be raised on appeal where these issues were not raised at trial. State v. Dosier, 88 N.M. 32, 536 P.2d 1088 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975).

Nor inadmissibility of prior convictions. — Where the defendant does not assert the inadmissibility of prior convictions of crimes punishable by imprisonment for less than one year, this issue may not be raised for the first time on appeal. State v. Cardona, 86 N.M. 373, 524 P.2d 989 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

Nor error in exclusion of witnesses. — Where the defendant fails to furnish the state a list of the names and addresses of the witnesses he intends to call at the trial as he has been ordered to do by the trial court pursuant to Rule 28(a)(3), N.M.R. Crim. P. (see now Rule 5-502A(3) NMRA), the state objects to calling these witnesses and the trial court grants the state's motion, reserving reconsideration of the matter until the district attorney has spoken to the witnesses, but, without explanation, the defendant does not call any of these witnesses to the stand, he voluntarily abandons any further effort to have these witnesses appear and he cannot be heard on appeal to complain of error in their exclusion. State v. Bojorquez, 88 N.M. 154, 538 P.2d 796 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Nor propriety of witness' sentence for contempt. — The propriety of a witness' sentence for contempt in refusing to answer questions put by the state is not before the court of appeals for review where the issue was not raised in the trial court. State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976).

Nor claim that motion not needed to offer information concerning victim's prior rape. — Whether information concerning a prior rape of a victim is "new information" within the meaning of 30-9-16 NMSA 1978 (pertaining to evidence of the victim's past sexual conduct) and, thus, does not require a separate written motion before being offered into evidence, will not be considered by an appellate court where the issue is

raised for the first time on appeal. State v. Montoya, 91 N.M. 752, 580 P.2d 973 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Failure to object to admission of evidence constitutes waiver of objection, and such objection cannot be raised for the first time on appeal. McCauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968).

Including polygraph evidence. — Since the admissibility of polygraph evidence is now governed by the Rules of Evidence, there is no reason to suppose that parties who wish to appeal the admissibility of such evidence are excused from challenging its "erroneous" admission at trial. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Also, claim of inadequate inquiry into admissibility of evidence not considered on appeal. — Where the defendant objects to the admission of certain evidence not disclosed prior to trial by the district attorney, but makes no claim of surprise to the trial court, nor seeks a continuance or asks the trial court to conduct the "adequate inquiry" which on appeal he asserts is required, the appellate court will not consider the claim that the trial court's inquiry was inadequate. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Appointment of special master. — A juvenile who fails to invoke a ruling by the children's court on the application of the rule permitting that court to appoint a special master, and who fails to give the court below or the state the opportunity to address the criteria of the rule does not preserve the propriety of the appointment as an issue on appeal. State v. Jason F., 1998-NMSC-010, 125 N.M. 111, 957 P.2d 1145.

Propriety of admission of evidence not preserved for review. — Contention that it was error to admit evidence regarding severance damages to certain tract in condemnation suit, which was not called to attention of trial court or even included in motion for new trial, was not preserved for review and could not be first raised in supreme court. City of Albuquerque v. Ackerman, 82 N.M. 360, 482 P.2d 63 (1971).

Error as to cross-examination cannot be raised for first time on appeal. — An objection should be made at the trial to the court's action in restricting defendant's counsel in cross-examining a witness, and if the defendant fails to invoke the court's ruling when the alleged error is committed it may not be raised for the first time on appeal. State v. Walker, 54 N.M. 302, 223 P.2d 943 (1950).

Where no objection to cross-examination is made in the trial court, the point will not be considered on appeal. State v. Garcia, 78 N.M. 136, 429 P.2d 334 (1967).

Where, in the trial court, objections to the appellant's cross-examination are sustained, and counsel for appellant fails to make a tender of what he intends to show, he cannot raise this point on appeal. State v. Hudson, 78 N.M. 228, 430 P.2d 386 (1967).

Where the defendant never asserts to the trial court that his cross-examination is being improperly limited, such a contention will not be considered for the first time on appeal. State v. Apodaca, 81 N.M. 580, 469 P.2d 729 (Ct. App. 1970).

Where, after the state objects to further questioning regarding a witness' juvenile record and the judge sustains the objection, the defendant makes no proffer as to what his next questions would have been and what he expected to show, the defendant fails to preserve the error because the difficulty of the evidentiary problems involved in this sort of questioning makes the appellate court unwilling to guess as to what questions the defendant was prevented from asking. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

An asserted improper limitation of cross-examination of a juvenile raised for the first time on appeal will not be considered. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

An error in instructions is waived where the trial court's attention has not been called to the error. State v. Johnson, 60 N.M. 57, 287 P.2d 247 (1955).

Objections to instructions cannot be raised for the first time on appeal where the defendant neither objected to the instructions at trial nor tendered any written request. State v. Ochoa, 61 N.M. 225, 297 P.2d 1053 (1956); State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977).

The failure to object waives any errors or defects in instructions. State v. Minor, 78 N.M. 680, 437 P.2d 141 (1968); 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).

Where the defendant does not object to faulty instruction, nor tender a correct written instruction, such error is not preserved for review and does not constitute fundamental error. State v. Jaramillo, 85 N.M. 19, 508 P.2d 1316 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

Where the defendant fails to raise issues directed to the sufficiency of the information to charge the crime and the sufficiency of the instructions defining the crime in the trial court, they will not be reviewed on appeal. State v. Mata, 86 N.M. 548, 525 P.2d 908 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

The complaint that the trial court erred in failing to instruct the jury at the time a statement was admitted that it could not be considered as evidence against a nondeclarant codefendant comes too late where it was not raised before the trial court. 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).

The trial court does not err in failing to admonish the jury as to the limited scope to be given to testimony regarding prior sex offenses where the appellant does not at any time request the court to advise or admonish the jury as to the consideration it should give to such evidence. Consequently, such contention, in the absence of fundamental error, is not subject to review. State v. Minns, 80 N.M. 269, 454 P.2d 355 (Ct. App.), cert. denied, 80 N.M. 234, 453 P.2d 597 (1969).

Where a signed statement of one defendant is admitted in evidence at the trial without objection and another defendant does not request the trial court to instruct on the issue, the error claimed is waived. State v. Riley, 82 N.M. 298, 480 P.2d 693 (Ct. App. 1971).

Where the defendant's contention that a handwritten notation violates that portion of Rule 41(e), N.M.R. Crim. P. (see now Rule 5-608E NMRA), which states: "no instruction which goes to the jury room shall contain any notation" is not presented to the trial court for its ruling, it is not before the appellate court for review. State v. Herrera, 82 N.M. 432, 483 P.2d 313 (Ct. App.), cert. denied, 404 U.S. 880, 92 S. Ct. 217, 30 L. Ed. 2d 161 (1971).

Where the defendant fails to request in the trial court that the instructions be amplified to further define "intent" and "knowledge," he may not raise the issue as to additional instructions in appellate court. State v. Gonzales, 86 N.M. 556, 525 P.2d 916 (Ct. App. 1974).

Where the defendant does not offer an instruction on his competence to stand trial, nor does he object to the instructions given the jury, this issue is not properly preserved for appeal. 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).

The trial court's error, if any, in admitting certain evidence is not properly preserved for review where the trial court makes a preliminary ruling that the evidence is in fact irrelevant and will not be discussed further unless the state shows him some law, and recesses the trial until the following day, and there is no further mention of the evidence. Under these circumstances, it is incumbent upon the defendant to move to strike the testimony complained of or to ask for a curative instruction. State v. Sandoval, 88 N.M. 267, 539 P.2d 1029 (Ct. App. 1975).

Where the defendant's contention that the trial court refused to give instructions to the effect that if the defendant was intoxicated to the point that he was incapable of malice, he could not be guilty of murder in the second degree, is not raised in the trial court, it will not be considered for the first time on appeal. State v. Gutierrez, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

The defendant's contention that the jury could not have adequately performed their required function of determining the voluntariness of his statement because they were never informed as to what the "Miranda rights" which the attorneys, witnesses and the court referred to all through the trial is waived where the defendant does not request an

instruction defining "Miranda rights." State v. Torres, 88 N.M. 574, 544 P.2d 289 (Ct. App. 1975).

Where the defendant fails to ask for an instruction pursuant to Rule 303(c), N.M.R. Evid. (see now Rule 11-303C NMRA), to the effect that the existence of a presumed fact which establishes guilt, negatives a defense or is an element of the offense must, on all the evidence, be proved beyond a reasonable doubt, the error is not before the appeals court for review. State v. Matamoros, 89 N.M. 125, 547 P.2d 1167 (Ct. App. 1976).

In a prosecution for criminal sexual penetration, where the trial court gives the statutory definition of "personal injury" appearing at 30-9-10 NMSA 1978, and also gives the statutory definition of "great bodily harm" at 30-1-12 NMSA 1978, the lack of an additional definition of "personal injury" is not error; if the defendant desires that "personal injury" be further defined, he should submit a requested instruction to that effect, and where he does not do so, he cannot complain of the lack of an additional definition of the term. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Error in receiving guilty plea cannot be raised for first time on appeal. — Contention that the reception into evidence of the defendant's plea of guilty when arraigned before a justice of the peace was error cannot be raised for the first time in the supreme court. State v. Hudman, 78 N.M. 370, 431 P.2d 748 (1967).

Where the defendant argues that he is entitled to have his judgment of conviction and sentence vacated because the trial judge failed to advise him of the sentence which might be imposed upon his plea of guilty, he must fail in this contention when this question is not presented to the trial court, and therefore, cannot be raised on appeal. State v. Knerr, 79 N.M. 133, 440 P.2d 808 (Ct. App. 1968).

The defendant's contention that there was a misunderstanding between the court and the defendant at the time of an alleged plea bargaining session which resulted in prejudice to the defendant cannot be raised for the first time on appeal. State v. Ranne, 83 N.M. 241, 490 P.2d 683 (Ct. App. 1971).

The issue of the voluntariness of a guilty plea cannot be raised for the first time on appeal nor may issues directed to the trial court's procedure in accepting a guilty plea, such as claimed violations of Rule 21, N.M.R. Crim. P. (see now Rules 5-303 and 5-304 NMRA), be raised for the first time on appeal. State v. Wood, 86 N.M. 731, 527 P.2d 494 (Ct. App.), cert. denied, 86 N.M. 730, 527 P.2d 493 (1974); State v. Brakeman, 88 N.M. 153, 538 P.2d 795 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Where the defendant claims that the trial court's procedure prior to his admitting the charge of being a habitual offender is defective in that his admission cannot legally be accepted because he has not been duly cautioned as to his rights, but does not claim that his admission is involuntary, his claim will not be heard on appeal since it has not been raised in the trial court. State v. Jordan, 88 N.M. 230, 539 P.2d 620 (Ct. App. 1975).

Nor question of mandatory penalty. — Where the question of a mandatory penalty is not raised before or after judgment and sentence, not having been raised in the trial court, it cannot be raised for the first time on appeal. State v. Atencio, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Unattacked findings binding. — Findings which have not been attacked as being unsupported by the evidence are binding on court on appeal. Springer Corp. v. Kirkeby-Natus, 80 N.M. 206, 453 P.2d 376 (1969).

Since no attack was made upon findings of trial court, facts found below were facts upon which decision by appellant court would be based. Southwest Motel Brokers, Inc. v. Alamo Hotels, Inc., 72 N.M. 227, 382 P.2d 707 (1963).

Findings are facts upon which appeal must be determined. Valdez v. Garcia, 79 N.M. 500, 445 P.2d 103 (Ct. App.), cert. denied, 79 N.M. 449, 444 P.2d 776 (1968).

Where petitioners requested no findings of fact or conclusions of law upon issues, took no exceptions to the court's findings or conclusions and in no way attacked the findings as being inaccurate, incomplete or inadequate, the facts found were only facts before the court and were binding on appeal. Alfred v. Anderson, 86 N.M. 227, 522 P.2d 79 (1974).

Absence of pecuniary injury cannot be raised for first time on appeal. — Where defendants in wrongful death case presented no proposed findings of fact on the absence of pecuniary injury to beneficiaries, and did not discuss such issue in memorandum to the trial court on damages, matter would not be considered for the first time on appeal. Wilson v. Wylie, 86 N.M. 9, 518 P.2d 1213 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

Nor setting of trial date. — Objection to setting of trial date is necessary to preserve the question for review. Pope v. Lydick Roofing Co., 81 N.M. 661, 472 P.2d 375 (1970).

Nor issue of latent injury. — In workmen's compensation case, where latent injury was neither alleged nor considered by the trial court, the issue could not come before supreme court. Higgins v. Board of Dirs., 73 N.M. 502, 389 P.2d 616 (1964).

Nor contributory negligence. — Supreme court would not consider question of contributory negligence which was neither raised in trial nor passed upon by trial court. Nally v. Texas-Arizona Motor Freight, Inc., 69 N.M. 491, 368 P.2d 806 (1962).

Nor employer's negligence. — Allegation of negligence by employer involved question of fact to be decided by a jury and could not be raised for the first time in the supreme court. Gibson v. Helms, 72 N.M. 152, 381 P.2d 429 (1963).

Nor status of deceased. — Where question of the status of deceased boys in wrongful death action brought against city for their deaths while playing in cave which collapsed

was not presented to trial court until defendant moved for judgment n.o.v., the question was raised too late to be the subject of review. Williams v. Town of Silver City, 84 N.M. 279, 502 P.2d 304 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

Nor validity of road tests. — Where a ruling of the trial court was not invoked on issue of similarity of road conditions at time of tests and at time of accident, it was not before the court for review. Dahl v. Turner, 80 N.M. 564, 458 P.2d 816 (Ct. App.), cert. denied, 80 N.M. 608, 458 P.2d 860 (1969).

Nor verification of disability complaint. — Where failure to verify occupational disease disablement, and complaint was not objected to in trial court, it could not be considered by appellate court. Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965).

Nor alleged inequity. — Defendants' contention that it would be inequitable for plaintiffs to have reacquired motel property for nominal consideration and still hold them to promissory note was not subject to review for first time on appeal. McNabb v. Warren, 83 N.M. 247, 490 P.2d 964 (1971).

Nor right to constructive trust. — In breach of contract suit, where claim of right to a constructive trust was first raised in supreme court on appeal, the court would not consider it, even if there were merit to it. Romero v. Sanchez, 86 N.M. 55, 519 P.2d 291 (1974).

Nor bars to rescission of contract. — A claim that the plaintiff was barred from obtaining rescission because he did not read the contract before signing it was not an issue on appeal where it was not raised in the trial court. C.B. & T. Co. v. Hefner, 98 N.M. 594, 651 P.2d 1029 (Ct. App. 1982).

Nor bar to rescission of policy. — In action by insurer to rescind medical expense policy allegation that such insurance could not be rescinded after loss had occurred and claim made could not be raised on appeal, not having been presented to trial court. Prudential Ins. Co. of Am. v. Anaya, 78 N.M. 101, 428 P.2d 640 (1967).

Nor claim of sovereign immunity. — Where contention that plaintiff's claim for damages involved tort claims for which state could not be sued was not stated in the application for an interlocutory appeal, and was raised for the first time in the briefs, it would not be considered by the court of appeals. Feldman v. Regents of Univ. of N.M., 88 N.M. 392, 540 P.2d 872 (Ct. App. 1975).

Nor affirmative defenses. — Where no affirmative defense alleging duress and lack of consideration was made in the pleadings nor was a trial court ruling invoked thereon, question was not preserved for review. Soens v. Riggle, 64 N.M. 121, 325 P.2d 709 (1958).

Although failure to plead matter which constitutes an affirmative defense does not preclude a party from taking advantage of the opposing party's proof if such proof establishes the defense, appellant cannot take advantage of appellee's proof for the first time on appeal. Fredenburgh v. Allied Van Lines, 79 N.M. 593, 446 P.2d 868 (1968).

Where plaintiff did not plead affirmative defenses of waiver or estoppel as required by former Rule 8(c), N.M.R. Civ. P. (see now Rule 1-008C NMRA), and the case was not tried on such issues below, neither waiver nor estoppel was issue on appeal. Western Farm Bureau Mut. Ins. Co. v. Barela, 79 N.M. 149, 441 P.2d 47 (1968).

Nor mitigation issue. — Where one neither pleads mitigation of damages as an affirmative defense nor introduces any evidence to support the defense but instead argues the matter before the court and then presents his case, the argument alone will not create an issue on appeal. The burden is on the defendant to seek a ruling, and since no ruling or decision was obtained from the trial court, the defendant had failed to preserve for review the question of mitigation of damages. Acme Cigarette Servs., Inc. v. Gallegos, 91 N.M. 577, 577 P.2d 885 (Ct. App. 1978).

Nor defenses to summary judgment. — In determining whether it was error for trial court to grant summary judgment, appellate court is limited to matters presented in pleadings, affidavits and pre-trial depositions, and defenses could not be invoked for the first time on appeal. Western Farm Bureau Mut. Ins. Co. v. Barela, 79 N.M. 149, 441 P.2d 47 (1968).

Nor waiver of defenses. — Question of insurer's waiver of defenses raised for the first time on appeal would not be considered. Wiseman v. Arrow Freightways, Inc., 89 N.M. 392, 552 P.2d 1240 (Ct. App.), cert. denied, 90 N.M. 9, 558 P.2d 621 (1976).

Nor existence of reduction of note to judgment. — Where claim that judgment was based on a promissory note which had been reduced to and merged in a different judgment by the Navajo tribal court was not raised or ruled upon by the trial court it could not be considered on appeal. Batchelor v. Charley, 74 N.M. 717, 398 P.2d 49 (1965).

Nor as to error in allowance of interest. — Alleged error in judgment which provided for interest from date thereof, although neither note nor findings and conclusions of court mentioned interest, was not jurisdictional, and could not be raised for first time on appeal. Brock v. Adams, 79 N.M. 17, 439 P.2d 234 (1968).

Nor claim as to inadequacy of damages. — As plaintiffs did not invoke any ruling of the trial court on the asserted inadequacy of damages, they may not raise issue for the first time on appeal. Schrib v. Seidenberg, 80 N.M. 573, 458 P.2d 825 (Ct. App. 1969).

Nor challenge to stipulated verdict form. — Where trial judge gave parties opportunity to respond to the stipulated verdict form, and plaintiff failed to do so, plaintiff could not then challenge the verdict form on appeal, since the issue had not been

properly preserved. Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, 125 N.M. 748, 965 P.2d 332.

Nor claim of excessive verdict. — Contentions that verdict against appellant was excessive, was not supported by substantial evidence or was based on passion, undue influence or mistaken measure of damages, which contentions were not raised in the trial court, were not preserved for review and could not be raised for the first time on appeal. Lujan v. Gonzales, 84 N.M. 229, 501 P.2d 673 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972).

Where allegation that verdict was excessive and resulted from passion, prejudice and sympathy was not raised below, it would not be considered on appeal. McCauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968).

Nor validity of release. — Where trial court did not rule on the validity or the effect of the release executed after entry of the judgment in workmen's compensation case, court of appeals would not consider the release for the first time on appeal. Burton v. Jennings Bros., 88 N.M. 95, 537 P.2d 703 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Nor age of licensee. — In action by lessors seeking reassignment of liquor license, question of minority of one of the lessors, not presented to trial court, was not reviewable on appeal. Shelley v. Norris, 73 N.M. 148, 386 P.2d 243 (1963).

Nor type of certificate. — Issue of class or type of wrecker owner's certificate would not be considered on appeal, where it was not directly and specifically raised in the trial court. Trujillo v. Romero, 82 N.M. 301, 481 P.2d 89 (1971).

Nor validity of signature. — In an action seeking a declaratory judgment and an injunction to prevent city from fluoridating water supply, allegation that facsimile signature of city clerk was fatal to city's cause, never raised in trial court, could not be raised before the supreme court. Turner v. Barnhart, 83 N.M. 759, 497 P.2d 970 (1972).

Nor necessity of stockholders consent to sale of assets. — Where issue of consent of stockholders to sale of corporate assets was never raised, and no ruling invoked or evidence presented or requested thereon, although in argument between counsel on a motion to strike certain testimony, appellant's attorney stated that if the entire assets of corporation were sold, the consent of stockholders would have to be obtained, issue was not preserved for review. Southwest Motel Brokers, Inc. v. Alamo Hotels, Inc., 72 N.M. 227, 382 P.2d 707 (1963).

Nor sufficiency of evidence to support agency decision. — Whether agency decision was supported by substantial evidence could not be first raised on appeal. Musgrove v. Department of Health & Social Servs., 84 N.M. 89, 499 P.2d 1011 (Ct. App.), cert. denied, 84 N.M. 77, 499 P.2d 999 (1972).

Nor propriety in guardianship proceeding of reliance on agency investigation. — In guardianship proceeding, propriety of relying on an investigation by the department of public welfare (now replaced by human services department) could not be questioned for the first time on appeal. In re Caffo, 69 N.M. 320, 366 P.2d 848 (1961).

Nor right to personal judgment. — Where question of appellee's right to personal judgment against appellant, as distinguished from right to lien upon appellant's property, was never raised in trial court, appellant was precluded from raising question on appeal. English v. Branum, 31 N.M. 334, 245 P. 252 (1926).

Nor sufficiency of writ. — Where appellant did not raise the question as to whether the writ must advise the garnishee of consequences of its failure to answer before trial court, and no claim was made that question was jurisdictional, issue was not properly before supreme court. Conejos County Lumber Co. v. Citizens Sav. & Loan Ass'n, 80 N.M. 612, 459 P.2d 138 (1969).

Nor failure to enter interlocutory order. — Appellants could not raise contention that court should have entered interlocutory order for the first time on appeal. Van Orman v. Nelson, 78 N.M. 11, 427 P.2d 896 (1967).

Nor propriety of de novo review. — Where complaint that trial court was proceeding improperly in undertaking to try certain zoning issues de novo on review of decision of city commission was not made below, trial court's findings could not be attacked on appeal, and were facts upon which court would decide case. Krutzner Corp. v. City of Las Vegas, 81 N.M. 359, 467 P.2d 25 (1970).

Nor improper closing argument. — Where defendant did not invoke ruling of trial court on his objection to inclusion in plaintiff's closing argument of comments of doctor which were allegedly not in evidence, he could not complain thereof. Hale v. Furr's Inc., 85 N.M. 246, 511 P.2d 572 (Ct. App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973).

Nor order of dismissal. — Where city intended to claim error on the part of the trial court in entering the order of dismissal, it was the city's duty to clearly assert this claim and to present argument and authority in support thereof, and where the city failed to do so, neither the order of dismissal nor the cause in which the order was entered could be before the supreme court on appeal. Sangre De Cristo Dev. Corp. v. City of Santa Fe, 84 N.M. 343, 503 P.2d 323 (1972), cert. denied, 411 U.S. 938, 93 S. Ct. 1900, 36 L. Ed. 2d 400 (1973).

Nor refusal of motion not in record. — Claim that the trial court erred in refusing to grant the defendants' motion for new trial or in alternative for remittitur was not subject to review, since no refusal appeared of record. Selgado v. Commercial Whse. Co., 88 N.M. 579, 544 P.2d 719 (Ct. App. 1975).

C. RECORD ON APPEAL.

Duty to insure that record is made. — Litigant seeking review of a ruling of the trial court has the duty to see that a record is made of the proceedings he desires to have reviewed. Ikelman v. Ikelman, 82 N.M. 262, 479 P.2d 766 (1971).

Litigant desiring review of a ruling of the trial court has a duty to see that a record is made of the proceedings to be reviewed; otherwise the correctness of such ruling cannot be questioned. Barnett v. Cal M, Inc., 79 N.M. 553, 445 P.2d 974 (1968).

For appellate review to be meaningful there must be record of sufficient completeness to permit proper consideration of an appellant's claims; this does not require a complete verbatim transcript, however, and alternative methods may be employed. State v. Herrera, 84 N.M. 46, 499 P.2d 364 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355, 409 U.S. 1110, 93 S. Ct. 918, 34 L. Ed. 2d 692 (1973).

Appeals are limited to the record presented for review. State v. Buchanan, 78 N.M. 588, 435 P.2d 207 (1967); State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970); State v. Andrada, 82 N.M. 543, 484 P.2d 263 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754 (1971); State v. Herrera, 84 N.M. 46, 499 P.2d 364 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355, 409 U.S. 1110, 93 S. Ct. 918, 34 L. Ed. 2d 692 (1973); State v. Snow, 84 N.M. 399, 503 P.2d 1177 (Ct. App.), cert. denied, 84 N.M. 390, 503 P.2d 1168 (1972).

Appellate court will not assume facts that do not appear in the record. State v. Sandoval, 76 N.M. 570, 417 P.2d 56 (1966).

An appellate court will consider only the record and will not assume facts unsupported by the record. State v. Thayer, 80 N.M. 579, 458 P.2d 831 (Ct. App. 1969).

Where the record is ambiguous concerning a statement allegedly made to the jury by the assistant district attorney, and does not show that either the court or counsel agreed such a statement was made, the alleged remark is not supported by the record. The appellate court will not assume facts not so supported. State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct. App. 1967).

Court of appeals cannot speculate as to matters outside the record but is limited to a consideration of what appears in the record. State v. Henderson, 81 N.M. 270, 466 P.2d 116 (Ct. App. 1970).

Facts not of record not reviewed. — The facts which are necessary to present a question for review by the appellate court are those facts established by the record and any fact not before the court on appeal will not be reviewed. State v. Paul, 82 N.M. 619, 485 P.2d 375 (Ct. App.), cert. denied, 82 N.M. 601, 485 P.2d 357 (1971).

Even facts which can be judicially noticed. — Where a municipal ordinance is not included on the transcript, and the appellant does not suggest that the court should judicially notice the ordinance, probable cause for an arrest for a violation of the

ordinance will not be considered by the supreme court, even where the district court has taken judicial notice of the ordinance. City of Albuquerque v. Leatherman, 74 N.M. 780, 399 P.2d 108 (1965).

Findings which are not attacked are facts before the appellate court. State v. Hodnett, 79 N.M. 761, 449 P.2d 669 (Ct. App. 1968); State v. Jacoby, 82 N.M. 447, 483 P.2d 502 (Ct. App. 1971); State v. Woods, 85 N.M. 452, 513 P.2d 189 (Ct. App. 1973); State v. Carr, 85 N.M. 463, 513 P.2d 397 (Ct. App. 1973).

A finding which is not attacked is a fact before the appellate court, and where no attack is made on a finding it will not be reviewed. McCroskey v. State, 82 N.M. 49, 475 P.2d 49 (Ct. App. 1970).

Record on appeal is presumed accurate and is conclusive on the reviewing court. State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

Docketing statement. — The docketing statement no longer governs the issues that may be raised on a nonsummary calendar. State v. Salgado, 112 N.M. 537, 817 P.2d 730 (Ct. App. 1991).

On general calendar, the appellate court can consider any evidence in the record on appeal even if not noted in the docketing statement, and does not consider factual assertions in the docketing statement that are not supported by the record on appeal. State v. Salgado, 112 N.M. 537, 817 P.2d 730 (Ct. App. 1991).

Insofar as the docketing statement acts as a substitute for the record in presenting facts to the appellate court in proceedings on the summary calendar, that purpose of the docketing statement is superseded by the record on appeal once the case is on the general calendar. State v. Salgado, 112 N.M. 537, 817 P.2d 730 (Ct. App. 1991).

Defendant responsible for making proper record despite court's responsibility to limit prejudicial cross-examination. — The primary responsibility is on the trial court to determine when 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 the defendant, but the defendant is not relieved of his responsibility for making a proper record of claimed error he wishes reviewed on appeal. State v. Baca, 80 N.M. 488, 458 P.2d 92 (Ct. App. 1969).

Appellant must point out facts asserted, as appellate court will not search record. — The court will not search the record in an effort to try to determine what appellant has in mind. The duty is on the appellant to point out specifically the evidence which he claims is erroneously admitted and the court's rulings thereon. The appellate court will not search the record to find error upon which the trial court may be reversed. State v. Weber, 76 N.M. 636, 417 P.2d 444 (1966).

A claim that counsel was ineffective during the course of the trial because he registered only limited objections despite numerous leading questions asked by the state will be denied where the appellant fails to make reference in the transcript to a single leading question. An assertion of fact must be accompanied by reference to the transcript showing a finding or proof of it. Otherwise, the court may disregard the fact, as the court will not search the record to find error. 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).

Court cannot review possible errors that are not preserved in the record. State v. Elliott, 89 N.M. 756, 557 P.2d 1105 (1977).

The appellant's supplement to brief in chief by which he seeks to raise points which are outside the record cannot be considered by an appellate court because these points are outside the record. State v. Lujan, 79 N.M. 200, 441 P.2d 497 (1968).

Where there is nothing in the record on which to base an allegation, there is nothing for an appellate court to consider. State v. Colvin, 82 N.M. 287, 480 P.2d 401 (Ct. App. 1971).

Contentions not presented before trial court, as shown in record, not reviewable. — Where the record does not show that the defendant's present contention was presented to the trial court, it will not be considered on appeal. State v. Silver, 83 N.M. 1, 487 P.2d 910 (Ct. App. 1971).

And this includes assertion of denial of right to counsel. — Where the appellant urges that the imposition of a life sentence was improper because he did not have the assistance of counsel in one of the earlier felony convictions included in the habitual criminal charge, but this objection was not presented before the trial court and the record is wholly silent on the point, the supreme court will not speculate on whether there was a denial of the constitutional right to assistance of counsel, or a waiver of the right. State v. Sandoval, 76 N.M. 570, 417 P.2d 56 (1966).

Where the record is barren of any mention of a motion, and the matter in question was not called to the attention of the trial court nor ruled upon, then this matter may not be raised for the first time on appeal and is therefore not subject to review. State v. Cebada, 84 N.M. 306, 502 P.2d 409 (Ct. App. 1972).

And objections to instructions. — Where the appellant moves at the close of the state's case, as well as at the close of all testimony, and by a motion for a new trial after the verdict, to dismiss the charges because of a failure of proof to support a conviction of murder either in the first or second degree or of manslaughter, but where no objection to the jury being instructed on manslaughter along with the two degrees of murder is stated in the record, this constitutes a waiver of errors or defects in the instructions. State v. Lopez, 79 N.M. 282, 442 P.2d 594 (1968).

And argument as to improper remarks by prosecutor. — While remarks of the prosecutor concerning the defendant's failure to testify are clearly impermissible and in the absence of waiver would constitute reversible error, where the defendant objects to the prosecutor's remarks, but where, out of the hearing of the jury, the trial court indicates that the prosecutor's remarks have been invited by the defendant's argument, and for unexplained reasons the record fails to include the defendant's argument to the jury, the court of appeals cannot presume error; consequently, no reviewable question is presented. 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).

And claim of erroneous exclusion of evidence. — The record does not support a claim that the trial court acted arbitrarily and without adequate inquiry into the circumstances surrounding a violation of the notice of alibi rule by excluding the evidence in question, where it shows the parties were given an opportunity to present their contentions to the trial court, but such contentions were never raised. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Any trial ruling presumed correct. — Every presumption favors the correctness of any ruling or decision of the trial court, and a party alleging error must be able to point clearly to it. State v. Weber, 76 N.M. 636, 417 P.2d 444 (1966).

Abuse of discretion cannot be presumed but must be affirmatively established, because where the record is silent as to the reasons for a ruling, regularity and correctness are presumed. State v. Serrano, 76 N.M. 655, 417 P.2d 795 (1966).

And claims require support of record before reversal authorized. — There is no error in the trial court's denial of the defendant's motion to dismiss for failure to authorize state payment for a polygraph examination where the record does not support the defendant's claim of indigency at the time of the motion, the record does not show that any claim of critical evidence was ever raised prior to the appeal, there is nothing in the record supporting a claim of critical evidence at the time the motion was denied, the defendant calls alibi witnesses so that as regards an alibi defense the absence of a polygraph examination is not critical, and the defendant's motion seeking the polygraph examination makes no allegations of any kind concerning the requirements for admissibility. State v. Carrillo, 88 N.M. 236, 539 P.2d 626 (Ct. App. 1975).

Trial court's erroneous mannerisms cannot be shown by typewritten record. — Where the transcript is typewritten, it does not show any alleged erroneous mannerisms of the trial court, and the appellate court cannot determine either whether the trial court indulged in any such asserted mannerisms or whether counsel has made improper charges against the trial court. State v. Herrera, 90 N.M. 306, 563 P.2d 100 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

III. EXCEPTIONS TO PRESERVATION REQUIREMENT.

A. IN GENERAL.

Issue not raised in trial court considered only if it falls within statutory exception. — Issues not raised in the trial court nor the docketing statement may not be raised for the first time in the brief in chief and, if so raised, may only be considered if the issue falls within one of the statutory exceptions. State v. Aranda, 94 N.M. 784, 617 P.2d 173 (Ct. App. 1980).

Only jurisdictional questions could be raised for first time on appeal under Rule 20(1) of former Supreme Court Rules. Western Farm Bureau Mut. Ins. Co. v. Barela, 79 N.M. 149, 441 P.2d 47 (1968); Danz v. Kennon, 63 N.M. 274, 317 P.2d 321 (1957).

Constitutional issues. — Court of Appeals will not address constitutional issues if the issues were not raised in the district court, unless the issues involve matters of jurisdiction, fundamental error, or fundamental rights. State v. Druktenis, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

Question of preemption by federal law. — Although the issue is raised for the first time in the supreme court, whether or not state law is preempted by federal legislation in a particular area is an issue directed toward subject matter jurisdiction and therefore may be raised at any time in the course of the proceedings. Ashlock v. Sunwest Bank, 107 N.M. 100, 753 P.2d 346 (1988), overruled on other grounds, Gonzales v. Surgidev Corp., 120 N.M. 133, 899 P.2d 576 (1995).

Exceptions to former rule. — Notwithstanding former rule, the supreme court in the interests of justice, did not limit to jurisdictional questions those that could be first raised therein; questions which could be raised for the first time on appeal included jurisdictional issues, questions of a general public nature affecting the state at large, and matters affecting fundamental rights of a party. Candelaria v. Gutierrez, 30 N.M. 195, 230 P. 436 (1924). See also Mitchell v. Allison, 54 N.M. 56, 213 P.2d 231 (1949) (including inherently and fatally defective judgments among questions which may be first raised on appeal).

Three exceptions to general rule. — Although normally questions not objected to at a hearing may not be raised on review, there were three exceptions to former Rule 308, N.M.R. App. P. (Crim.) (see now this rule), being: that jurisdictional questions could be raised for the first time on appeal, that questions of a general public nature affecting the interest of the state at large could be determined by the court without having been raised in the trial court, and that the court could determine propositions not raised in the trial court where it was necessary to do so in order to protect the fundamental rights of the party. State v. Pacheco, 85 N.M. 778, 517 P.2d 1304 (Ct. App. 1973).

Although there is a general proscription against an appellate court considering matters not yet raised in the trial court, such matters may be considered if the question involves: (a) general public interest; (b) fundamental rights of a party; or (c) facts or circumstances occurring or arising, or first becoming known after the trial court lost jurisdiction. St. Vincent Hosp. v. Salazar, 95 N.M. 147, 619 P.2d 823 (1980).

Issues of public interest and fundamental rights. — The appellate court cannot accept jurisdiction merely because issues of general public interest and fundamental personal due process rights are at stake. The timely filing of a notice of appeal under Rule 12-201A is jurisdictional. State ex rel. Human Servs. Dep't v. Jasso, 107 N.M. 75, 752 P.2d 790 (Ct. App. 1987).

Failure to object not excused on ground that objection would have magnified error. — The defendant cannot excuse his failure to object to a claimed error on the ground that to have done so would have magnified the error in the minds of the jury. State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241, 404 U.S. 1015, 92 S. Ct. 688, 30 L. Ed. 662 (1972).

And closeness of case does not excuse lack of objection. — The assertion that the case is "close" and that the supreme court should review errors in the record notwithstanding the failure of counsel to save the question for review is without merit. State v. Gonzales, 77 N.M. 583, 425 P.2d 810 (1967).

Sufficiency of complaint. — Although defendant city never raised the question of the sufficiency of the complaint until filing of answer brief, such objection may always be raised. Valdez v. City of Las Vegas, 68 N.M. 304, 361 P.2d 613 (1961).

B. JURISDICTIONAL QUESTIONS.

1. GENERALLY.

Jurisdictional questions may be raised at any time. Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967), overruled on other grounds, Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 824 P.2d 1033 (1992).

Attack on subject-matter jurisdiction may be made at any time in the proceedings; it may be made for the first time upon appeal, or it may be made by a collateral attack in the same or other proceedings long after the judgment has been entered. Chavez v. County of Valencia, 86 N.M. 205, 521 P.2d 1154 (1974).

Failure to pass upon question of venue or jurisdiction in prior appeal is not in any sense controlling in later appeal. Allen v. McClellan, 77 N.M. 801, 427 P.2d 677 (1967), overruled in New Mexico Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

Court will notice, without exception or presentation, jurisdictional matters rendering a case inherently and fatally defective. Baca v. Perea, 25 N.M. 442, 184 P. 482 (1919).

Jurisdiction of the trial court may be raised on appeal, since that court could not act if it did not properly have jurisdiction. Perea v. Baca, 94 N.M. 624, 614 P.2d 541 (1980).

Jurisdictional issues may be raised sua sponte. — Where a jurisdictional issue is not raised by party to appeal, appellate court may nevertheless raise the issues sua

sponte. Masterman v. State Taxation & Revenue Dep't, 1998-NMCA-126, 125 N.M. 705, 964 P.2d 869.

Jurisdictional error may be raised for the first time on appeal. State v. Buhr, 82 N.M. 371, 482 P.2d 74 (Ct. App. 1971); State v. Doe, 95 N.M. 90, 619 P.2d 194 (Ct. App. 1980).

Jurisdictional or fundamental errors may be first raised on appeal. — Errors not raised in the trial court cannot be first raised on appeal unless the errors claimed are either jurisdictional or fundamental. State v. James, 76 N.M. 376, 415 P.2d 350 (1966); State v. Jaramillo, 85 N.M. 19, 508 P.2d 1316 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973); State v. Stevens, 96 N.M. 753, 635 P.2d 308 (Ct. App.), rev'd on other grounds, 96 N.M. 627, 633 P.2d 1225 (1981), cert. denied, 458 U.S. 1109, 102 S. Ct. 3489, 73 L. Ed. 2d 1371 (1982).

Errors neither jurisdictional nor fundamental cannot be raised for the first time on appeal. State v. Baca, 80 N.M. 488, 458 P.2d 92 (Ct. App. 1969); State v. Rodriquez, 81 N.M. 503, 469 P.2d 148 (1970); State v. Frazier, 85 N.M. 545, 514 P.2d 302 (Ct. App. 1973).

Jurisdiction can be questioned at any time. — Jurisdiction refers to the judicial power to hear and determine a criminal prosecution, whereas venue relates to and defines the particular county or territorial area within a state or district in which the prosecution is to be brought or tried. Venue does not affect the power of the court and can be waived, but a jurisdictional defect can never be waived because it goes to the very power of the court to entertain the action, and such a defect can be raised at any stage of the proceedings, even sua sponte by the appellate court. 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).

Lack of jurisdiction at any stage of proceedings is controlling consideration which must be resolved before going further, and an appellate court may raise the question of jurisdiction on its own motion. In re Kinscherff, 89 N.M. 669, 556 P.2d 355 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

To be raised on court's own motion. — Even if jurisdictional question was not raised by either party, an appellate court will and should, on its own motion, raise lack of jurisdiction where an order lacks finality due to an absence of the necessary determination and order of the trial court. Pacheco v. Pacheco, 82 N.M. 486, 484 P.2d 328 (1971); Aetna Cas. & Sur. Co. v. Miles, 80 N.M. 237, 453 P.2d 757 (1969).

Jurisdictional question of whether the appeal was timely filed must be determined whether it is called to court's attention or not. Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967).

Appellate court may raise the question of jurisdiction on its own motion. State v. McNeece, 82 N.M. 345, 481 P.2d 707 (Ct. App. 1971).

Burden of demonstrating want of jurisdiction rests upon the party asserting such want. State v. Reyes, 78 N.M. 527, 433 P.2d 506 (Ct. App. 1967).

2. QUESTIONS DEEMED JURISDICTIONAL.

Jurisdiction of oil conservation commission. — Question of oil conservation commission's jurisdiction to make order establishing separate production units would be determined by supreme court although raised therein for the first time. Sims v. Mechem, 72 N.M. 186, 382 P.2d 183 (1963).

Constitutionality of statute creating offense deemed jurisdictional. — Although the constitutionality of the statute creating the offense is raised for the first time on appeal, the question is jurisdictional and will be considered on review. State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct. App. 1969).

When the defendant asserts that a statute is unconstitutional, he questions the district court's power or authority to decide the particular matter presented; in such a case the question is jurisdictional and may be raised for the first time on appeal. State v. Aranda, 94 N.M. 784, 617 P.2d 173 (Ct. App. 1980).

The contention that the child abuse statute is unconstitutional, while not listed in the docketing statement, is one which may be raised for the first time in the appellate brief. State v. Fulton, 99 N.M. 348, 657 P.2d 1197 (Ct. App. 1983).

As is claim regarding constitutional right to jury. — The defendant has a constitutional right to a jury of 12. Because a fundamental right is involved, the issue of an alternative in the jury room is reviewable. State v. Coulter, 98 N.M. 768, 652 P.2d 1219 (Ct. App. 1982).

And failure to instruct on essential element of crime. — The refusal to give an instruction containing an essential element of the crime charged, in the absence of any other instructions covering that element, is jurisdictional, and jurisdictional questions can be raised for the first time on appeal. State v. Walsh, 81 N.M. 65, 463 P.2d 41 (Ct. App. 1969); State v. Jennings, 102 N.M. 89, 691 P.2d 882 (Ct. App. 1984).

Where counsel makes no objections to the instructions of the trial court, error, if any, must be jurisdictional to be reviewable, and the failure to instruct on an essential element of the crime is jurisdictional. State v. Bachicha, 84 N.M. 397, 503 P.2d 1175 (Ct. App. 1972); State v. Fuentes, 85 N.M. 274, 511 P.2d 760 (Ct. App.), cert. denied, 85 N.M. 265, 511 P.2d 751 (1973); State v. Montoya, 86 N.M. 155, 520 P.2d 1100 (Ct. App. 1974); State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

Except where the legislature clearly indicates a desire to eliminate the requirement of criminal intent, criminal statutes will be construed in the light of the common law and criminal intent will be required, and the failure to instruct on this required element will be considered jurisdictional. State v. Fuentes, 85 N.M. 274, 511 P.2d 760 (Ct. App.), cert. denied, 85 N.M. 265, 511 P.2d 751 (1973).

And failure to prove geographic location of crime. — The contention that the state has failed to prove jurisdiction over defendant in that the state has produced no evidence that at the time of the alleged offense the defendant was even in the state of New Mexico can sua sponte be raised for consideration because it is jurisdictional. 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); State v. Losolla, 84 N.M. 151, 500 P.2d 436 (Ct. App. 1972).

Conviction and sentence of defendant under inapplicable statute is a question of jurisdiction, since one aspect of jurisdiction is the power or authority to decide the particular matter presented. State v. McNeece, 82 N.M. 345, 481 P.2d 707 (Ct. App. 1971).

Imposition of illegal sentence is jurisdictional. — The state may challenge the legality of a sentence for the first time on appeal, because the trial court has no jurisdiction to impose an illegal sentence. State v. Bachicha, 111 N.M. 601, 808 P.2d 51 (Ct. App. 1991).

Both the state and defendants are allowed to challenge illegal sentences for the first time on appeal. State v. Shay, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. granted, 2005-NMCERT-002.

As is existence of statute creating offense. — See State v. Cutnose, 87 N.M. 300, 532 P.2d 889 (Ct. App. 1975), overruled on other grounds State v. McCormack, 100 N.M. 657, 674 P.2d 1117 (1984).

Question of failure of proof of offense charged is jurisdictional and may be raised for the first time on appeal. State v. Linam, 90 N.M. 729, 568 P.2d 255 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977), overruled on other grounds, State v. Ruffins, 109 N.M. 668, 789 P.2d 616 (1990); State v. Stein, 1999-NMCA-065, 127 N.M. 362, 981 P.2d 295.

3. QUESTIONS DEEMED NOT JURISDICTIONAL.

Alleged lack of probable cause for arrest is not jurisdictional question and cannot be raised for first time on appeal from a denial of post-conviction relief. State v. Lattin, 78 N.M. 49, 428 P.2d 23 (1967).

Neither is refusing to postpone proceedings to accord defendant opportunity to produce witness. — The contention on appeal that the trial court erred in refusing to

postpone the proceedings so as to accord the defendant an opportunity to produce a material witness is without merit where the defendant at no time requested a postponement during the trial, and such a question is not jurisdictional and therefore cannot be raised for the first time on appeal. State v. Milton, 80 N.M. 727, 460 P.2d 257 (Ct. App. 1969).

Alleged lack of opportunity for cross-examination is not jurisdictional and does not involve fundamental error, and it may not be raised for the first time on appeal. State v. Baca, 81 N.M. 686, 472 P.2d 651 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970); State v. Smith, 102 N.M. 350, 695 P.2d 834 (Ct. App. 1985), overruled on other grounds Gillespie v. State, 107 N.M. 455, 760 P.2d 147 (1988).

Neither is variance between indictment and proof. — A faulty allegation of fact in an indictment on the name and address of the party and place victimized is not jurisdictional as the error can be cured by the verdict of the jury. State v. Jaramillo, 85 N.M. 19, 508 P.2d 1316 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

Nor inconsistent instructions. — A claim that the instruction defining the crime involved was inconsistent with the specific charge does not amount to a claim of jurisdictional error. State v. Urban, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974).

Failure to instruct on definition or amplification of element of crime is not jurisdictional error. State v. Jennings, 102 N.M. 89, 691 P.2d 882 (Ct. App. 1984).

Challenge to legal correctness of manslaughter instruction not claim of jurisdictional error. — The defendant's challenge to the legal correctness of the uniform jury instruction on voluntary manslaughter (former UJI Crim. 2.20 (now see Rule 14-220 NMRA)) is not a claim of jurisdictional error and is not before the court on review when it is raised for the first time on appeal. State v. Scott, 90 N.M. 256, 561 P.2d 1349 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977), overruled on other grounds State v. Reynolds, 98 N.M. 529, 650 P.2d 813 (1982).

Nor is objection to erroneous instruction upon credibility. — Where an instruction upon credibility contains erroneous statements of law, it still satisfies the requirements of this rule, as this rule operates only when there is a complete failure to instruct upon a necessary issue; therefore, where the defendant makes no objection to such an instruction he will not be heard on appeal. State v. Cardona, 86 N.M. 373, 524 P.2d 989 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

C. GENERAL PUBLIC INTEREST.

Applicability of workers' compensation rule was of public interest. — Issue regarding the applicability of a workers' compensation rule could be considered for the first time on appeal, where it was in the public interest to alert workers' compensation division and the bar that new regulations would not apply to any case before the

regulations were filed with the state records center. Pineda v. Grande Drilling Corp., 111 N.M. 536, 807 P.2d 234 (Ct. App. 1991).

Disposition of mentally ill, delinquent children affects interests of state. — The question whether the children's court erred in committing mentally ill, delinquent children to the state boys' school and in ordering that psychiatric care be provided them at the school affects the interests of the state at large and is properly before the court of appeals, although not raised in the children's court. State v. Doe, 90 N.M. 572, 566 P.2d 121 (Ct. App. 1977).

But not ruling on objection to closing argument. — The trial court's ruling on an objection to closing argument by the district attorney does not present any issue of substantial public interest. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969).

D. FUNDAMENTAL ERROR.

1. GENERALLY.

Failure to comply with appellate rules does not prevent review of fundamental error. State v. Reynolds, 79 N.M. 195, 441 P.2d 235 (Ct. App. 1968).

The doctrine of fundamental error is not applicable merely to excuse a failure to make a timely objection during trial. State v. Jett, 111 N.M. 309, 805 P.2d 78 (1991).

Doctrine protects indisputably innocent or very questionably guilty. — The doctrine of fundamental error is to be resorted to in criminal cases only for the protection of those whose innocence appears indisputable, or is open to such question that it would shock the conscience to permit the conviction to stand. State v. Sanders, 54 N.M. 369, 225 P.2d 150 (1950); State v. Torres, 78 N.M. 597, 435 P.2d 216 (Ct. App. 1967); State v. Tapia, 79 N.M. 344, 443 P.2d 514 (Ct. App. 1968); State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (Ct. App.); State v. Rodriguez, 81 N.M. 503, 469 P.2d 148 (1970); State v. Luna, 92 N.M. 680, 594 P.2d 340 (Ct. App. 1979).

The doctrine of fundamental error is to be resorted to in criminal cases only if the innocence of the defendant appears indisputable or the question of his guilt being so doubtful that it would shock the conscience to permit his conviction to stand. State v. Gomez, 82 N.M. 333, 481 P.2d 412 (Ct. App. 1971).

Fundamental error applicable to issues raised by state. — The doctrine of fundamental error may be applicable to issues raised on appeal by the state. State v. Alingog, 116 N.M. 650, 866 P.2d 378 (Ct. App. 1993), rev'd on other grounds, 117 N.M. 756, 877 P.2d 562 (1994).

The doctrine of fundamental error is applicable only under exceptional circumstances and solely to prevent a miscarriage of justice, and applies only where the

defendant's guilt is open to such question as would shock the conscience if the conviction were permitted to stand. State v. Jett, 111 N.M. 309, 805 P.2d 78 (1991).

To be fundamental, error must deprive defendant of rights essential to defense. — The doctrine of fundamental error has its place in this jurisdiction. The errors complained of must be such as go to the foundation of the case, and which deprive the defendant of rights essential to his defense. Smith v. State, 79 N.M. 450, 444 P.2d 961 (1968).

Fundamental error will only be involved to prevent a plain miscarriage of justice where the defendant has been deprived of rights essential to the defense. State v. Jaramillo, 85 N.M. 19, 508 P.2d 1316 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

To be fundamental, error must deprive the defendant of rights essential to his defense. State v. Jett, 111 N.M. 309, 805 P.2d 78 (1991).

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 fundamental 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).

Fundamental error not equivalent to fundamental right. — There is a difference between a fundamental right and fundamental error. The theory of fundamental error is bottomed upon the innocence of the accused or a corruption of actual justice and such error cannot be waived. On the other hand, most rights, however fundamental, may be waived or lost by the accused. State v. Rogers, 80 N.M. 230, 453 P.2d 593 (Ct. App. 1969).

Fundamental error may be first raised on appeal. — Fundamental error is error which goes to the foundation of the case or which takes from a defendant a right essential to his defense. Where it appears and justice requires, the appellate court will consider it whether or not exceptions are taken in the court below or whether or not it is assigned as error on appeal. State v. Romero, 86 N.M. 244, 522 P.2d 579 (1974).

Paragraph B(2) of this rule allows the Court of Appeals to consider questions of fundamental error even if the issue was not preserved below. State v. Boergadine, 2005-NMCA-028, 137 N.M. 92, 107 P.3d 532, cert. denied, 2005-NMCERT-003.

But reviewing court's discretion applied guardedly and only where fundamental right invaded. — A reviewing court will exercise its discretion of fundamental error very guardedly, and only when some fundamental right has been invaded, but never in aid of strictly legal, technical or unsubstantial claims. State v. Lott, 73 N.M. 280, 387 P.2d 855 (1963); State v. Chacon, 80 N.M. 799, 461 P.2d 932 (Ct. App. 1969).

And doctrine cannot excuse failure to make proper objections. — The fundamental error rule is to be applied sparingly to prevent a miscarriage of justice; it is not to be applied to excuse a failure to make proper objections in the court below. State v. Tapia, 79 N.M. 344, 443 P.2d 514 (Ct. App. 1968).

Fundamental error determined on case by case basis. — Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which is essential to his defense, and no court could or ought to permit the defendant to waive this right; in determining whether fundamental error exists, each case must stand on its own. State v. Gillihan, 85 N.M. 514, 514 P.2d 33 (1973).

Showing on appeal fundamental nature of error helpful. — While preservation of error is not scrupulously required in situations where the fundamental rights of parties are involved, at least some showing on appeal of the suggested fundamental or jurisdictional nature of the error is helpful. Further, fundamental error will only be heard to prevent a plain miscarriage of justice where someone has been deprived of rights essential to a defense, or to protect those whose innocence appears indisputable, or open to such question that it would shock the conscience to permit the conviction to stand. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Supplemental brief allowed to show fundamental error disregarded absent showing of fundamental error. — Where no fundamental error is disclosed upon the examination of a supplemental brief, the leave for filing of which was granted on a representation of fundamental error, such a brief shall be disregarded. State v. Till, 78 N.M. 255, 430 P.2d 752 (1967), cert. denied, 390 U.S. 713, 88 S. Ct. 1426, 20 L. Ed. 2d 254 (1968).

Violation of fundamental right. — In replevin of automobile, where it was alleged and denied that defendant bought same knowing that plaintiff held title under conditional sale contract, and proof of knowledge was essential to recovery, judgment for plaintiff in the absence of such proof violated a fundamental right which the court would protect, even though question was first raised on appeal. Schaefer v. Whitson, 32 N.M. 481, 259 P. 618 (1927).

2. DOCTRINE FOUND APPLICABLE.

Failure to allow participation in parental rights hearing. — Failure to allow a parent to defend against the termination of her parental rights is fundamental error. State ex rel. Children, Youth & Families Dep't v. Steven R., 1999-NMCA-141, 128 N.M. 304, 992 P.2d 317.

Doctrine applicable where lack of evidence to support finding respondent committed delinquent act. — Where counsel at a delinquency trial adequately notifies the court of the lack of evidence to support any finding of the respondents having

committed the act alleged, although the point is not raised on appeal, the scope of review would consider it as a question involving the fundamental rights of a party. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Application of doctrine to murder charges. — The questions of whether a crime existed for attempted "depraved mind" murder and whether attempted second degree murder was proved, as applied to the facts of the case, could be raised for the first time on appeal by the court, although not raised below or on appeal by the parties involved; otherwise, fundamental error would go uncorrected. State v. Johnson, 103 N.M. 364, 707 P.2d 1174 (Ct. App. 1985).

Where exculpatory evidence, plus absence of evidence to support conviction, conviction set aside. — If there is a total absence of evidence to support a conviction, as well as evidence of an exculpatory nature, then an appellate court has the duty to see that substantial justice is done and to set aside the conviction. State v. Reynolds, 79 N.M. 195, 441 P.2d 235 (Ct. App. 1968); State v. Tapia, 79 N.M. 344, 443 P.2d 514 (Ct. App. 1968); State v. Luna, 92 N.M. 680, 594 P.2d 340 (Ct. App. 1979).

Fundamental error requires certainty in instruction defining crime. — The issue as to an erroneous instruction may be raised in the appellate court for the first time because fundamental error, or due process, requires that there be certainty applied to the definition of the crime. State v. Buhr, 82 N.M. 371, 482 P.2d 74 (Ct. App. 1971).

And where basis of verdict cannot be discerned, new trial awarded. — Where the court has no way of knowing, because of an erroneous instruction, whether a murder conviction is or is not on the basis of premeditated killing, there is fundamental error, and the defendant will be awarded a new trial. State v. Buhr, 82 N.M. 371, 482 P.2d 74 (Ct. App. 1971).

Claim that hearing is not fair and impartial falls within fundamental error exception. State v. Pacheco, 85 N.M. 778, 517 P.2d 1304 (Ct. App. 1973).

Prosecutor's reference to silence of defendant deemed plain error. — The district attorney's question concerning the defendant's silence is plain error because it is a comment on the defendant's silence, and as such can be first raised on appeal. State v. Lara, 88 N.M. 233, 539 P.2d 623 (Ct. App. 1975).

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 of the Rules of Evidence. Any reference to the defendant's silence by the state, if it lacks significant probative value, constitutes plain error and, as such, it would require reversal even if the defendant fails to timely object. However, where a witness refers to the defendant's silence, the defendant must object to this testimony in order to preserve the error (objecting to the testimony of the witness as being

inadmissible under either former Rule 402 or former Rule 403, N.M.R. Evid. (see now Rules 11-401 and 11-402)). State v. Baca, 89 N.M. 204, 549 P.2d 282 (1976).

Right to effective counsel always subject to review. — The right to effective counsel is a fundamental right subject to review regardless of adherence to procedural rules. State v. Luna, 92 N.M. 680, 594 P.2d 340 (Ct. App. 1979).

Failure to offer opportunity to withdraw plea. — District court's failure to offer defendant the opportunity to withdraw his plea after the court refused to accept the prosecutor's sentencing recommendation pursuant to a plea agreement between the state and defendant was fundamental error, requiring a remand to the court with instructions either (1) to resentence defendant in conformity with the plea agreement or (2) to permit defendant to withdraw his plea. State v. Bencomo, 109 N.M. 724, 790 P.2d 521 (Ct. App. 1990).

Failure to properly instruct jury. — The failure to instruct the jury on the essential elements of an offense constitutes fundamental error. Where fundamental error is involved, it is irrelevant that the defendant was responsible for the error by failing to object to an inadequate instruction or by objecting to an instruction which might have cured the defect in the charge to the jury. State v. Osborne, 111 N.M. 654, 808 P.2d 624 (1991).

Trial court's failure to provide the jury with an instruction that adequately defined the proper culpable mens rea for negligent child abuse was fundamental error. State v. Mascarenas, 2000-NMSC-017, 129 N.M. 230, 4 P.3d 1221.

3. DOCTRINE NOT FOUND APPLICABLE.

No fundamental error. — Where the state’s key witness made inconsistent statements in a deposition and at trial; defense counsel objected to the state’s direct examination of the witness about which version of the witness’s testimony was true on the grounds that the witness should be provided an attorney to advise him about his Fifth Amendment rights against self-incrimination; the state responded that it did not intend to prosecute the witness for perjury even if he had lied during his deposition and that the trial court could grant the witness immunity from future perjury prosecution; the trial court prevented defense counsel from inquiring into the possibility that the state had promised to grant the witness immunity in exchange for his testimony, but allowed defense counsel wide latitude in cross-examining the defendant on his inconsistent statements and any prior untrue statements he made under oath, the trial court’s limitation of defendant’s right of cross-examination of the witness, while error, was not fundamental error State v. Silva, 2008-NMSC-051, ____ N.M. ____, 192 P.3d 1192.

Failure of counsel to preserve error not fundamental error. — The failure of counsel to preserve error is not a grounds for exercise of the power to declare fundamental error. State v. Lott, 73 N.M. 280, 387 P.2d 855 (1963).

Use note instruction. — Absent an objection by defendant, failure to instruct on a definition contained in a Use Note did not elevate the definition to an essential element; failure to instruction on the definition was not fundamental error. State v. Barber, 2003-NMCA-053, 133 N.M. 540, 65 P.3d 1095.

Neither is lack of advice on legal effect of guilty plea. — The claim that the defendant has not been fully advised of the legal effect of his prior plea of guilty presents neither a jurisdictional claim nor fundamental error. Where no ruling on the point has been invoked in the sentencing court, none will be made on a motion to vacate sentence. State v. Brewer, 77 N.M. 763, 427 P.2d 272 (1967).

Doctrine cannot excuse failure to object to questions asked on voir dire. — The fundamental error rule does not apply to a situation where no objections are made to the questions asked on voir dire and no motion is made for a mistrial or a new trial on the ground asserted to be fundamental error, because the appellate court has always applied the rule sparingly, to prevent a miscarriage of justice, and not to excuse failure to make proper objections in the court below. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968).

Nor can it be applied to voluntary statement made after arrest. — Where a statement is obtained on the day of arrest and is voluntarily made without any inducement or threat, there is no basis for the application of the doctrine of fundamental error. State v. Olguin, 78 N.M. 661, 437 P.2d 122 (1968).

Loss of fundamental right of cross-examination not fundamental error. — If fundamental error exists it is not because of the loss of the fundamental right of cross-examination. Fundamental error is a doctrine resorted to in a criminal case only if the innocence of the defendant appears indisputable or the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand. State v. Rogers, 80 N.M. 230, 453 P.2d 593 (Ct. App. 1969).

Ineffective counsel must render trial farce to be considered fundamental error. — An appellant court is responsible to see that a person accused of a crime shall have a fair trial with a proper defense. The obligation on review, however, is to affirm a conviction unless the record reveals a very real possibility of a miscarriage of justice. Unless there is affirmative evidence that the trial was a sham, a farce or a mockery the court cannot say that defendant had ineffective counsel. State v. Chacon, 80 N.M. 799, 461 P.2d 932 (Ct. App. 1969).

Single criminal intent doctrine. — Court did not commit fundamental error by refusing to instruct jury that the state was required to prove that each instance of embezzlement charged was the result of a distinct criminal impulse; the single criminal intent doctrine no longer applies to embezzlement cases, in light of the 1995 amendments to the embezzlement statute. State v. Faubion, 1998-NMCA-095, 125 N.M. 670, 964 P.2d 834, cert. denied, 125 N.M. 322, 961 P.2d 167 (1998).

Substantial evidence to support verdict negatives resort to fundamental error. — If there is substantial evidence to support the verdict of the jury, the supreme court will not resort to fundamental error. State v. Rodriguez, 81 N.M. 503, 469 P.2d 148 (1970).

Prosecutor's improper comment on victim's "constitutional rights" not plain error. — New Mexico has no rule that would support the defendant's assertion that an allegedly improper comment of the prosecutor on the victim's "constitutional rights" can be raised for the first time on appeal on the basis that the comment was plain error. State v. Sanchez, 86 N.M. 713, 526 P.2d 1306 (Ct. App. 1974).

Contention that constitutional right to confront accusers denied found not reviewable. — See State v. Doe, 91 N.M. 92, 570 P.2d 923 (Ct. App. 1977).

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).

ARTICLE 3
General Provisions

12-301. Parties and substitution.

A. **Death of a party.** If a party dies after notice of appeal is filed or while a proceeding is otherwise pending, the personal representative of the deceased party may be substituted as a party on motion filed in the appellate court by the representative or by any party. The motion of a party shall be served upon the representative as provided in Rule 12-307 NMRA. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the appellate court directs. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. If a party entitled to appeal dies before notice of appeal, the notice may be filed by the party's personal representative or if none, by the party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the appellate court in accordance with this rule.

B. **Substitution for other causes.** If substitution of a party in the appellate court is necessary for any reason other than death, substitution shall be effected in accordance with the procedure provided in Paragraph A of this rule.

C. **Public officers; death or separation from office.**

(1) When a public officer is a party to an appeal or other proceeding in the appellate court in the officer's official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) A public officer who is a party to an appeal or other proceeding in the officer's official capacity may be described by official title rather than by name, unless the court otherwise directs.

[As amended, effective September 1, 1991.]

ANNOTATIONS

Cross references. — As to death of party after judgment and before review, see 39-3-19 NMSA 1978.

As to death of party pending review, see 39-3-20 NMSA 1978.

As to substitution of parties upon review, see 39-3-21 NMSA 1978.

The 1991 amendment, effective for cases filed in the supreme court and court of appeals on and after September 1, 1991, rewrote this rule.

Federal rules. — See Fed. R. App. P. Rule 43.

Right to add parties was contingent on appeal having been perfected, under former Supreme Court Rules. Home Fire & Marine Ins. Co. v. Pan Am. Petroleum Corp., 72 N.M. 163, 381 P.2d 675 (1963).

Time requirements under former rules. — Under former Supreme Court Rules, essential or necessary party to appeal could not be added after time allowed for appeal has expired. Brown v. New Mexico State Bd. of Educ., 83 N.M. 99, 488 P.2d 734 (1971); Miller v. Oskins, 33 N.M. 109, 263 P. 764 (1927).

There was no time limit under statute or Rule 8 of former Supreme Court Rules on the right to make application to add parties, though unseemly delay or prejudice to the opposite party would be factors of great weight in looking with disfavor on such an application. Ferguson-Steere Motor Co. v. SCC, 59 N.M. 220, 282 P.2d 705 (1955).

Indispensable parties. — On appeal of state corporation commission (now public regulation commission) order authorizing trucking operations, where mandate of a judgment would operate directly upon commission and injunctive features would run

directly to commission and personnel, commission and personnel were indispensable parties. Ferguson-Steere Motor Co. v. SCC, 59 N.M. 220, 282 P.2d 705 (1955).

Addition of party previously barred by untimely filing. — Although a notice of appeal by the state engineer was filed within the time provided in 72-7-3 NMSA 1978, it was not filed within the time provided by the Rules of Appellate Procedure. The appeal was therefor untimely and the court was without jurisdiction to hear it. However, having jurisdiction of an appeal filed by other parties, and there being no prejudice to the parties, the state engineer's motion to be added as a party appellant was granted. Ensenada Land & Water Ass'n v. Sleeper, 107 N.M. 494, 760 P.2d 787 (Ct. App. 1988).

Persons not parties below. — Under Rule 8 of former Supreme Court Rules, supreme court would deny motion by persons not parties below to intervene or be made parties to appeal, but would consider brief which they tendered as amicus curiae brief. Drink, Inc. v. Babcock, 77 N.M. 277, 421 P.2d 798 (1966).

Appellants added. — On appeal from directed verdict in favor of owner-petroleum corporation and welding contractor in action brought by insurer alleging negligence resulting in loss of drilling rig and equipment by fire, insureds (drilling companies) would be added as appellants on motion of appellant (insurer) made when appellees (owner and contractor) questioned right to appeal, there being an identity of interest between insurer and insureds. Home Fire & Marine Ins. Co. v. Pan Am. Petroleum Corp., 72 N.M. 163, 381 P.2d 675 (1963).

Counsel substituted for deceased defendant. — Defendant's death while his appeal was pending did not require abatement of the criminal proceedings to their inception; rather, the court could permit the appeal to move forward and appoint defense counsel of record as defendant's substitute for the remainder of the proceeding. State v. Salazar, 1997-NMSC-044, 123 N.M. 778, 945 P.2d 996 overruling State v. Doak, 89 N.M. 532, 554 P.2d 993 (Ct. App. 1976).

Substitution of worker's estate for worker's compensation claimant. — Worker's estate is entitled to be substituted for the worker for the purpose of prosecuting an appeal as it relates to benefits incurred before death. Estate of Mitchum v. Triple S Trucking, 113 N.M. 85, 823 P.2d 327 (Ct. App. 1991).

Rule permits appellate court to allow proceedings to continue on their merits following the death of a party. Henry v. Daniel, 2004-NMCA-016, 135 N.M. 261, 87 P.3d 541, cert. denied, 2004-NMCERT-002.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 279 et seq.

4 C.J.S. Appeal and Error § 232 et seq.

12-302. Appearance, withdrawal or substitution of attorneys.

A. **Signatures.** The original of each brief, motion or other paper filed shall bear the signature of at least one of the counsel filing it, or if a party is proceeding pro se, the signature of the party. A "signature" means an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law.

B. **Appearance.** An attorney or firm shown as participating in the filing of any brief, motion or other paper shall, unless otherwise indicated, be deemed to have appeared in the cause. If an attorney's appearance is limited pursuant to Paragraph C of Rule 16-102 NMRA, the limitation shall be specified on the cover page and in the signature block of each paper filed by the attorney pursuant to the limited appearance and the cover page and signature block of the paper shall include an address at which service may be made on the client.

C. **Withdrawal.** No attorney or firm that has appeared without limitation in a cause may withdraw from it without written consent of the appellate court, filed with the appellate court clerk. Such consent may be conditioned upon substitution of other counsel or the filing by the attorney's client of an address at which service may be made on the client or otherwise conditioned by the appellate court. Proof of service by the withdrawing attorney shall be made on all other parties. Attorneys whose appearances are limited as set forth in Paragraph B of this rule need not obtain consent of the appellate court before withdrawing or otherwise ceasing to act in the matter, except if the purpose of the limited representation is not completed.

D. **Notice.** Notice of withdrawal or substitution of counsel shall be given to all parties either by withdrawing counsel or by substituted counsel and proof of service filed with the appellate court clerk. If an attorney ceases to act in a cause for a reason other than withdrawal with consent, upon motion of any party, the appellate court may require the taking of such steps as it may be advised to insure that the cause will proceed with promptness and dispatch.

E. **Nonadmitted counsel in civil cases.**

(1) Counsel not admitted to practice law in New Mexico, but who are admitted to practice law and in good standing in another state or territory, may, upon compliance with Rule 24-106 NMRA sign briefs, motions and other papers, and may orally argue before the appellate court, only in association with counsel admitted to practice law and in good standing in New Mexico. New Mexico counsel shall sign the first paper filed in the appellate court, and New Mexico counsel's name and address shall appear on all subsequent papers filed. Unless excused by the appellate court, New Mexico counsel shall also be present in person in all proceedings.

(2) Nonadmitted counsel shall state by affidavit that they are admitted to practice law and are in good standing to practice law in another state or country and that they have complied with Rule 24-106 NMRA. Such affidavit shall be filed with the first paper filed in the appellate court, or as soon as practicable after a party decides on

representation by nonadmitted counsel. Such an affidavit need not be filed if nonadmitted counsel has already filed an affidavit in compliance with Rule 24-106 NMRA in a lower court. Upon filing of the affidavit, nonadmitted counsel will be deemed admitted subject to the other terms and conditions of this subsection. Proof of service of the affidavit shall be made as provided in Rule 12-307 NMRA. A separate motion and order are not required for the participation of nonadmitted counsel.

(3) For good cause shown, the appellate court may revoke the privilege granted herein of any nonadmitted counsel to appear in any proceeding.

(4) New Mexico residents not admitted to practice law in this state may not appear as counsel, except pro se.

F. **Nonadmitted counsel in criminal cases.**

(1) Counsel not admitted to practice law in New Mexico, but who are admitted to practice law and in good standing in another state or territory, may, upon compliance with Rule 5-108 NMRA sign briefs, motions and other papers, and may orally argue before the appellate court, only in association with counsel admitted to practice law and in good standing in New Mexico. New Mexico counsel shall sign the first paper filed in the appellate court, and New Mexico counsel's name and address shall appear on all subsequent papers filed. Unless excused by the appellate court, New Mexico counsel shall also be present in person in all proceedings.

(2) Nonadmitted counsel shall state by affidavit that they are admitted to practice law and are in good standing to practice law in another state or country and that they have complied with Rule 5-108 NMRA. Such affidavit shall be filed with the first paper filed in the appellate court, or as soon as practicable after a party decides on representation by nonadmitted counsel. Upon filing of the affidavit, nonadmitted counsel will be deemed admitted subject to the other terms and conditions of this subsection. Proof of service of the affidavit shall be made as provided in Rule 12-307 NMRA. A separate motion and order are not required for the participation of nonadmitted counsel, unless nonadmitted counsel has not previously complied with Rule 5-108 NMRA.

(3) For good cause shown, the appellate court may revoke the privilege granted herein of any nonadmitted counsel to appear in any proceeding.

(4) New Mexico residents not admitted to practice law in this state may not appear as counsel, except pro.

[As amended, effective September 1, 1993; January 1, 1997; May 1, 2003; January 20, 2005; as amended by Supreme Court Order 05-8300-18, effective October 11, 2005; by Supreme Court Order 07-8300-24, effective November 1, 2007; by Supreme Court Order 08-8300-016, effective June 20, 2008.]

Committee commentary. — New Mexico has enacted an Electronic Authentication Documentation Act which provides for the Secretary of State to register electronic signatures using the public key technology. See Section 14-15-4 NMSA 1978.

ANNOTATIONS

Cross references. — As to method for changing attorney, see 36-2-14 NMSA 1978.

As to death or removal of attorney, see 36-2-15 NMSA 1978.

The 1993 amendment, effective September 1, 1993, substituted "which" for "who" in the first sentence and "the client" for "him" in the second sentence in Paragraph C; and substituted "the nonresident counsel" for "him or them" in Paragraph E.

The 1997 amendment, effective January 1, 1997, added the last sentence in Paragraph A defining "signature".

The 2003 amendment, effective May 1, 2003, in Paragraph E, substituted Subparagraphs (1), (2) and (3) for the former first sentence concerning nonresident counsel and redesignated the former second sentence as Subparagraph (4).

The 2004 amendment, effective January 20, 2005, substituted “an attorney or firm” for “counsel or firms” in the first sentence and added the second sentence of Paragraph B, and, in Paragraph E, inserted “upon compliance with Rule 24-106 NMRA” in the first sentence of Subparagraph (1) and substituted “country and that they have complied with Rule 24-106 NMRA” for “territory” in the first sentence of Subparagraph (2).

The 2005 amendment, approved by Supreme Court Order 05-8300-18, effective October 11, 2005, amended Paragraph B to change "counsel or firms" to "an attorney or firm" and to add the second sentence relating to limited appearances and amended Subparagraphs (1) and (2) to add the reference to Rule 21-106 NMRA.

The 2007 amendment, approved by Supreme Court Order 07-8300-24, effective November 1, 2007, add a new Paragraph F relating to nonadmitted counsel in criminal cases.

The 2008 amendment, approved by Supreme Court Order 08-8300-016, effective June 20, 2008, added the last sentence in Subsection C, which permits an attorney who has entered a limited appearance to withdraw without the consent of the appellate court if the purpose of the limited appearance has been completed and limited the application of the remainder of the provisions of Subsection C to the withdrawal of attorneys who have appeared without limitation.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 173 et seq.

4 C.J.S. Appeal and Error §§ 283 et seq., 393, 394.

12-303. Appointment of counsel.

A. **Criminal, delinquency and need of supervision cases.** Unless appellate counsel has been retained to represent the respondent in a children's court delinquency or need of supervision proceeding or the defendant in a criminal case, prior to the filing of the notice of appeal, trial counsel shall obtain from the district judge and file in the district court an order appointing the appellate division of the public defender department as appellate counsel. In the event that the public defender appellate division is unable to represent the respondent or defendant on appeal, the district court shall appoint appellate counsel. Prior to entering an order the district court, in its discretion, may hold a hearing to determine the eligibility for appointed counsel.

B. **Termination of parental rights cases.** Unless appellate counsel has been retained to represent the respondent in a proceeding terminating parental rights, trial counsel shall be responsible for obtaining an order appointing appellate counsel. Prior to entering an order, the district court, in its discretion, may hold a hearing to determine the eligibility for appointed counsel.

C. **Appeal by state.** If the notice of appeal has been filed by the state, trial counsel for the respondent in a delinquency or need of supervision case or for the defendant in a criminal case, shall be responsible for representing the respondent or defendant on appeal unless, within five (5) days after service of the notice of appeal, trial counsel obtains and files in the district court the order appointing the appellate division of the public defender department.

D. **Filing and mailing of order.** If an order is entered by the district court appointing the appellate division of the public defender department or other counsel to represent on appeal a respondent in a delinquency or need of supervision case or a defendant in a criminal case, it shall be the responsibility of trial counsel to file the order with the district court clerk. The district court clerk shall promptly mail a copy of the order appointing the appellate division of the public defender department or other counsel as counsel for the appeal to the appellate court, appellate division of the office of the attorney general and the appellate division of the public defender department.

E. **Review by appellate court.** Within ten (10) days after entry of a district court order denying the appointment of counsel, the defendant in a criminal case, the respondent in a delinquency or need of supervision case or the respondent in a termination of parental rights case may file in the appellate court a motion to review the district court order. The motion shall be accompanied by the docket fee and by a copy of the motion filed in the district court and a copy of the order denying the motion. Review pursuant to this paragraph shall proceed in accordance with the procedure set forth in Paragraphs B and C of Rule 12-204 NMRA except that the public defender shall also be entitled to file a response.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Existence and extent of right of litigant in civil case, or of criminal defendant, to represent himself before state appellate courts, 24 A.L.R.4th 430.

12-304. Free process on appeal.

A. **Workers' compensation cases.** The provisions of the Workers' Compensation Act shall govern fees and other costs in workers' compensation cases.

B. **Criminal and children's court cases.**

(1) A defendant in a criminal case or a respondent in a children's court case who is represented by the public defender department may proceed on appeal without the payment of docket or other fees.

(2) A defendant in a criminal case, a respondent in a children's court case or any other person who has been determined to be entitled to free process in the trial court may proceed on appeal without a further determination of indigency except as provided in Rule 12-303 NMRA. A copy of the district court order determining indigency shall be filed in the Court of Appeals with the docketing statement and in the Supreme Court with the statement of the issues.

C. **Civil cases.** Rule 23-114 NMRA shall govern free process on appeal in civil cases.

D. **Appeals by the state.** The state, or a political subdivision of the state, may proceed on appeal without the payment of the docket fee.

[As amended, effective April 1, 1998; as amended by Supreme Court Order 07-8300-42, effective February 25, 2008.]

ANNOTATIONS

The 1998 amendment, effective for pleadings due on and after April 1, 1998, in Paragraph A, substituted "workers' " for "worker's" in two places and substituted "Workers' " for "Workmen's"; in Paragraph B, deleted "attached to and" following "shall be", inserted "in the Court of Appeals", and substituted "and in the Supreme Court with the statement of the issues" for "in lieu of payment of the docket fee or other fees".

The 2007 amendment, approved by Supreme Court Order 07-8300-42, effective February 25, 2008, added a new Subsection C, renumbered the former Subsection C as Subsection D and added "or a political subdivision of the state".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 407 et seq.; 21A Am. Jur. 2d Criminal Law §§ 804 et seq., 809, 810, 835.

Determination of indigency of accused entitling him to transcript or similar record for purposes of appeal, 66 A.L.R.3d 954.

4 C.J.S. Appeal and Error § 320 et seq.

12-305. Form of papers prepared by parties.

A. **Scope.** This rule applies to briefs, motions, applications, petitions and all other papers, except exhibits, prepared by parties or their counsel and filed in the appellate court.

B. **General requirements.** All papers shall be:

(1) clearly legible;

(2) typewritten or printed on good quality white paper, eight and one-half by eleven (8 1/2 x 11) inches in size, with left, right, top and bottom margins of one (1) inch;

(3) paginated with consecutive page numbers at the bottom;

(4) stapled at the upper left-hand corner; and

(5) signed in accordance with Paragraph A of Rule 12-302, with the signature block containing the name, address and telephone number of counsel filing the paper, or, if the party is not represented by counsel, the name, address and telephone number of the party filing the paper.

C. **Minimum size for type style or typeface.** Except for handwritten documents, all papers shall be typed or printed using either a proportionally-spaced or monospaced type style or typeface.

(1) A proportionally-spaced type style or typeface, such as Times New Roman, must include serifs and must be fourteen (14) point or larger. A proportionally-spaced type style or typeface varies the horizontal spacing of each character based on its relative shape.

(2) A monospaced type style or typeface, such as Courier, may not contain more than ten (10) characters per inch. A monospaced type style or typeface allots the same amount of horizontal space for each character, whatever the relative shape of the characters.

D. **Spacing.** All papers shall be double-spaced, except that information required by Paragraph E of this rule, cover page, table of contents, table of authorities, headings, subheadings, footnotes, quotations, signature blocks and addresses contained in a certificate of service may be single-spaced.

E. **Caption.** The front page of all papers shall show:

(1) the name of the appellate court;

(2) the parties to the appeal and their status below and on appeal, with the plaintiff, petitioner or party initiating the proceeding in the trial court or administrative body listed first (e.g., John Doe, Plaintiff-Appellee v. Richard Roe, Defendant-Appellant);

(3) the docket number in the appellate court if one has been assigned; and

(4) the title of the paper being filed.

F. **Cover page.** The front cover of a docketing statement, statement of the issues or brief shall also show:

(1) the county or administrative body in which the case was filed or tried, except for briefs filed in the Supreme Court pursuant to Rule 12-502 NMRA;

(2) the name of the trial judge or administrative officer, except for briefs filed in the Supreme Court pursuant to Rule 12-502 NMRA; and

(3) the name, mailing address and telephone number of counsel filing the document, or, if a party is not represented by counsel, the name, address and telephone number of the party.

G. **Captions in appeals under the Children's Code.** In appeals concerning children involved in litigation under the provisions of the Children's Code, the captioning shall conform to the following practice:

(1) in criminal appeals involving a child adjudicated as a delinquent offender under Article 2 of the Children's Code, the caption should identify the child by the child's first name and the first initial of the child's last name, and the status of the child on appeal should be listed as "Child-Appellant" or "Child-Appellee", as the case may be;

(2) in criminal appeals involving a child adjudicated as a serious youthful offender or youthful offender and sentenced as an adult under Article 2 of the Children's Code, the caption should identify the child by the child's full first and last name, and the status of the child on appeal should be listed as "Defendant-Appellant" or "Defendant-Appellee", as the case may be;

(3) in civil appeals involving a child who is the subject of an abuse and neglect proceeding or a termination of parental rights proceeding under Article 4 of the Children's Code, the caption should identify the child and the child's parents by their first names and the first initial of their last names, and should name any guardian ad litem;

(4) in all other appeals involving a child under the provisions of the Children's Code, the caption should identify the child, and the child's parents when necessary, by their first names and the first initial of their last names, and should name any guardian ad litem.

[As amended, effective July 1, 1990; August 1, 1992; September 1, 1995; April 1, 1998; June 15, 2000; as amended by Supreme Court Order 05-8300-18, effective October 11, 2005; by Supreme Court Order 07-8300-24, effective November 1, 2007.]

ANNOTATIONS

CommitteeCommentary for 2007 Amendments

In an effort to provide additional options for producing more readable documents, the 2007 amendments to this rule move the formatting requirements for transcripts and records proper to new Rule 12-305.1 NMRA and otherwise restate the formatting requirements for all other papers filed with the appellate courts. Of particular note are the new minimum type style or typeface requirements set forth in Paragraph C of this rule. For example, except for handwritten papers, all papers filed with the Court must now use a proportionally-spaced or monospaced type style or typeface.

A proportionally-spaced type style or typeface allots a different amount of space to each letter based on the particular size and shape of that letter. Proportional fonts use less space and, therefore, less paper to print. A commonly used proportionally-spaced type style is Times New Roman. A monospaced type style or typeface look like typewritten text because each letter uses the same amount of space on the page regardless of its size or shape. A commonly used monospaced type style is Courier.

If a proportionally-spaced type style or typeface is used, it must include serifs and it must be fourteen (14) point or larger. If a monospaced type style or typeface is used, it may not contain more than ten (10) characters per inch. If the practitioner is not sure whether a particular type style or typeface is proportionally-spaced or monospaced, the rule provides guidance by stating that Times New Roman is a proportionally-spaced type style and Courier is a monospaced type style. The selection of a particular proportionally-spaced or monospaced type style is a matter of personal preference, but the choice must comply with the requirements of Paragraph C of this rule. Moreover, the choice will determine the applicable minimum type-volume limitations for set forth in these rules if the practitioner chooses to exceed the traditional page limitations set forth in these rules. *See* Paragraph F(3) of Rule 12-213 NMRA and Paragraph D(3) of Rule 12-502 NMRA.

Cross references. — For the form of captions in the Children's Court, *see* Rule 10-107 NMRA.

For the captions in pleadings in adoption proceedings, *see* Sections 32A-5-7 and 32A-5-9 NMSA 1978.

The 1992 amendment, effective for cases filed in the supreme court and court of appeals on or after August 1, 1992, added "and, except for a cover page, shall be typed or printed using pica (10 pitch) type style or a twelve (12) point typeface" to the end of the first sentence in Paragraph B.

The 1995 amendment, effective September 1, 1995, in Paragraph C, inserted "docketing statement" in the introductory language, added the language beginning "and their status" at the end of Subparagraph (2), deleted former Subparagraph (3) relating to status of the parties and redesignated the remaining subparagraphs accordingly, and substituted "the docketing statement or brief" for "the brief if submitting a brief" in Subparagraph (6).

The 1998 amendment, effective for pleadings due on and after April 1, 1998, inserted "statement of the issues" following "docketing statement" in Paragraph C and Subparagraph C(6).

The 2000 amendment, effective June 15, 2000, in Paragraph B, changed the widths of the left, right, top and bottom margins to one inch.

The 2005 amendment, approved by Supreme Court Order 05-8300-18, effective October 11, 2005, added Paragraph D relating to captions in proceedings under the provisions of the Children's Code.

Appellate rules do not address footnotes. Murken v. Solv-Ex Corp., 2005-NMCA-137, 138 N.M. 653, 124 P.3d 1192.

Footnotes. — A brief violates the rules where the footnotes do not consist of permissible type size and are not double spaced, and because if the footnotes were placed in the text of the brief, it would undoubtedly exceed 35 pages. Murken v. Solv-Ex Corp., 2005-NMCA-137, 138 N.M. 653, 124 P.3d 1192.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 C.J.S. Appeal and Error §§ 506 et seq., 606.

12-305.1. Form of transcripts of proceedings and records proper.

A. **Preparation of transcripts of proceedings and records proper.** Copies of stenographic transcripts of proceedings shall be reproduced from the original transcript by any duplicating or copying process that produces a clear black image on white paper or shall be typed or printed on white paper. The format of transcripts of proceedings

shall comply with the provisions of Paragraphs B and C of this rule. Transcripts and records proper shall be bound and paginated with consecutive page numbers at the bottom.

B. **Cover page.** The front cover shall show:

(1) the name of the appellate court;

(2) the parties to the appeal and their status below and on appeal, with the plaintiff, petitioner or party initiating the proceeding in the trial court or administrative body listed first (e.g., John Doe, Plaintiff-Appellee v. Richard Roe, Defendant-Appellant);

(3) the county or administrative body in which the case was filed or tried;

(4) the name of the trial judge or administrative officer;

(5) the title of the paper being filed; and

(6) the name, mailing address and telephone number of all counsel or, if a party is not represented by counsel, the name, mailing address and telephone number of the party.

C. **Caption in appeals under the Children's Code.** In appeals concerning children involved in litigation under the provisions of the Children's Code, the captioning shall conform to the following practice:

(1) in criminal appeals involving a child adjudicated as a delinquent offender under Article 2 of the Children's Code, the caption should identify the child by the child's first name and the first initial of the child's last name, and the status of the child on appeal should be listed as "Child-Appellant" or "Child-Appellee", as the case may be;

(2) in criminal appeals involving a child adjudicated as a serious youthful offender or youthful offender and sentenced as an adult under Article 2 of the Children's Code, the caption should identify the child by the child's full first and last name, and the status of the child on appeal should be listed as "Defendant-Appellant" or "Defendant-Appellee", as the case may be;

(3) in civil appeals involving a child who is the subject of an abuse and neglect proceeding or a termination of parental rights proceeding under Article 4 of the Children's Code, the caption should identify the child and the child's parents by their first names and the first initial of their last names, and should name any guardian ad litem;

(4) in all other appeals involving a child under the provisions of the Children's Code, the caption should identify the child, and the child's parents when necessary, by

their first names and the first initial of their last names, and should name any guardian ad litem.

[Approved by Supreme Court Order 07-8300-24 effective November 1, 2007.]

12-306. Number of copies of papers.

A. **Scope of rule.** This rule governs the number of copies of briefs, motions and other papers to be filed in the appellate court unless otherwise provided by these rules or by the appellate court.

B. **Copy; definition.** As used in this rule, "copy" includes the original.

C. **Papers filed in the Supreme Court.** The following numbers of copies of papers shall be filed in the Supreme Court:

(1) notices of appeal in cases in which the notice of appeal is originally filed in the Supreme Court:	one (1);
(2) statement of the issues:	three (3);
(3) motions for extension of time or page limits and responses thereto:	one (1);
(4) briefs in chief, answer briefs and reply briefs:	seven (7);
(5) motions to amend papers and responses thereto:	one (1);
(6) motions for rehearing and briefs in support thereof and responses thereto:	six (6);
(7) petitions for writs of certiorari and responses thereto:	seven (7);
(8) all other motions, responses and briefs in support thereof or opposition thereto:	four (4);
(9) all other papers:	seven (7).

D. **Papers filed in the Court of Appeals.** One (1) copy of all motions, briefs and other papers shall be filed in the Court of Appeals, except for briefs in chief, answer briefs and reply briefs, when six (6) copies shall be filed.

[As amended, effective July 1, 1990; April 1, 1998; May 1, 2003; as amended by Supreme Court Order 06-8300-21, effective December 18, 2006; by Supreme Court Order 07-8300-24, effective November 1, 2007.]

ANNOTATIONS

The 1998 amendment, effective for pleadings due on and after April 1, 1998, substituted "statement of the issues" for "docketing statement" in Subparagraph C(2).

The 2003 amendment, effective May 1, 2003, inserted "and requests for oral argument" following "reply briefs" in Paragraph D.

The 2006 amendment, approved by Supreme Court Order 06-8300-21, effective December 18, 2006, deleted "and requests for oral argument" in Paragraph D.

The 2007 amendment, approved by Supreme Court Order 07-8300-24, effective November 1, 2007, revised Paragraph C to provide that the cover of the petition shall include the name, address and telephone number of counsel or the petitioner; added new Paragraph D; added new Paragraph E providing to a statement of compliance and relettered former Paragraphs D through J as Paragraphs F through L.

12-307. Filing and service.

A. **Filing.** The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court. "Filing" shall include filing a facsimile copy or filing an electronic copy as may be permitted pursuant to Rule 12-307.1 NMRA or Rule 12-307.2 NMRA. A filing made by facsimile or electronic means in compliance with Rule 12-307.1 NMRA or Rule 12-307.2 NMRA constitutes a written paper for the purpose of applying these rules. Filing by mail is not complete until actual receipt. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

B. **Service of all papers required.** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall be served by such party or person acting for the party on all other parties to the proceeding. Service shall be made at or before the time of filing the paper with the court.

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

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

(1) "delivery of a copy" means:

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

(b) sending a copy by facsimile or electronic transmission when permitted by Rule 12-307.1 NMRA or Rule 12-307.2 NMRA;

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

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

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

E. **Proof of service.** Except as provided in Rules 12-307.1 and 12-307.2 NMRA, proof of service shall be in the form of written acknowledgment of service by the person served, certificate of the clerk of the court or of the attorney making service, or affidavit of any other person. It shall state the manner and date of service, the names of the persons served and the addresses used for service. Such proof of service shall be filed with the papers or immediately after service is effected.

[As amended, effective July 1, 1990; August 1, 1992; September 1, 1995; April 1, 1998; June 15, 2000; October 11, 2005; as amended by Supreme Court Order 06-8300-21, effective December 18, 2006.]

ANNOTATIONS

Cross references. — For service and filing of pleadings in the district court, *see* Rule 1-005 NMRA.

The 1993 amendment, effective September 1, 1993, substituted "the party if the party" for "the party himself if he" in the second sentence of Paragraph B and in the first sentence of Paragraph C.

The 2006 amendment, approved by Supreme Court Order 06-8300-21, effective December 18, 2006, rewrote Paragraph A; deleted the second and third sentences of Paragraph B relating to service upon the attorney of record; added Paragraphs C and D; redesignated former Paragraph C as Paragraph E; and amended the new Paragraph E to add the exception at the beginning of the rule.

Federal rules. — See Fed. R. App. P. Rule 25.

For comparable federal rule, *see* Rule 25 of the Federal Rules of Appellate Procedure.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review §§ 325, 571 et seq.

Consequences of prosecution's failure to file timely brief in appeal by accused, 27 A.L.R.4th 213.

4 C.J.S. Appeal and Error § 1 et seq.

12-307.1. Filing and service by facsimile.

A. **Facsimile copies permitted to be filed.** Subject to the provisions of this rule, a party may file a facsimile copy of any paper by faxing a copy directly to the court or by faxing a copy to an intermediary agent who files it in person with the court. A facsimile copy of a paper has the same effect as any other filing for all procedural and statutory purposes. The filing of papers with the court by facsimile copy shall be made by faxing them to the clerk of the court at a number designated by the clerk. Each appellate court shall designate one or more telephone numbers to receive fax filings.

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

C. **Paper size and quality.** No facsimile copy shall be filed with the court unless it is on plain paper and substantially satisfies all of the requirements of Rule 12-305 of these rules.

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

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

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

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

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

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

G. **Service by facsimile.** Any document required to be served by Paragraph B of Rule 12-307 NMRA may be served on a party or attorney by facsimile transmission if the party or attorney has:

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

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

Service of a paper by facsimile is accomplished when the transmission is successfully completed.

H. **Proof of service by facsimile.** Proof of service by facsimile shall be in the form of written acknowledgment of service by the person served, certificate of the clerk of the court or of the attorney making service or affidavit of any other person. It shall state:

(1) that the paper was served by facsimile transmission; and

(2) the date of service and telephone numbers of the sending and receiving facsimile machines.

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

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

[Approved, effective January 1, 1997; as amended, January 1, 2000; as amended by Supreme Court Order 06-8300-21, effective December 18, 2006.]

ANNOTATIONS

Cross references. — For filing and service in the district court by facsimile, *see* Rule 1-005.1 NMRA.

For pleadings filed in the district court, *see* Paragraph A of Rule 1-007 NMRA.

The 1999 amendment, effective for cases filed on and after January 1, 2000, deleted Paragraph D(3) and redesignated Paragraph D(4) as present Paragraph D(3).

The 2006 amendment, approved by Supreme Court Order 06-8300-21, effective December 18, 2006, deleted "pleading" or "pleadings" in three places in Paragraph A; deleted the provision in Paragraph A for serving a fax copy of a paper on the judge; substituted "service" for "transmission" twice in Paragraph B; rewrote Paragraph D to delete service of "pleadings"; amended Paragraphs E and F to delete "pleadings or" in

three places; rewrote Paragraphs G and H; deleted "pleading or" in Paragraph I in two places; and added Paragraph J, relating to conformed copies.

12-307.2. Electronic service and filing of papers.

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

(1) "electronic transmission" means email or other transfer of data from computer to computer; and

(2) "document" includes the electronic representation of papers.

B. **Service by electronic transmission.** Any document required to be served by Paragraph B of Rule 12-307 may be served on a party or attorney by electronic transmission of the document if the party or attorney has:

listed an email address on a paper filed with the court in the action; or

agreed to be served with papers by email.

Electronic service is accomplished when the transmission of the paper is successfully completed. If within two (2) days after service by electronic transmission, a party served notifies the sender of the electronic transmission that the paper cannot be read, the paper shall be served by any other method authorized by Rule 12-307 designated by the party to be served.

C. **Service by electronic transmission by the court.** The court may serve any document by electronic transmission to an attorney or party pursuant to Paragraph B of this rule.

D. **Filing by electronic transmission.** Documents may be filed with the court by electronic transmission in accordance with this rule if:

(1) the Supreme Court has adopted technical specifications for electronic transmission; and

(2) the court in which documents are filed by electronic transmission has complied with the technical specification for electronic transmission adopted by the Supreme Court.

E. **Single transmission.** Whenever a rule requires multiple copies of a document to be filed only a single transmission is necessary.

F. **Time of filing.** For purposes of filing by electronic transmission, a "day" begins at 12:01 a.m. and ends at midnight. If electronic transmission of a document is received before midnight on the day preceding the next business day of the court it will be

considered filed on the immediately preceding business day of the court. For any questions of timeliness, the time and date registered by the court's computer will be determinative.

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

H. **Proof of service by electronic transmission.** Proof of service shall be in the form of written acknowledgment of service by the person served, certificate of the clerk of the court or of the attorney making service or affidavit of any other person. It shall state:

(1) the name of the person who sent the document;

(2) the date of service and email address of the sender and recipients; and

(3) a statement that the document was served by electronic transmission and that the transmission was successful.

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

[Approved, effective July 1, 1997; as amended by Supreme Court Order 06-8300-31, effective January 15, 2007.]

ANNOTATIONS

Cross references. — *See* Rule 12-302 NMRA for definition of a computer generated "signature".

See Rule 1-005.2 NMRA for service by electronic transmission in civil cases in the district court.

See Rule 5-103.2 NMRA for service by electronic transmission in criminal cases in the district court.

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

The 2006 amendment, approved by Supreme Court Order 06-8300-31, effective January 15, 2007, rewrote Paragraph B to delete the Supreme Court register of attorneys who have consented to be served by electronic transmission and to conform this rule with the January 3, 2005 amendment of Rule 1-005.2 NMRA, added "Service by" to the heading for Paragraph C and substituted "serve" for "send", "service" for "transmission" and "or party" for "registered" in that paragraph, inserted "with the court"

in the introductory language of Paragraph D, revised Paragraph D to require compliance with technical specifications approved by the Supreme Court instead of specifications approved by the district court in which the papers or pleadings are filed to permit electronic filing of pleadings and papers that must be accompanied by the filing of a fee, deleted former Paragraph F, which dealt with service by electronic transmission, and redesignated former Paragraphs G and H as present Paragraphs F and G, and revised former Paragraph I, relating to proof of service by electronic transmission, and added Paragraph I relating to conformed copies.

12-308. Computation of time.

A. **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's day, Martin Luther King, Jr.'s birthday, Memorial day, Independence day, Labor day, Columbus day, Veterans' day, Thanksgiving day, Christmas day and any other day designated as a state or judicial holiday.

B. **Additional time after service by mail.** Except as otherwise provided by these rules, whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon the party and the paper is served by mail, three (3) days shall be added to the prescribed period.

[As amended, effective September 1, 1991; September 1, 1993; January 1, 1997.]

ANNOTATIONS

Cross references. — As to computation of time under constitutional and statutory provisions, see 12-2-2G NMSA 1978.

For legal holidays, see 12-5-1 NMSA 1978 et seq.

For designation of legal holidays, see 12-5-2 NMSA 1978.

The 1991 amendment, effective for cases filed in the supreme court and court of appeals on and after September 1, 1991, in the last sentence in Paragraph A, substituted "legal holiday means any day designated as a legal public holiday in New Mexico pursuant to Section 12-5-2 NMSA 1978, as it may be amended or recompiled, or any day" for "legal holiday shall include any day".

The 1993 amendment, effective September 1, 1993, substituted "upon the party" for "upon him" in Paragraph B.

The 1997 amendment, effective January 1, 1997, in Paragraph A, inserted "or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk inaccessible" and substituted "one of the aforementioned days" for "a Saturday, Sunday or a legal holiday" in the second sentence, and substituted the last two sentences for "For purposes of this rule a legal holiday means any day designated as a legal or public holiday in New Mexico pursuant to Section 12-5-2 NMSA 1978, as it may be amended or recompiled, or any day during which the office of the clerk of the appropriate court is closed for any consecutive period of three (3) hours or more between 8:00 a.m. and 5:00 p.m.".

Federal rules. — See Fed. R. App. P. Rule 26.

Appeal from suppression order. — Paragraph A of this rule governs the computation of the ten-day period under 39-3-3B(2) NMSA 1978. State v. Fernandez, 1999-NMCA-128, 128 N.M. 111, 990 P.2d 224.

Legal holidays. — Although under 12-5-2 NMSA 1978, Good Friday is not listed as a designated legal holiday, former Rule 23(a), N.M.R. App. P. (Civ.) (see now Paragraph A of this rule) defined as a "legal holiday" for the purpose of the rules set forth for appellate civil procedure. Public Serv. Co. v. Catron, 98 N.M. 134, 646 P.2d 561 (1982).

Time for motion for rehearing runs from the date of the filing of the appellate court’s disposition, not its service on the parties. Mora v. Williams, 111 Fed. Appx. 537 (10th Cir. 2004).

Notice of cross-appeal timely. — Notice of cross-appeal filed on Monday following expiration on Saturday of period after service of notice of appeal was timely. Sierra Life Ins. Co. v. First Nat'l Life Ins. Co., 85 N.M. 409, 512 P.2d 1245 (1973).

Where plaintiff served his notice of appeal by mail on Friday, February 6, defendants' ten days in which to file their notice of cross-appeal did not end until Friday, February 20 and, because they had been served by mail, they still had an additional three days in which to file their notice of cross-appeal. A.D. Powers v. Miller, 1999-NMCA-080, 127 N.M. 496, 984 P.2d 177.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 513.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appellate review, 61 A.L.R.2d 482.

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

4 C.J.S. Appeal and Error § 1 et seq.

12-309. Motions.

A. **Use of motion.** Unless otherwise prescribed by these rules, all applications for an order or other relief shall be made by filing a motion.

B. **Content and filing.** Motions shall be filed, together with any supporting affidavits or other papers, with proof of service on all parties as provided in Rule 12-307. A motion shall state concisely and with particularity the relief sought and the ground on which it is based. If the docket fee has not already been paid, it must accompany the motion unless free process has been granted in which case the free process order shall accompany the motion.

C. **Opposition or concurrence.** Prior to filing a motion, the moving party shall attempt to ascertain whether the motion will be opposed by any other party. The motion shall recite whether, upon inquiry by counsel for the movant, any other party has expressed an intention to oppose or not oppose the motion or why the position of another party was not obtained after reasonable effort.

D. **Procedural motions.** Motions seeking extensions of time, leave to exceed the length of brief permitted by these rules and similar motions directed to the appellate court's discretion in procedural matters need not be accompanied by briefs. Such motions shall state with particularity the reasons for the request.

E. **Other motions.** Other motions may be accompanied by a separate brief. Adverse parties may file and serve a response within fifteen (15) days after service of movant's motion.

[As amended, effective October 1, 1995; January 1, 2000.]

ANNOTATIONS

The 1995 amendment, effective October 1, 1995, added Paragraph C and redesignated the remaining paragraphs accordingly.

The 1999 amendment, effective for cases filed on and after January 1, 2000, substituted "fifteen (15)" for "ten (10)" in the last sentence of Paragraph E.

Federal rules. — See Fed. R. App. P. Rule 27.

Requirements for motion to dismiss appeal, etc. — Motion to dismiss an appeal or writ of error, strike a bill of exceptions or otherwise dispose of any cause except upon its merits, based upon other than jurisdictional grounds, would not be granted except upon a showing of prejudice to the moving party, or that the ends of justice required the granting thereof, under former Supreme Court Rules. Barelas Community Ditch Corp. v. City of Albuquerque, 61 N.M. 222, 297 P.2d 1051 (1956).

Party filing motion for rehearing without supporting brief was not entitled to reconsideration as of right under former Supreme Court Rules. Dunne v. Petterman, 52 N.M. 284, 197 P.2d 618 (1948).

Reviewable questions on rehearing were limited to those presented by the points originally relied upon for reversal, matters authorized by supreme court rules and errors asserted in the motion for rehearing under former Supreme Court Rules. Sanchez v. Dale Bellamah Homes of N.M., Inc., 76 N.M. 526, 417 P.2d 25 (1966).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 C.J.S. Appeal and Error § 641 et seq.

12-310. Duties of clerks.

A. **Records.** The appellate court clerk shall make and keep a record of the papers filed and tendered for filing in such manner and form as the appellate court may, from time to time, direct.

B. **Copies.** Copies of filed documents may be furnished to counsel by the appellate court clerk upon payment of a reasonable charge for reproducing the same, the rate of charge to be fixed from time to time by the appellate court.

C. **Borrowed materials.** Unless otherwise ordered by the court, a party, an attorney of record or an agent of an attorney of record may borrow the record proper, transcript of proceedings or exhibits by signature upon a form promulgated by the appellate court clerk. These borrowed materials shall be returned at such time as may be designated by the clerk, not later than the date of submission of the cause to the court. Failure to return any borrowed materials on or before a date so designated may be punished as contempt.

D. **Opinions.** Immediately after an opinion is filed the appellate court clerk shall call one attorney of record for each party in the case to advise the attorney of the result and shall send each attorney one (1) copy of the opinion, without charge.

E. **Certiorari.** The supreme court clerk shall promptly advise one attorney of record for each party in the case of the action taken by the supreme court on any petition for a writ of certiorari.

[As amended, effective September 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed in the supreme court and court of appeals on and after September 1, 1991, rewrote Paragraphs B and C and redesignated former Paragraphs C and D as present Paragraphs D and E.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 484.

4 C.J.S. Appeal and Error §§ 290 et seq., 392, 520, 543.

12-311. Process.

Process of the supreme court shall be in the name of the chief justice of the supreme court. Process of the court of appeals shall be in the name of the chief judge of the court of appeals. It shall be in such form as may be prescribed by the appellate court and attested by the signature of the appellate court clerk and the seal of the court.

12-312. Failure to comply with rules.

A. **Appellant's failure to file.** If an appellant fails to file a docketing statement in the Court of Appeals, statement of the issues in the Supreme Court or a brief in chief as provided by these rules, such failure may be deemed sufficient grounds for dismissal of the appeal by the appellate court.

B. **Appellee's failure to file.** If an appellee fails to file an answer brief as provided by these rules, the cause may be submitted upon the brief of appellant, and appellee may not thereafter be heard, except by permission of the appellate court.

C. **Non-complying notice of appeal.** An appeal filed within the time limits provided in these rules shall not be dismissed for technical violations of Rule 12-202 which do not affect the substantive rights of the parties.

D. **Other sanctions.** For any failure to comply with these rules or any order of the court, the appellate court may, on motion by appellant or appellee or on its own initiative, take such action as it deems appropriate in addition to that set out in Paragraphs A and B of this rule, including but not limited to citation of counsel or a party for contempt, refusal to consider the offending party's contentions, assessment of fines, costs or attorney fees or, in extreme cases, dismissal or affirmance.

[As amended, effective April 1, 1998.]

ANNOTATIONS

The 1998 amendment, effective for pleadings due on and after April 1, 1998, inserted "in the Court of Appeals, statement of the issues in the Supreme Court" in Paragraph A.

Concession of issue. — The rule that an issue is conceded by failing to brief it or by failing to cite authorities applies to appellants and not appellees. Mannick v. Wakeland, 2005-NMCA-098, 138 N.M. 113, 117 P.3d 919, cert. granted, 2005-NMCERT-001.

Appellee does not have to file a brief. Mannick v. Wakeland, 2005-NMCA-098, 138 N.M. 113, 117 P.3d 919, cert. granted, 2005-NMCERT-001.

Rules construed liberally to allow determination on merits. — Former Rules 102 and 404, N.M.R. App. P. (Crim.) (see now this rule), were enforcement rules designed to give the courts sufficient power to insure that appellants complied with other procedural rules, and appeals could be dismissed for failure to follow appellate procedures that were outlined. However, the supreme court followed a policy of construing rules liberally, to the end that causes on appeal could be determined on the merits where it could be done without impeding or confusing the administration of justice or perpetrating injustice. Olguin v. State, 90 N.M. 303, 563 P.2d 97 (1977).

Court will not hesitate in imposing rule's sanctions. — The supreme court fully expected compliance with its rules of procedure in general and its specific orders in particular, and it would not hesitate to impose the sanctions provided for in former Rule 31, N.M.R. App. P. (Civ.) (see now this rule). United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

But appeal dismissed only in extreme case. — The determination of what constitutes an extreme case had to be made on a case-by-case basis and no party or counsel could assume that procedural rules could be disregarded without the possibility that his case would be dismissed; nevertheless, the court should have considered other sanctions against counsel or a party prior to applying the extreme sanction of dismissal, since former Rule 102, N.M.R. App. P. (Crim.), provided that only in extreme cases was the appeal to be dismissed. Olguin v. State, 90 N.M. 303, 563 P.2d 97 (1977).

Such as where indigent defendant takes no steps for preparation of transcript. — An appeal will be dismissed on a motion by the state for noncompliance with former Rule 208, N.M.R. App. P. (Crim.) (see now Rule 12-211 NMRA), when an indigent defendant does not respond to the motion or appear at a hearing to show cause why the appeal should not be dismissed, there is nothing showing that the defendant has sought an order for free process as ordered to meet the cost of production of the transcript process and no steps have been taken for the preparation of a transcript for use in the appeal. State v. Laran, 90 N.M. 295, 562 P.2d 1149 (Ct. App. 1977).

Or fails to include exhibits. — The supreme court will dismiss a party's substantial evidence issue when that party fails to incorporate in the record on appeal those exhibits which are germane to that issue. Luxton v. Luxton, 98 N.M. 276, 648 P.2d 315 (1982).

But not where accused not responsible for breach of rules. — The dismissal of an appeal for the failure to file a poverty affidavit prior to the expiration of an extension is an abuse of discretion where the reason for the delay appears to rest with the court reporter and nothing in the record indicates a lack of diligence on the part of the accused except for the fact that he has not requested an additional extension. State v. Reyes, 79 N.M. 632, 447 P.2d 512 (1968).

It is inconsistent for the court of appeals to impose the most severe sanction of dismissal against a criminal defendant for failing to file a docketing statement while failing to impose any sanction against heedless counsel upon whom the defendant relied, and the case will be remanded under these circumstances with instructions to allow the filing of the statement and to reinstate the matter for its determination upon the merits. Olguin v. State, 90 N.M. 303, 563 P.2d 97 (1977).

Failure to supply complete record. — When problems with an unintelligible or missing portion of a transcript are not timely called to the attention of the proper court under Rule 12-211C(4) and E NMRA, the appellate court may refuse to consider contentions relating to that portion of the transcript. State ex rel. Educ. Assmts. Sys. v. Cooperative Educ. Servs., 110 N.M. 331, 795 P.2d 1023 (Ct. App. 1990).

Filing notice of appeal with district court clerk jurisdictional. — An appellant who filed a notice of appeal with the clerk of the court of appeals rather than with the clerk of the district court did not comply with the place-of-filing requirement of Paragraph A of Rule 12-202 NMRA. Thus, the court was without jurisdiction to consider the appeal. Lowe v. Bloom, 110 N.M. 555, 798 P.2d 156 (1990) (overruling Martinez v. Wooten Construction Co., 109 N.M. 16, 780 P.2d 1163 (Ct. App. 1989) to the extent it holds otherwise).

Law reviews. — For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Appellate review of order denying extension of time for filing notice of appeal under Rule 4(a) of Federal Rules of Appellate Procedure, 39 A.L.R. Fed. 829.

Failure to appeal denial of double jeopardy claim within time limits of Rule 4, Federal Rules of Appellate Procedure, as precluding review of claim on appeal of conviction at retrial, 51 A.L.R. Fed. 770.

Lack of notice to contemnor at time of contemptuous conduct of possible criminal contempt sanctions as affecting prosecution for contempt in federal court, 76 A.L.R. Fed. 797.

12-313. Settlement conferences.

The appellate court may, by procedures adopted by it from time to time, hold settlement conferences to facilitate the settlement of cases pending on appeal.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Imposition of sanctions by federal courts for failure to engage in compromise and settlement negotiations, 104 A.L.R. Fed. 461.

ARTICLE 4 Disposition

12-401. Voluntary dismissal.

A. **Dismissal in district court.** If an appeal has not been docketed, the appeal may be dismissed by the district court upon motion of the appellant or by the parties upon the filing of a stipulation of the parties affected by the appeal. The district court clerk shall advise the appellate court in writing of the dismissal.

B. **Dismissal in appellate court.** Prior to entry of disposition, if all of the parties affected by an appeal or other proceedings shall sign and file with the appellate court clerk an agreement that the same be dismissed, an order of dismissal shall be entered and mandate or other process of the court shall issue immediately. An appeal or other proceeding may be dismissed by the appellate court after motion by the appellant or person instituting the proceeding, and upon such terms as are fixed by the appellate court or agreed upon by the affected parties.

C. **Notice of dismissal.** The appellate court clerk shall transmit a conformed copy of any dismissal entered under this rule to the district court, board, commission, administrative agency or official whose action was sought to be reviewed.

[As amended, effective July 1, 1990.]

ANNOTATIONS

Cross references. — As to dismissal of appeal by appellant, see 39-3-14 NMSA 1978.

Federal rules. — See Fed. R. App. P. Rule 42.

Attorney fees. — Appellate courts have authority to either make an allowance of attorney fees on appeal or to remand to the lower court for that purpose. Vinton Eppsco, Inc. v. Showe Homes, Inc., 97 N.M. 225, 638 P.2d 1070 (1981).

What constitutes a reasonable attorney fee is discretionary with the appellate courts. Vinton Eppsco, Inc. v. Showe Homes, Inc., 97 N.M. 225, 638 P.2d 1070 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 862 et seq.; 24 Am. Jur. 2d Dismissal §§ 1 to 3, 6 to 52.

Right of plaintiff to dismiss an action brought in behalf of himself and other persons, 8 A.L.R. 950, 91 A.L.R. 587.

Abandonment of appeal or right of appeal by commencement, or prosecution to judgment, of another action, 115 A.L.R. 121.

Appellate review at instance of plaintiff who has requested, induced, or consented to dismissal or nonsuit, 23 A.L.R.2d 664.

Jurisdiction to proceed with trial of criminal case pending appeal from order overruling demurrer, motion to quash, or similar motion for dismissal, 89 A.L.R.2d 1236.

Dismissal of appeals under Rule 42(b) of Federal Rules of Appellate Procedure, 42 A.L.R. Fed. 758.

5 C.J.S. Appeal and Error § 631 et seq.

12-402. Issuance and stay of mandate.

A. **Entry of disposition.** Writings evidencing disposition by the appellate court shall be filed with the appellate court clerk and such filing constitutes entry thereof.

B. **Supreme court.** Unless otherwise ordered, mandate shall not issue until expiration of fifteen (15) days after entry of disposition of the proceedings and, if timely motion for rehearing is filed, then upon disposition of such motion for rehearing.

C. **Court of appeals.** Mandate from the court of appeals shall not issue until the time has elapsed for seeking certiorari in the supreme court. If certiorari is sought, mandate shall not issue until final disposition of the application for the writ or, if the writ is granted, until final action on the cause by the supreme court. For good cause shown, the court of appeals may recall its mandate within ten (10) days of issuance thereof.

D. **Stipulated mandate.** Upon stipulation of the parties, mandate or other process may issue prior to the time or times above specified.

E. **Stay of mandate pending appeal or application for certiorari in the United States Supreme Court.** A stay or recall of the mandate pending appeal or application to the United States Supreme Court for a writ of certiorari may be granted upon motion. The stay shall not exceed sixty (60) days unless the period is extended for cause shown. If during the period of the stay there is filed with the appellate court clerk a notice from the clerk of the United States Supreme Court that the party who has obtained the stay has filed an appeal or a petition for the writ in that court, the stay shall continue until final disposition. Upon the filing of a copy of an order denying the petition

for writ of certiorari or dismissing the appeal, or a judgment affirming the decision of the court, the mandate shall issue immediately. If the petition for writ of certiorari seeks review of a decision of the court of appeals, and if the court of appeals has denied a stay or recall of mandate under this paragraph, the petitioner may obtain review of the court of appeals' action in the supreme court by filing a motion in the supreme court within ten (10) days of the court of appeals' denial.

ANNOTATIONS

Cross references. — For appeal as stay of execution, see 31-11-1 NMSA 1978.

For continuation of case from term to term, see 39-3-6 NMSA 1978.

Federal rules. — See Fed. R. App. P. Rule 41.

Effect of judgment on parties who do not appeal. — Where part of a judgment appealed from is so interwoven and connected with the remainder of the judgment; the appeal from a part of the judgment involves a consideration of the whole; and reversal is ordered, the district court does not abuse its discretion by extending the order of reversal to the entire judgment. In the Matter of the Estate of Duran, 2007-NMCA-068, 141 N.M. 793, 161 P.3d 290.

District court not required to give notice as condition precedent to commitment order. — With the issuance of mandate by the appellate court, the district court is directed to issue a commitment order. Accordingly, the district court is not required to give notice to the defendant, his attorney, or his bondsmen as a condition precedent to the issuance of the commitment order. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Jurisdiction of Supreme Court. — Upon mandate having been issued by the Supreme Court and action having been taken thereon in the district court, jurisdiction of the Supreme Court would have been at an end under former Supreme Court Rules. Woodson v. Lee, 74 N.M. 227, 392 P.2d 419 (1964).

Supreme Court opinion, not mandate, conclusive. — Upon remand, the district court was required to look to the opinion of the Supreme Court, not to the mandate, and, if there was any conflict in the Supreme Court's opinion and the mandate, the mandate had to give way to the court's opinion as the law of the case under former Supreme Court Rules. Wilson v. Employment Sec. Comm'n, 76 N.M. 652, 417 P.2d 455 (1966).

Denials of petitions for certiorari writs. — The extension of finality for mandate issuance under Paragraph B of this rule does not apply to denials of petitions for writs of certiorari by the New Mexico Supreme Court. Mora v. Williams, 111 Fed. Appx. 537 (10th Cir. 2004).

Time of final disposition. — Under former Supreme Court Rules, a civil case was considered to be finally disposed of and the mandate issued when time for filing a motion for rehearing had expired without a motion having been filed or if a motion had been filed, when the same was denied. Bobrick v. State, 83 N.M. 657, 495 P.2d 1104 (Ct. App. 1972).

Under former Supreme Court Rules, a civil case was considered to be finally disposed of and the mandate issued when time for filing a motion for rehearing had expired without a motion being filed or if a motion had been filed, when the same was denied. If a new opinion had been filed after motion for rehearing, 20 days were allowed to elapse before mandate was issued, unless an order was entered directing otherwise. Woodson v. Lee, 74 N.M. 227, 392 P.2d 419 (1964).

Legal question on subsequent appeal. — If an appellate court had considered and passed upon a question of law and remanded the case for further proceedings, the legal question so resolved would not be determined in a different manner on a subsequent appeal under former Supreme Court Rules. Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co., 83 N.M. 558, 494 P.2d 971 (1972).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 591 et seq.

Reversal of judgment as affecting another judgment based on the reversed judgment and rendered pending the appeal, 81 A.L.R. 712.

Power of appellate court to reconsider its decision after mandate has issued, 84 A.L.R. 579.

Reversal upon appeal by, or grant of new trial to, one coparty defendant against whom judgment was rendered, as affecting judgment in favor of other coparty defendants, 166 A.L.R. 563.

Stay or supersedeas on appellate review in mandamus, 88 A.L.R.2d 420.

5B C.J.S. Appeal and Error §§ 1835 to 2003.

12-403. Costs and attorney fees.

A. **Recovery.** In all proceedings in the appellate court the party prevailing shall recover the party's costs unless otherwise provided by law, by these rules, or unless the court shall otherwise determine. Costs may be apportioned by the appellate court in such manner as it may direct.

B. **Allowable costs.** Allowable costs shall include:

(1) docket fee or other fees paid in the appellate court;

(2) costs of preparing the record proper and the transcript of proceedings;

(3) reasonable attorney fees for services rendered on appeal in causes where the award of attorney fees is permitted by law, if requested in the briefs or by motion filed within ten (10) days of entry of disposition;

(4) damages pursuant to NMSA 1978 § 39-3-27, if it is determined that the appeal is frivolous, not in good faith, or merely for purposes of delay, if requested in the briefs or by motion filed within ten (10) days of entry of disposition; and

(5) such other costs as the appellate court may deem proper.

C. **Taxation of costs.** Unless there is objection, or it is otherwise ordered, the appellate court clerk shall tax costs in accordance with records of the appellate court clerk's office and the certificates of the district court clerk and court reporter.

[As amended, effective September 1, 1993.]

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — As to fixing of taxable costs by rules of procedure, see 39-3-11 NMSA 1978.

As to recovery of costs in civil actions, see 39-3-30 NMSA 1978.

The 1993 amendment, effective September 1, 1993, substituted "the party's costs" for "his costs" in Paragraph A.

Duty to assess costs. — Assessment of costs on appeal is for appellate court, and not for the trial court. Davis v. Severson, 71 N.M. 480, 379 P.2d 774 (1963).

Awarding of appellate costs generally supported. — While this rule places discretion in the appellate court to withhold or apportion costs, it generally supports the notion of awarding appellate costs. Dennison v. Marlowe, 108 N.M. 524, 775 P.2d 726 (1989).

Clerk of supreme court had authority under former rules to tax costs allowed in judgment although certification of costs by district clerk was not included in transcript of record. Warder v. Shufeldt, 41 N.M. 507, 71 P.2d 653 (1937).

Cost of preparation of a taxpayer's hearing before commissioner of revenue (now replaced by director of revenue division of taxation and revenue department) could not properly be taxed to the bureau (revenue division) where taxpayer successfully appealed decision; since former Rule 27, N.M.R. App. P. (Civ.) (see now this rule) was not applicable to appeals from decisions of tax commissioner (director of revenue division), which involve a situation "otherwise covered," by 7-1-25B NMSA 1978. New Mexico Bureau of Revenue v. Western Elec. Co., 89 N.M. 468, 553 P.2d 1275 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 909 et seq.

Award of costs by appellate court as affected by subsequent proceedings or course of the action in the lower court, 116 A.L.R. 1152.

Award of damages for dilatory tactics in prosecuting appeal in state court, 91 A.L.R.3d 661.

Award of damages or costs under 28 USCS § 1912 or Rule 38 of Federal Rules of Appellate Procedure, against appellant who brings frivolous appeal, 67 A.L.R. Fed. 319.

Award of costs in appellate proceedings in federal court under Rule 39 of Federal Rules of Appellate Procedure, 68 A.L.R. Fed. 494.

II. RECOVERY.

Costs may be recovered against state. — The legislature, in this section, gives express authority, without exception, to the recovery of costs against any losing party, including the state. Kirby v. New Mexico State Hwy. Dep't, 97 N.M. 692, 643 P.2d 256 (Ct. App. 1982).

But criminal defendant cannot recover costs against state under this rule when an appeal results in a reversal. State v. Hudson, 2003-NMCA-139, 134 N.M. 564, 81 P.3d 501.

Prevailing party recovers. — When appellee is prevailing party he may recover costs. Atma v. Munoz, 48 N.M. 114, 146 P.2d 631 (1944).

Costs on reversal of directed verdict. — Upon reversal of directed verdict for defendant and remand for trial by jury, costs of appeal would be assessed against defendant pursuant to whose motion for directed verdict, error in proceedings had arisen. Sanchez v. Gomez, 57 N.M. 383, 259 P.2d 346 (1953).

Recovery of costs paid pursuant to bond. — Insurer which had issued appeal bond, for appeal from small claims court to district court, where appeal had been dismissed and costs adjudicated, could recover clerk-reporter fees from insured, after it paid same

when insured refused to do so. Royal Indem. Co. v. Bottone, 66 N.M. 155, 343 P.2d 1042 (1959).

Cost when no "prevailing" party. — Where each party in a case involving a removal order from the state corporation commission (now public regulation commission) to the supreme court had prevailed on certain issues and thus there was no single "prevailing party," it was nevertheless deemed to be unfair and unreasonable to shift the cost of an already prepared record to the party which had enjoyed the greatest success on removal. Southern Pac. Transp. Co. v. Corporation Comm'n, 105 N.M. 145, 730 P.2d 448 (1986).

Where there are portions of each judgment that are affirmed and portions that are reversed, such that there is no clear "prevailing party" in these situations, the court has authority to mandate that each party should bear its own costs on appeal. Mannick v. Wakeland, 2005-NMCA-098, 138 N.M. 113, 117 P.3d 919, cert. granted, 2005-NMCERT-001.

III. ALLOWABLE COSTS.

Garnishee held to be "prevailing party." — Garnishee, which defeated garnishor's claim that garnishee violated a legal duty to stop payment on checks sent to payee, was "prevailing party" entitled to attorney's fees and costs at the trial and appellate levels. Central Sec. & Alarm Co. v. Mehler, 1998-NMCA-096, 125 N.M. 438, 963 P.2d 515, cert. denied, 125 N.M. 322, 961 P.2d 167 (1998).

Garnishment proceedings. — Garnishee who prevailed on motion for summary judgment as to its liability for outstanding checks from garnishee to judgment debtor was a "prevailing party" within the meaning of this section, and was entitled to an award of costs and attorney's fees from garnishor, as well as costs and attorney's fees on appeal. Central Sec. & Alarm Co. v. Mehler, 1998-NMCA-096, 125 N.M. 438, 963 P.2d 515, cert. denied, 125 N.M. 322, 961 P.2d 167 (1998).

Transcript costs. — On appeal following judgment in quiet title suit and denial of motion to set aside stipulation, appellant's contention that she should be reimbursed portion of cost of record included in transcript on grounds that it was unnecessarily requested by appellee was without merit, as material complained of provided background to show there was a dispute which trial court could have decided if case had gone to trial and part of material complained of was used in appellant's rebuttal argument. Marrujo v. Chavez, 77 N.M. 595, 426 P.2d 199 (1967).

Defendants had right to seek inclusion in transcript of all proceedings casting light on extent of negligence and weight attributed to same by trial court, where plaintiff desired testimony of only two witnesses and was attempting to show that court applied erroneous measure of negligence, and under former Supreme Court Rules trial court did not err in assessing costs of transcript of record against plaintiff. Davis v. Severson, 71 N.M. 480, 379 P.2d 774 (1963).

Award of attorney fees on appeal requires statutory authority. Alber v. Nolle, 98 N.M. 100, 645 P.2d 456 (Ct. App. 1982).

Failure to request attorney fees by motion. — Where a party is entitled to attorney fees as a matter of law, the district court must award the fees even when the prevailing party fails to request those fees by formal motion to the Supreme Court. Aguilera v. Palm Harbor Homes, Inc., 2004-NMCA-120, 136 N.M. 422, 99 P.3d 672, cert. denied, 2004-NMCERT-010.

Attorney's fees not awarded. — Fact that the plaintiff's appeal as presented lacked merit did not mean that it was taken or pursued in bad faith or for the purposes of delay and harassment, and the supreme court would not award defendant attorneys' fees for the appeal under Rule 17(3) of former Supreme Court Rules, which authorized award of damages for appeals taken merely for delay. Perez v. Gallegos, 87 N.M. 161, 530 P.2d 1155 (1974).

The appellate court will not award attorney fees where an appeal raises substantial questions concerning a decision of the personnel board. State ex rel. New Mexico State Hwy. Dep't v. Silva, 98 N.M. 549, 650 P.2d 833 (Ct. App. 1982).

Attorney fees were properly not awarded pursuant to this rule, where the company cited no law for the proposition that attorney fees were recoverable as costs in a tort case. Dawley v. La Puerta Architectural Antiques, Inc., 2003-NMCA-029, 133 N.M. 389, 62 P.3d 1271.

Costs not awarded. — Where the parties' agreement to split costs meant that the allowable costs incurred by defendant related to its appeal on the merits, and the allowable costs incurred by plaintiffs related to their cross-appeal on other issues, plaintiffs did not incur allowable costs as an appellee in defendant's appeal and neither party was entitled to recover costs relating to plaintiffs' cross-appeal because the court ruled in favor of each party on one issue therein. New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-028, 127 N.M. 654, 986 P.2d 450.

Supreme Court may recall mandate to add attorneys' fees. — The New Mexico supreme court may, upon its own motion or upon motion of any of the parties, recall its mandate to correct or clarify its inadvertent failure to award attorneys' fees. Central Adjustment Bureau, Inc. v. Thevenet, 101 N.M. 612, 686 P.2d 954 (1984).

Unfair Practices Act. — This rule and 57-12-10 C NMSA 1978 are not mutually exclusive. Aguilera v. Palm Harbor Homes, Inc., 2004-NMCA-120, 136 N.M. 422, 99 P.3d 672, cert. denied, 2004-NMCERT-010.

Section 57-12-10 C NMSA 1978 allows the award of attorney fees in Unfair Practices Act cases, and this rule simply provides a procedure for requesting the appellate portion of those allowable fees. Aguilera v. Palm Harbor Homes, Inc., 2004-NMCA-120, 136 N.M. 422, 99 P.3d 672, cert. denied, 2004-NMCERT-010.

12-404. Rehearings.

A. **Motion; when filed.** A motion for rehearing may be filed within fifteen (15) days after filing of the appellate court's disposition, or any subsequent modification of its disposition, unless the time is shortened or enlarged by order. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits set by this rule. The motion shall state briefly and with particularity, but without argument, the points of law or fact which in the opinion of the movant the court has overlooked or misapprehended. If the motion is based upon a point of law or fact not raised, briefed or argued by any party but relied upon by the court in its disposition of the matter, the motion shall specifically so state, and shall be accompanied by a brief in support thereof. In all other cases the movant may, but is not required to, file a brief in support of the motion at the time it is filed. No response to a motion for rehearing shall be filed unless requested by the court. If a motion for rehearing is granted, the appellate court clerk shall give notice thereof and any party who has not filed a brief on rehearing may, within fifteen (15) days after notice, file a brief addressed to the issues on rehearing. There shall be no other briefs or argument unless the appellate court shall otherwise direct.

B. **How granted.** Rehearing in the Supreme Court may be granted upon the request of any three justices. Any justice or acting justice may participate in a rehearing or consideration of a motion for rehearing irrespective of whether the justice participated in the decision or was a member of the court at the time the decision was filed. Rehearing in the court of appeals may be granted at the request of any two judges who participated in the hearing or decision. If any judge of the court of appeals who participated in the hearing or decision is unable, for any reason, to participate in a rehearing or consideration of a motion for rehearing, the chief judge or acting chief judge shall designate another judge or acting judge of the court of appeals as a replacement, and the judge so designated shall have the same duties and authority as though the judge had participated in the hearing and concurred in the decision.

C. **Effect on decision or opinion; effect of failure to act.** The granting of a motion for rehearing shall have the effect of suspending the decision or opinion of the court until final determination by the appellate court. Any motion for rehearing not acted upon within thirty (30) days after it is filed shall be deemed denied unless otherwise ordered by the court. If a motion for rehearing is granted and no further order or disposition is made of it within thirty (30) days thereafter, or, if argument has been directed, then within thirty (30) days after argument, the relief sought by the motion shall be deemed denied unless otherwise ordered by the court.

[As amended, effective September 1, 1991; September 1, 1993; January 1, 1997.]

ANNOTATIONS

The 1991 amendment, effective for cases filed in the supreme court and court of appeals on and after September 1, 1991, inserted "who has not filed a brief on rehearing" in the next-to-last sentence in Paragraph A.

The 1993 amendment, effective September 1, 1993, in Paragraph B, substituted "whether the justice" for "whether he" in the second sentence, and substituted "the judge had" for "he had" near the end of the last sentence.

The 1997 amendment, effective January 1, 1997, substituted "fifteen (15) days" for "ten (10) days" in the fifth sentence in Paragraph A.

Federal rules. — See Fed. R. App. P. Rule 40.

Motion denied by operation of law. — There is no provision in this rule which provides that a motion for reconsideration or rehearing is deemed denied by operation of law if it is not acted upon by the district court within a certain time period. Paule v. Santa Fe County, 2005-NMSC-021, 138 N.M. 82, 117 P.3d 240.

Motion for rehearing. — Proposition which did not have for its basis fundamental error could not, as a matter of right, be raised on motion for rehearing under former Supreme Court Rules. Wilson v. Rowan Drilling Co., 55 N.M. 81, 227 P.2d 365 (1950).

Party filing motion for rehearing without supporting brief was not entitled to reconsideration as of right under former Supreme Court Rules. Dunne v. Petterman, 52 N.M. 284, 197 P.2d 618 (1948).

Motion for reconsideration of initial denial of rehearing motion. — A party's motion for reconsideration of the supreme court's initial denial of his motion for rehearing could properly be considered a motion filed after a subsequent modification of the court's original denial. Boudar v. E.G. & G., Inc., 106 N.M. 279, 742 P.2d 491 (1987).

Questions reviewed on rehearing. — On rehearing, only those questions were reviewed which were provided for by Rule 18 of former Supreme Court Rules and matters which could have been considered on original appeal but had not been raised could not be considered. Pitek v. McGuire, 51 N.M. 364, 184 P.2d 647 (1947).

Tolling period. — The 15-day period for filing a rehearing motion is recognized as a tolling period. Mora v. Williams, 111 Fed. Appx. 537 (10th Cir. 2004).

Denial of certiorari writ. — This rule, and its allotment of 15 days to move for rehearing, applies to denials of certiorari by the New Mexico Supreme Court. Mora v. Williams, 111 Fed. Appx. 537 (10th Cir. 2004).

New Mexico rules of appellate procedure do not preclude the filing of a motion for rehearing with its Supreme Court to reconsider the denial of a certiorari writ. Mora v. Williams, 111 Fed. Appx. 537 (10th Cir. 2004).

New points may not be presented in a petition for rehearing. State v. Curlee, 98 N.M. 576, 651 P.2d 111 (Ct. App. 1982).

Civil case was considered to be finally disposed of and mandate issued when time for filing motion for rehearing had expired without motion being filed or, if filed, if same was denied under former Supreme Court Rules. Woodson v. Lee, 74 N.M. 227, 392 P.2d 419 (1964).

Law reviews. — For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 878 et seq.

Effect of equal division of appellate court upon rehearing after reversal, 131 A.L.R. 1011.

5 C.J.S. Appeal and Error § 676 et seq.

12-405. Opinions.

A. **Necessity.** It is unnecessary for the appellate court to write formal opinions in every case. Disposition by order, decision or memorandum opinion does not mean that the case is considered unimportant. It does mean that no new points of law, making the decision of value as a precedent, are involved.

B. **Disposition by order, decision or memorandum opinion.** When the appellate court determines that one or more of the following circumstances exists and is dispositive of the case, it may dispose of the case by order, decision or memorandum opinion:

(1) The issues presented have been previously decided by the supreme court or court of appeals;

(2) The presence or absence of substantial evidence disposes of the issue;

(3) The issues are answered by statute or rules of court;

(4) The asserted error is not prejudicial to the complaining party;

(5) The issues presented are manifestly without merit.

C. **Publication of opinions.** All formal opinions shall be published in the New Mexico Reports. An order, decision or memorandum opinion, because it is unreported and not uniformly available to all parties, shall not be published nor shall it be cited as precedent in any court.

ANNOTATIONS

Non-published order not valid precedent. — Where the supreme court cited no authority for its order and did not state the principle upon which it relied, and the order was not intended for publication, under Paragraph C, it would not be used as precedent. 1987 Op. Att'y Gen. No. 87-41.

Unpublished opinions of this court have no precedential value and should not be cited as authoritative in briefs to this court. Coslett v. Third St. Grocery, 117 N.M. 727, 876 P.2d 656 (Ct. App. 1994).

While an unpublished opinion of the Court of Appeals is of no precedential value, it may be presented to the Court of Appeals for consideration if a party believes it persuasive. Gormley v. Coca-Cola Enter., 2004-NMCA-021, 135 N.M. 128, 85 P.3d 252, cert. granted, 2004-NMCERT-001.

Calendar notice not valid precedent. — It is inappropriate to cite a calendar notice as controlling authority; however, if counsel concludes that language in a memorandum opinion or calendar notice is persuasive, we see no reason why it cannot be presented to the court for consideration if the language is presented without reference to its source. State v. Gonzales, 110 N.M. 218, 794 P.2d 361 (Ct. App. 1990), aff'd, 111 N.M. 363, 805 P.2d 630 (1991).

Where no cause shown against summary affirmance, conviction summarily affirmed. — Where the parties are notified that the court of appeals proposes summary affirmance and the defendant submits a memorandum in opposition to summary affirmance but nothing in the memorandum shows cause why there should not be a summary affirmance, then the defendant's conviction is summarily affirmed. State v. Albertson, 89 N.M. 557, 555 P.2d 380 (Ct. App.), rev'd on other grounds, 89 N.M. 499, 554 P.2d 661 (1976).

Memorandum opinion does not deny a petitioner's constitutional right to appeal as guaranteed by N.M. Const., art. VI, § 2. Hudson v. State, 89 N.M. 759, 557 P.2d 1108 (1976), cert. denied, 431 U.S. 924, 97 S. Ct. 2198, 53 L. Ed. 2d 238 (1977).

Defendant not entitled to new trial where overwhelming evidence of guilt exists. — Where the evidence, exclusive of any improperly admitted exhibits, points so overwhelmingly to the guilt of the defendant of the crime of which he was convicted that there is no reasonable possibility that the admission into evidence of such improperly received exhibits contributed to his conviction, the defendant is not entitled to a new trial. State v. Gray, 79 N.M. 424, 444 P.2d 609 (Ct. App. 1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 973 et seq.; 20 Am. Jur. 2d Courts § 152.

Precedential effect of unpublished opinions, 105 A.L.R.5th 499.

5 C.J.S. Appeal and Error § 962 et seq.

12-406. Timely disposition of appeals.

A. **Timely disposition of appeal required.** The timely disposition of appeals is an essential requirement of justice.

B. **Submission to panel.** In any appeal or other case pending before the Supreme Court or Court of Appeals on a nonsummary calendar, the Court should render a decision or otherwise dispose of the case within six (6) months of the date the case is submitted to a panel for disposition. The clerk shall notify the parties at the time of submission that the case has been submitted.

C. **Tolling of time.** If after submission, supplemental briefing is ordered, if the case is referred for settlement or under any similar circumstances, the time for disposition shall be tolled.

[Approved, effective July 1, 1990; as amended by Supreme Court Order 05-8300-18, effective October 11, 2005.]

Committee commentary. — This rule was amended in 2005 to reflect lengthened briefing times and the actual time required by court procedures prior to submission of a case to a panel for decision and also to eliminate the burdensome record-keeping requirements in the former rule. The former rule had been adopted in 1990 and provided not only for timely disposition of appeals but also for periodic statements of reason why a case had not been disposed of in a period consistent with the rule.

The former rule indicated a decision should be filed within ten (10) months of the notice of appeal. Since the enactment of the former rule, Rule 12-210 NMRA has been amended to lengthen the parties' briefing times. In addition, it did not appear that the former rule considered the time required in the Court of Appeals to initially calendar or recalendar a case or the time required in both appellate courts to make satisfactory arrangements, copy and transmit the record proper, inspect the transcript for errors, and transmit the transcript to the appellate court. The time from notice of appeal to decision should include time for (1) filing the docketing statement (30 days - Rule 12-208 NMRA), (2) payment for and transmission of the record proper (14 days minimum - Rule 12-209(B) NMRA), (3) assignment to calendar (21 to 90 days or greater depending on recalendaring - Rule 12-210 NMRA), (4) designation, satisfactory arrangements, preparation of transcript, objection period, transmission to appellate court (15 + 15 + 60 + 15 + 7 = 112 days, assuming no cross-designations and no objections - Rule 12-211(C) NMRA), (5) briefing time (111 days - Rule 12-210(B) NMRA; Rule 12-308(B) NMRA) and (6) time for submission in the next month after briefing is completed (30 days), for a total of 319 days or more.

For both courts, the period of time between the initiation of a case and disposition often lengthens as a result of events outside the sole control of the courts. For this reason,

and in order to concentrate at present on the period of time within the sole control of the appellate courts, no aspirational goal is included for the period of time between the initiation of a case in one of the appellate courts and its disposition by that court. Nevertheless, the times allowed by the rules to prepare the record and transcript, calendar the case, and brief the issues is a measure of the length of delay to be expected after the initiation of a case and before its submission to a panel for decision.

The former rule required a decision within three months of submission. The respective courts are closer to an average of six (6) months as time from submission to disposition. The Supreme Court suggested the six-month time frame to the Committee in hopes that the enactment of this rule will encourage both appellate courts to decide most of their cases within six (6) months of submission. Thus, the period for a case to be decided after submission is aspirational.

ANNOTATIONS

The 2005 amendment, approved by Supreme Court Order 05-8300-18, effective October 11, 2005, designated the former Paragraph A except the first sentence as a new Paragraph B as amended to add "on a nonsummary calendar", change the time for disposition from ten to six months from the date the case is submitted to a panel and add the last sentence, deleted former Paragraphs B and C and added a new Paragraph C.

ARTICLE 5
Writs

12-501. Certiorari to the district court from denial of habeas corpus.

A. **Scope of rule.** This rule governs petitions for the issuance of writs of certiorari seeking review of denials of habeas corpus petitions by the district court pursuant to Rule 5-802 of the Rules of Criminal Procedure.

B. **Time.** Petitions for writs of certiorari shall be filed with the supreme court clerk within thirty (30) days of the district court's denial of the petition. The petition shall be accompanied by the docket fee or a free process order. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits set by this paragraph.

C. **Petition; contents.** The petition, not exceeding ten pages, shall have attached a copy of the petition for writ of habeas corpus and attachments filed in district court, the response, if any, and a copy of the district court's denial thereof, and shall contain:

(1) a description of the proceedings in district court relating to the petition, showing whether an evidentiary hearing was held in district court, and if so, a summary of the evidence presented therein;

(2) a direct and concise argument showing that the district court's decision was erroneous; and

(3) a prayer for relief.

D. **Briefs, records and transcripts.** In the event the writ of certiorari is issued, additional briefs, the record and transcripts may be filed only as directed by the appellate court.

E. **Failure to act.** Unless otherwise ordered by the supreme court, any petition for a writ of certiorari under this rule not acted upon by the court within thirty (30) days shall be deemed denied.

F. **Service.** Service of any paper shall be made and proof thereof accomplished in accordance with Rule 12-307 NMRA.

G. **Copies.** If the petition for writ of certiorari has been filed pro se by a petitioner adjudged indigent, only the original petition shall be filed. In all other cases, copies shall be filed in accordance with Rule 12-306 NMRA.

ANNOTATIONS

Defendant in custody in another jurisdiction. — A defendant is in "custody" for purposes of post-conviction relief under Rule 5-802 NMRA when the defendant is not physically restrained within the state of New Mexico, but is incarcerated in another state serving a sentence imposed by that state to be served concurrently or consecutively with the sentence imposed by the New Mexico court and is entitled to pursue post-conviction relief in New Mexico. Howard v. Martin, 111 N.M. 203, 803 P.2d 1108 (1991).

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

14 C.J.S. Certiorari § 1 et seq.

12-502. Certiorari to the Court of Appeals.

A. **Scope of rule.** This rule governs petitions for the issuance of writs of certiorari seeking review of decisions of the Court of Appeals and of actions of the Court of Appeals pursuant to Rule 12-505 NMRA of these rules.

B. **Time.** The petition for writ of certiorari shall be filed with the Supreme Court clerk within twenty (20) days after final action by the Court of Appeals and served immediately on respondent. The petition shall be accompanied by the docket fee or a free process order. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits set by this paragraph. Final action by the Court of Appeals shall be the filing of its decision with the Court of Appeals clerk unless timely

motion for rehearing is filed, in which event, final action shall be the disposition of the last motion for rehearing that was timely filed.

C. **Petition.**

(1) **Cover.** The cover of the petition shall show the names of the parties, with the plaintiff, petitioner or party initiating the proceeding in the trial court or administrative body listed first (e.g., State of New Mexico, Plaintiff-Respondent vs. John Doe, Defendant-Petitioner), and the name, mailing address and telephone number of counsel filing the petition, or, if a party is not represented by counsel, the name, mailing address and telephone number of the party.

(2) **Contents.** The petition shall contain a concise statement of the grounds on which the jurisdiction of the Supreme Court is invoked, showing:

(a) the date of entry of the decision and any order on motion for rehearing thereon;

(b) the questions presented for review (the Court will consider only the questions set forth in the petition);

(c) the facts material to the questions presented;

(d) the basis for granting the writ, specifying where applicable:

(i) any decision of the Supreme Court with which it is asserted the decision of the Court of Appeals is in conflict, and showing of such conflict, including a quotation from that part of the Court of Appeals decision, if any, and a quotation from the part of the Supreme Court decision showing the alleged conflict;

(ii) any decision of the Court of Appeals with which it is asserted the decision from which certiorari is sought is in conflict, and showing of such conflict, including a quotation from that part of the Court of Appeals decision, if any, and a quotation from that part of the prior Court of Appeals decision showing the alleged conflict;

(iii) what significant question of law under the Constitution of New Mexico or the United States is involved; or

(iv) the issue of substantial public interest that should be determined by the Supreme Court;

(e) a direct and concise argument amplifying the reasons relied upon for granting the writ, including specific references to the briefs filed in the Court of Appeals showing where the questions were presented to the Court of Appeals; and

(f) a prayer for relief, including whether the case should be remanded to the Court of Appeals for consideration of issues not raised in the petition if the relief requested is granted.

(3) **Attachments.** The petition shall have attached a copy of the decision of the Court of Appeals and, if decided on the summary calendar, a copy of any calendaring notices. If a motion for rehearing was filed, the motion and the order of the Court of Appeals on the motion shall be attached.

D. **Length limitations.** Except by permission of the Court, the petition shall comply with Rule 12-305 NMRA and the following length limitations:

(1) **Body of the petition defined.** The body of the petition consists of headings, footnotes, quotations and all other text except any cover page, table of contents, table of authorities, signature blocks and certificate of service.

(2) **Page limitation.** Unless the petition complies with Subparagraph (3) of Paragraph D of this rule, the body of the petition shall not exceed ten (10) pages; or

(3) **Type-volume limitation.** The body of the petition shall not exceed three thousand one hundred fifty (3,150) words, if the party uses a proportionally-spaced type style or typeface, such as Times New Roman, or three hundred forty-two (342) lines, if the party uses a monospaced type style or typeface, such as Courier.

E. **Statement of compliance.** If the body of the petition exceeds the page limitations of subparagraph (2) of Paragraph D of this rule, then the petition must contain a statement that it complies with the limitations of Subparagraph (3) of Paragraph D of this rule. If the petition is prepared using a proportionally-spaced type style or typeface, such as Times New Roman, the statement shall specify the number of words contained in the body of the petition as defined in Subparagraph (1) of Paragraph D of this rule. If the petition is prepared using a monospaced type style or typeface, such as Courier, the statement shall specify the number of lines contained in the body of the petition. If the word-count or line-count information is obtained from a word-processing program, the statement shall identify the program and version used.

F. **Conditional cross-petition.** Any party may, within fifteen (15) days of service of a petition for writ of certiorari, file a conditional cross-petition for writ of certiorari, to be considered only if the Court grants the petition. A conditional cross-petition shall be clearly identified as conditional on the cover. Material attached to the petition need not be attached again to a conditional cross-petition. A conditional cross-petition shall be governed by all other provisions of this rule, except as provided in this paragraph.

G. **Response.** A respondent may file a response to the petition within fifteen (15) days of service of the petition or within fifteen (15) days of the granting of the petition. The response shall comply with Paragraphs D and E of this rule. No other response may be submitted.

H. **Notice to Court of Appeals.** A copy of the petition for a writ of certiorari shall be delivered by the Supreme Court clerk to the Court of Appeals clerk who shall deliver the record of the cause to the Supreme Court on request, and recall any previously issued mandate.

I. **Briefs.** In the event the writ of certiorari is issued, additional briefs may be filed only as directed by the Supreme Court.

J. **Oral argument.** Oral argument shall not be allowed unless directed by the Supreme Court.

K. **Service.** Service of any paper shall be made and proof thereof accomplished in accordance with Rule 12-307 NMRA.

L. **Copies.** If the petition for writ of certiorari has been filed pro se by a petitioner adjudged indigent, only the original petition shall be filed. In all other cases, copies shall be filed in accordance with Rule 12-306 NMRA.

[As amended, effective July 1, 1990; August 1, 1992; October 1, 1995; January 1, 2000; November 1, 2003; as amended by Supreme Court Order 07-8300-24, effective November 1, 2007.]

ANNOTATIONS

Commentary for 2007 Amendments

In an effort to provide additional options for producing more readable documents, the 2007 amendments to this rule allow practitioners to exceed the traditional page limitations for a petition, conditional cross-petition or response if the pleading complies with the type-volume limitations set forth in the new Subparagraph (3) of Paragraph D of the rule. Specifically, petitions, conditional cross-petitions and responses that exceed the traditional ten (10) page limit may not contain more than three thousand one hundred fifty (3,150) words or three hundred forty-two (342) lines in the body of the petition, depending on whether a proportionally-spaced or monospaced type style or typeface is used. **See** Subparagraph (1) of Paragraph D for a definition of the body of the petition. If a proportionally-spaced type style or typeface is used, the word-count limit applies. If a monospaced type style or typeface is used, the line-count limit applies. In either case, a statement of compliance must be included as provided by Paragraph E of the rule to show that the pleading complies with the applicable type-volume limitation.

Cross references. — For certiorari review of administrative agency decisions, see Rule 12-505 NMRA.

For appeal of final decisions by agencies to district court, see 39-3-1.1 NMSA 1978.

For the definition and related discussion of proportionally-spaced type style or typeface, *see* Paragraph (C)(1) of Rule 12-305 NMRA and commentary.

For the definition and related discussion of monospaced type style or typeface, *see* Paragraph (C)(2) of Rule 12-305 NMRA and commentary.

The 1992 amendment, effective for cases filed in the supreme court and court of appeals on or after August 1, 1992, deleted "and memoranda in opposition" from the end of Paragraph C.

The 1995 amendment, effective October 1, 1995, added the second sentence in Paragraph C.

The 1999 amendment, effective for cases filed on and after January 1, 2000, near the end of Paragraph A, inserted "and of actions of the Court of Appeals pursuant to Rule 12-505 of these rules"; in the first sentence of Paragraph C, substituted "if" for "in cases", inserted "a copy of" following "summary calendar", and added the second sentence; in Paragraph F, deleted "forthwith" following "who shall", substituted "on request" for "clerk", and substituted "previously issued mandate" for "any mandate theretofore issued".

The 2003 amendment, effective November 1, 2003, deleted “of New Mexico” preceding “with” in Subparagraph (4)(a) of Paragraph C, inserted present Paragraph D, redesignated former Paragraph D as present Paragraph E and substituted “fifteen (15)” for “ten (10)” twice in the first sentence of that paragraph, and deleted former Paragraph E.

I. GENERAL CONSIDERATION.

Applicability of federal Telecommunications Act of 1996 and its compliance mandates on local governments is an issue of significant importance to justify the Supreme Court's review. Paule v. Santa Fe County, 2005-NMSC-021, 138 N.M. 82, 117 P.3d 240.

Significant question of constitutional law. — Where defendant alleged in his petition for a writ of certiorari that the state violated his rights as provided under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article II, Section 14 of the New Mexico Constitution, the state supreme court had jurisdiction to review defendant’s case by writ of certiorari because it involves a significant question of law under the constitution of New Mexico or the United States. State v. Urban, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1061.

Requirements for writ. — Certiorari generally is proper in two classes of cases: (1) whenever it is shown that the inferior court or tribunal has exceeded its jurisdiction; (2) whenever it is shown that the inferior court or tribunal has proceeded illegally, and no

appeal is allowed or other mode provided for reviewing its proceedings. Albuquerque Nat'l Bank v. Second Judicial Dist. Court, 77 N.M. 603, 426 P.2d 204 (1967).

Establishing propriety of writ. — Neither this rule nor 34-5-14 NMSA 1978 would require a defendant to establish the propriety of the writ of certiorari in his brief in chief. State v. Urban, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1061.

Court may only consider questions set forth in petition for certiorari. — In an appeal from a reversal of a summary judgment for the defendant in a defamation action, the supreme court could not review other allegedly defamatory statements by the defendant not set forth in the petition for certiorari in the absence of a cross-appeal or petition raising these issues. Fikes v. Furst, 2003-NMSC-033, 134 N.M. 602, 81 P.3d 545.

Remedy of certiorari was proper where district court had exceeded its jurisdiction by order forbidding disbursements from trust under writ of attachment which had been dissolved, even though beneficiary of trust was real party in interest and was not before the court. Albuquerque Nat'l Bank v. Second Judicial Dist. Court, 77 N.M. 603, 426 P.2d 204 (1967).

Need for legal precedent. — Where majority of the sitting panel of court of appeals affirmed district court, but were unable to agree upon any single basis for that action, and no precedent was created on important legal issues involved, supreme court would grant certiorari. Jim v. CIT Fin. Servs. Corp., 87 N.M. 362, 533 P.2d 751 (1975).

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

Existence of jurisdictional facts found by inferior tribunal as subject of inquiry on certiorari, 5 A.L.R.2d 675.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appellate review, 61 A.L.R.2d 482.

4 C.J.S. Appeal and Error § 550 et seq.

II. TIME.

Late filing fatal to petition. — When petition for writ of certiorari directed to court of appeals is filed later than the 20-day filing requirement, and absent some unusual circumstance justifying such late filing, it must be denied. Serna v. Board of County Comm'rs, 88 N.M. 282, 540 P.2d 212 (1975); Gulf Oil Corp. v. Rota-Cone Field Operating Co., 85 N.M. 636, 515 P.2d 640 (1973).

Late filing for certiorari not considered. — A petition for a writ of certiorari must be filed within 20 days after final action by the court of appeals, and where the defendant's

application is late, he is not entitled to consideration. State v. Weddle, 79 N.M. 252, 442 P.2d 210 (Ct. App. 1966), aff'd, 77 N.M. 417, 423 P.2d 609 (1967).

12-503. Writs of error.

A. **Scope.** This rule governs the procedure for issuance of a writ of error by the Supreme Court and Court of Appeals to the district court.

B. **Jurisdiction to issue.** As part of its appellate jurisdiction pursuant to Article 6, Section 29 of the Constitution of New Mexico, the Court of Appeals is granted authority to issue writs of error in those cases over which it would have appellate jurisdiction from a final judgment.

C. **Time.** A petition for writ of error shall be filed within thirty (30) days after the order sought to be reviewed is filed in the district court clerk's office. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to this time limit.

D. **Parties.** The first party to file a petition for writ of error, and any party joining in that petition, shall be designated an "appellant". Any opposing party, regardless of whether that party has also filed a petition, shall be designated an "appellee". The district court shall not be a party to the proceeding on a writ of error.

E. **Contents.** A party seeking a writ of error shall file a petition not exceeding fifteen (15) pages in length which shall contain:

(1) a concise statement of the nature of the case, a summary of the proceedings, the disposition below and the facts relevant to the petition;

(2) a concise statement of how the order sought to be reviewed:

(a) conclusively determines the disputed question;

(b) resolves an important issue completely separate from the merits of the action; and

(c) would be effectively unreviewable on appeal from a final judgment because the remedy by way of appeal would be inadequate;

(3) a copy of the order of the district court with the date of filing noted on its face and any other matters of record that will assist the appellate court in exercising its discretion.

F. **Filing.** The petition shall be filed in the court which would have appellate jurisdiction over a final judgment in the case along with the appellate docket fee or free process order.

G. **Service.** The party filing the petition shall serve a copy of it on all other parties to the proceeding and on the district court judge.

H. **Response.** Any party may file a response to a petition for writ of error within ten (10) days of service of the petition. The response shall be limited to fifteen (15) pages in length and shall be served on all other parties and on the district court judge.

I. **Proceedings upon issuance of writ.** The appellate court in its discretion may issue the writ. Upon issuance of the writ, the court shall assign the case to a calendar and the parties shall proceed in accordance with Rule 12-210 NMRA. The district court clerk shall transmit a copy of the record proper upon receipt of the notice of calendar assignment. Upon issuance of the writ a copy of the writ shall be served on all persons required to be served under Rule 12-202.

J. **Stay upon issuance of the writ.** Upon issuance of the writ, a party seeking a stay of the order which is the subject of the writ of error or a stay of proceedings pending appeal shall first seek such an order from the district court, and any party may thereafter seek appellate review of the district court's ruling pursuant to Rule 12-205, 12-206 or 12-207.

[As amended, effective December 1, 1993.]

ANNOTATIONS

Cross references. — As to writs of error, see 39-3-5 NMSA 1978.

The 1993 amendment, effective December 1, 1993, rewrote this rule.

Collateral orders. — The collateral order doctrine does not contemplate the granting of a writ of error unless the order conclusively determines a disputed issue that is entirely separate from the merits of the action. Williams v. Rio Rancho Public Schools, 2008-NMCA-150, ____ N.M. ____, ____ P.3d ____.

Collateral orders. — Collateral orders are reviewed under writ of error procedure. Collado v. N.M. Motor Vehicle Div., 2005-NMCA-056, 137 N.M. 442, 112 P.3d 303.

This rule means what it says. Pincheira v. Allstate Ins. Co., 2004-NMCA-030, 135 N.M. 220, 86 P.3d 645, cert. denied, 2004-NMCERT-003.

Paragraph C does not contain any provision extending time to appeal based upon the filing of a post-order motion seeking further review by the trial court. Pincheira v. Allstate Ins. Co., 2004-NMCA-030, 135 N.M. 220, 86 P.3d 645, cert. denied, 2004-NMCERT-003.

Time limit mandatory. — Where appeal had to be taken or a writ of error sued out within prescribed period under former Supreme Court Rules, the requirement was mandatory and jurisdictional. Breithaupt v. State, 57 N.M. 46, 253 P.2d 585 (1953).

Finality required. — There is no difference between the degree of finality of judgments, orders or decisions which may be reviewed by appeal and the degree of finality of judgments, orders or decisions which may be reviewed by error. Angel v. Widle, 86 N.M. 442, 525 P.2d 369 (1974).

Collateral orders. — Although this rule does not use the phrase “collateral order”, orders properly reviewable under this rule are referred to as collateral orders. King v. Allstate Ins. Co., 2004-NMCA-031, 135 N.M. 206, 86 P.3d 631, cert. denied, 2004-NMCERT-003.

Review of sovereign immunity determination. — As a general matter, the limited exception to the rule of finality known as the collateral order doctrine applies to district court determinations regarding governmental immunity under 37-1-23A NMSA 1978, and such determinations are subject to review by writ of error. Handmaker v. Henney, 1999-NMSC-043, 128 N.M. 328, 992 P.2d 879.

Remedies by appeal and writ of error cannot be prosecuted concurrently. Daily v. Foster, 17 N.M. 377, 128 P. 71 (1913).

Scope of review. — Scope of review under Rule 6 of former Supreme Court Rules, providing for writs of error, was co-extensive with the review under Rule 5 of former rules, relating to appeals. Milosevich v. Board of County Comm'rs, 46 N.M. 234, 126 P.2d 298 (1942).

Writ of error did not lie to review election contests under Rule 6 of former Supreme Court Rules. Hannett v. Mowrer, 32 N.M. 231, 255 P. 636 (1927).

Order not reviewable. — Order of district court declaring that the plaintiff was real party in interest, and denying the plea in abatement, was an interlocutory order not determinative of suit and was not reviewable on writ of error under former Supreme Court Rules. Albuquerque Gas & Elec. Co. v. Curtis, 43 N.M. 234, 89 P.2d 615 (1939).

Trial court's grant of a jury trial to a child in delinquency proceedings was not reviewable as a writ of error. In re Larry K., 1999-NMCA-078, 127 N.M. 461, 982 P.2d 1060.

An order granting or denying a motion for a protective order is not a collateral order and not subject to review by writ of error. King v. Allstate Ins. Co., 2004-NMCA-031, 135 N.M. 206, 86 P.3d 631, cert. denied, 2004-NMCERT-003.

Review of restraining order. — Where an order of the district court denominated "temporary restraining order" was to all intents and purposes final, as its effect was to permanently restrain the county board from transferring the teachers until the teachers

saw fit to present the case to "a competent tribunal" for determination, the case was reviewable on writ of error under Rule 6 of former Supreme Court Rules. Rio Arriba County Bd. of Educ. v. Martinez, 74 N.M. 674, 397 P.2d 471 (1964).

Writ of error could be taken from decree for sale of decedent's real estate to pay debts under Rule 6 of former Supreme Court Rules. Cooper v. Brownfield, 33 N.M. 464, 269 P. 329 (1928).

Motion to quash denied. — In tort action, where judgment might have been rendered against both or either party, either party was entitled to review, and a motion to quash the writ of error on the grounds that the suit was against both while the cause was submitted and judgment rendered against the defendant who did not bring error would be overruled. New Mexico & S.P.R.R. v. Madden, 7 N.M. 215, 34 P. 50 (1893).

Writ not barred. — Under former appellate procedure, an appeal sued out by one party to a suit, which was heard, did not bar another party from suing out a writ of error to review errors not reviewed on the appeal. Armijo v. Neher, 11 N.M. 354, 68 P. 914 (1902).

Under Rule 6 of former Supreme Court Rules, an appellant had the right, after taking and abandoning an appeal to the supreme court, to sue out a writ of error within the statutory period. Oskins v. Miller, 33 N.M. 104, 263 P. 766 (1927).

Parties. — Where plaintiff in error failed to make all interested parties below parties to writ of error, under former Supreme Court Rules neither the parties included nor those omitted could be made parties in the supreme court by motion or otherwise after the time had expired. Clark v. Rosenwald, 30 N.M. 175, 230 P. 378 (1924). See also Clark v. Rosenwald, 31 N.M. 443, 247 P. 306 (1925).

Writ of error could be amended by striking out the names of some of the defendants in error. Neher v. Armijo, 9 N.M. 325, 54 P. 236 (1898), overruled on other grounds de Bergere v. Chavez, 14 N.M. 352, 93 P. 762, 51 L.R.A. (n.s.) 50 (1908), aff'd sub nom. Chavez v. Bergere, 231 U.S. 482, 34 S. Ct. 144, 58 L. Ed. 325 (1913).

Where a writ of error was improperly directed to an individual rather than to a company, which was plaintiff below, it would be dismissed. R.H. Pierce Co. v. Richardson, 14 N.M. 340, 93 P. 717 (1908).

Issuance of writs at court's direction. — Where the supreme court, upon statehood, appointed the clerk of the territorial court as its clerk and allowed him to continue to issue writs of error, as had been the practice before statehood, such writs were issued with the knowledge and acquiescence of the supreme court and were to be taken as at their direction, within the scope of N.M. Const., art. VI, § 3. Wood v. Sloan, 18 N.M. 290, 137 P. 578 (1913). See also Farmers' Dev. Co. v. Rayado Land & Irrigation Co., 18 N.M. 138, 134 P. 216 (1913).

Writ of error as appropriate means for invoking collateral order doctrine. See Carrillo v. Rostro, 114 N.M. 607, 845 P.2d 130 (1992).

Law reviews. — For note, "The Adoption of the Collateral Order Doctrine in New Mexico: *Carrillo v. Rostro*," see 24 N.M.L. Rev. 389 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 C.J.S. Appeal and Error §§ 9 et seq.; 353 et seq.; 5 C.J.S. Appeal and Error § 724.

12-504. Extraordinary writs.

A. **Scope of rule.** This rule governs the procedure for the issuance of all writs in the exercise of the Supreme Court's original jurisdiction except for writs of certiorari to the Court of Appeals pursuant to Rule 12-502 NMRA and the district courts pursuant to Rule 12-501 and writs of error.

B. **Initiation of proceedings.**

(1) Extraordinary writ proceedings in the exercise of the Supreme Court's original jurisdiction shall be initiated by filing with the Supreme Court clerk a verified petition of the party seeking the writ. Subject to the provisions of Rule 12-304 NMRA and Rule 23-113 NMRA, the appropriate docket fee shall accompany the petition. As used in this rule, a "verified petition" is one which contains a statement under oath that the signer has read the petition and that the statements contained in the petition are true and correct to the best of the signer's knowledge, information and belief. The statement under oath need not be notarized. The petition shall set forth the following:

(a) the grounds on which jurisdiction of the Supreme Court is based;

(b) the circumstances making it necessary or proper to seek the writ in the Supreme Court if the petition might lawfully have been made to some other court in the first instance;

(c) the name or names of the real parties in interest, if any, if the respondent is a justice, judge, or other public officer or employee, court, board or tribunal, purporting to act in the discharge of official duties;

(d) the ground or grounds upon which the petition is based, and the facts and law supporting the same stated in concise form; and

(e) a concise statement of the relief sought.

(2) The petition shall have attached as exhibits any opinions, orders, transcripts or other papers indicating the respondent's position on the matter in question, if available. The petition may have attached as exhibits any pleadings or other

papers that are necessary and appropriate to inform the Court adequately regarding the circumstances out of which the petition arises and the basis for granting relief.

(3) If the circumstances giving rise to the petition appear to the petitioner to require the Court to act on an emergency basis, the petition shall clearly be designated in its title as an "emergency" petition.

C. **Proceedings and disposition.**

(1) The respondent, the real parties in interest, and the attorney general may file a response to the petition. The Court may act on a petition prior to the filing of a response.

(2) If it appears to a majority of the Court that the petition is without merit, concerns a matter more properly reviewable by appeal, or seeks relief prematurely, it may be denied summarily.

(3) If the petition is not summarily denied, the Court may direct the respondent, the real parties in interest, and the attorney general to file a response or further response to the petition, may request briefs on the issues presented in the petition, or may set a hearing on the petition, and the matter shall proceed accordingly or as otherwise ordered by the Court.

(4) If the petitioner is entitled to a writ or relief other than that requested in the petition, the petition shall not be denied but the Court shall grant the writ or relief to which the petitioner is entitled.

D. **Stays.**

(1) A party filing a petition for an extraordinary writ and also seeking a stay of some action by the respondent pending disposition of the petition shall include the phrase "and Request for Stay" in the title of the petition in addition to complying with other requirements of this paragraph. The respondent, the real parties in interest, and the attorney general may file a response to the request for stay, which may be joined with a response to the petition. The Court may act on a request for stay prior to the filing of a response.

(2) The Court may issue a stay to the respondent without notice to the respondent or the real parties in interest only if:

(a) it clearly appears from the verified petition or by affidavit filed with the Court that immediate and irreparable injury, loss or damage will result to the petitioner before the respondent or real parties in interest can be heard in opposition;

(b) it clearly appears from the verified petition or by affidavit filed with the Court that no loss or damage will result to the respondent or any real parties in interest, or, if loss or damage will occur, what that loss or damage will be; and

(c) petitioner certifies in writing to the Court the efforts, if any, that have been made to give notice and the reasons supporting the petitioner's claim that notice should not be required.

(3) If a request for stay is granted pursuant to this rule, the respondent, the real parties in interest, and the attorney general may move to have the stay vacated and the Court may act thereon with or without notice as deemed appropriate.

E. **Service.** Service of all papers filed under the rule shall be made pursuant to Rule 12-307 NMRA upon petitioner, respondent, any real parties in interest and, if the respondent is as described in Subparagraph (c) of Subparagraph (1) of Paragraph B of this rule, the attorney general.

F. **Costs and fees.** In disposing of a petition or request for stay, the Court may, in its discretion, assess costs and may, as permitted by law, award attorney fees.

[As amended, effective January 1, 1988; September 1, 1991; September 1, 1993; January 1, 1997; as amended by Supreme Court Order 08-8300-018, effective August 4, 2008.]

ANNOTATIONS

The 1991 amendment, effective for cases filed in the supreme court and court of appeals on and after September 1, 1991, in Subparagraph (1) of Paragraph B, inserted the second sentence.

The 1993 amendment, effective September 1, 1993, substituted "the petitioner's claim" for "his claim" in Subparagraph (2)(c) of Paragraph D.

The 1997 amendment, effective January 1, 1997, substituted "fifteen (15) days" for "ten (10) days" in Subparagraphs C(4)(a), (b), and (c).

The 2008 amendment, approved by Supreme Court Order 08-8300-018, effective August 4, 2008, added the references to Rules 12-304 and 23-113 NMRA in Subsection A; added the provision in Subsection A that the statement need not be notarized; added the last sentence in Paragraph (2) of Subsection B; added Paragraph (3) of Subsection B; added Paragraphs (1) and (3) of Subsection C; deleted former Paragraphs (2), (3) and (4) of Subsection C, which provided procedures for an initial hearing and a final hearing on a petition; added the last two sentences of Paragraph (1) of Subsection D; added the reference to the attorney general in Paragraph (3) of Subsection D; deleted the provision of former Paragraph (4) of Subsection D, which provided that if the stay were vacated, the court could either hear the petition or deny the petition without

hearing; deleted former Paragraph (5) of Subsection D, which provided that if a request for a stay were denied, the petition would be set for initial hearing unless the court denied the petition without hearing; deleted former Paragraph (1) of Subsection E which, provided for service on the respondent, interested parties and the attorney general; and added Subsection F.

Prerequisites. — Under Rule 24 of the former Supreme Court Rules, court of review should not use prerogative writs as a substitute for appeal; unless the question was of great public interest or unless requiring an appeal would have been so futile as to result in grave injustice, such writs were withheld except to prevent nonjurisdictional acts. Baca v. Burks, 81 N.M. 376, 467 P.2d 392 (1970).

Since there was neither a jurisdictional question presented nor any showing that grave injustice would result if the case proceeded to trial, the matter was not one calling for the writ, and the alternative writ of prohibition having been improvidently issued was discharged under former Supreme Court Rules. Baca v. Burks, 81 N.M. 376, 467 P.2d 392 (1970).

If a court had jurisdiction of both the subject matter and the parties, ordinarily prohibition would not issue under Rule 24 of former Supreme Court Rules. Two exceptions to this rule were recognized: one was where a court had acted in excess of jurisdiction, and the other was where, under supreme court's power of superintending control, refusal to act would cause irreparable mischief, exceptional hardship, undue burdens of expense or appeal would be grossly inadequate. State ex rel. SCC v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963).

Even where applications or petitions were required by statute, which also provided for liberal interpretation, certain minimum requirements had to be met under former Supreme Court Rules. Roberson v. Board of Educ., 78 N.M. 297, 430 P.2d 868 (1967).

Prohibition was not to be as means of obtaining piece-meal review, or as a substitute for appeal under former Supreme Court Rules. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

Prohibition was preventive rather than corrective remedy, and it would not issue to vacate orders already entered under former Supreme Court Rules. State ex rel. Davis v. District Court, 67 N.M. 215, 354 P.2d 145 (1960).

Original jurisdiction of Supreme Court in mandamus proceeding. — A mandamus petition for an order precluding the governor from implementing compacts and revenue-sharing agreements with Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian Gaming Regulatory Act was properly brought before the Supreme Court in an original proceeding. State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995).

Relator in mandamus action could question constitutionality of statute in a proper case under former Supreme Court Rules. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968).

Final judgment. — Writ of prohibition issuing from state supreme court is final judgment within meaning of federal law, and review of all proceedings concerning such should be sought in the United States Supreme Court. Gibner v. Oman, 459 F. Supp. 436 (D.N.M. 1977).

Writ properly issued. — Where conflict in New Mexico judicial districts as to constitutionality of death penalty existed, so that allowing the situation to remain would have resulted in unequal justice, a writ of prohibition to stop proceedings in conflicting cases until a determination of constitutionality was made was proper and would be made permanent, under former Supreme Court Rules. State ex rel. Serna v. Hodges, 89 N.M. 351, 552 P.2d 787 (1976), overruled on other grounds State v. Randeau, 89 N.M. 408, 553 P.2d 688 (1976).

The question of whether the state was barred by the double jeopardy clause from prosecuting an individual for driving under the influence (DWI) once the individual had been subjected to an administrative hearing for driver's license revocation based on the same offense was one of great public importance requiring use of the Supreme Court's power of superintending control. State ex rel. Schwartz v. Kennedy, 120 N.M. 619, 904 P.2d 1044 (1995).

Writ denied. — Since relators had plain, speedy and adequate remedy at law, prohibition did not lie under former Supreme Court Rules. Carter v. Montoya, 75 N.M. 730, 410 P.2d 951 (1966).

That fairly unusual burdens of expense would have to be borne by relators, although unfortunate, was frequently a necessary adjunct to litigation of the type here involved and was therefore insufficient under former Supreme Court Rules to warrant issuance of a writ of prohibition. State ex rel. Oil Conservation Comm'n v. Brand, 65 N.M. 384, 338 P.2d 113 (1959).

Fact that the district court might decide matters wrongly was of no concern of the supreme court when merely investigating the jurisdiction, nor was it material that the supreme court might on review be compelled to reverse the case, and writ of prohibition was denied under former Supreme Court Rules. State ex rel. Oil Conservation Comm'n v. Brand, 65 N.M. 384, 338 P.2d 113 (1959).

Where intervenor-defendant had been ordered discharged from the custody of the warden of the penitentiary and the order was not appealed, it was accordingly final and as intervenor was being detained within the first judicial district, respondent-district court judge had jurisdiction to consider intervenor's petition for habeas corpus; the remedy of prohibition was thus not available to the state under former Supreme Court Rules. Rodriguez v. District Court, 83 N.M. 200, 490 P.2d 458 (1971).

Writ of certiorari. — Appeals and writs of error were not to be compared to certiorari, and, generally speaking, the presence of the right to appeal made inappropriate and unavailable the right to certiorari under former Supreme Court Rules. Roberson v. Board of Educ., 78 N.M. 297, 430 P.2d 868 (1967).

Absent exceptional circumstances, the time for application for a writ of certiorari was the same as for an appeal or writ of error. Breithaupt v. State, 57 N.M. 46, 253 P.2d 585 (1953).

Amicus curiae must accept the case on the issues as raised by the parties, and cannot assume the functions of a party in mandamus proceeding. State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n, 79 N.M. 357, 443 P.2d 850 (1968).

Law reviews. — For article, "The Writ of Prohibition in New Mexico," see 5 N.M.L. Rev. 91 (1974).

For note, "Mandamus Proceedings Against Public Officials: State of New Mexico ex rel. Bird v. Apodaca," see 9 N.M.L. Rev. 195 (1978-79).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 325 et seq.

Inadequacy of remedy by appeal or writ of error as affecting right to mandamus, 4 A.L.R. 632.

Propriety of certiorari to review decisions of public officer or board granting, denying or revoking permit, certificate or license required as condition of exercise of particular right or privilege, 102 A.L.R. 534.

Legislature's express denial of right of appeal as affecting right to review on the merits by certiorari or mandamus, 174 A.L.R. 194.

Applicability of statute of limitations or doctrine of laches to certiorari, 40 A.L.R.2d 1381.

Plea of guilty in justice of the peace or similar inferior court as precluding appeal, 42 A.L.R.2d 995.

Statute providing for judicial review of administrative order revoking or suspending automobile driver's license as providing for trial de novo, 97 A.L.R.2d 1367.

4 C.J.S. Appeal and Error § 8 et seq.

12-505. Certiorari to the district court; decisions on review of administrative agency decisions.

A. **Scope of rule.** This rule governs review by the Court of Appeals of decisions of the district court:

(1) from administrative appeals pursuant to Rule 1-074 NMRA or Section 39-3-1.1 NMSA 1978; and

(2) from constitutional reviews of decisions and orders of administrative agencies pursuant to Rule 1-075 NMRA.

B. **Scope of review.** A party aggrieved by the final order of the district court in any case described in Paragraph A of this rule may seek review of the order by filing a petition for writ of certiorari with the Court of Appeals, which may exercise its discretion whether to grant the review.

C. **Time.** The petition for writ of certiorari shall be filed with the clerk of the Court of Appeals within twenty (20) days after entry of the final action by the district court. A copy of the petition shall be served immediately on the respondent. Unless the petition has been filed by the state, a political subdivision of the state, a defendant determined to be indigent by the district court or a defendant represented by a public defender or court-appointed counsel, the petition shall be accompanied by the docket fee. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits set by this paragraph. Final action by the district court shall be the filing of a final order or judgment in the district court unless timely motion for rehearing is filed, in which event, final action shall be the disposition of the last motion for rehearing which was timely filed.

D. **Petition; contents.** The petition, not exceeding ten (10) pages in length, shall have attached a copy of the final order or judgment of the district court and any district court findings or decision leading thereto, as well as a copy of the administrative decision under review by the district court. The cover of the petition shall show the names of the parties with the plaintiff or petitioner in the administrative agency listed first (e.g., State of New Mexico, Plaintiff v. John Doe). The petition shall contain a concise statement showing:

(1) the date of entry of the judgment or final order of the district court and any order entered by the court on a motion for rehearing;

(2) a copy of the appellant's and appellee's statements of appellate or review issues filed in the district court;

(3) the questions presented for review by the Court of Appeals; only the questions set forth in the petition will be considered by the Court;

(4) the facts material to the questions presented;

(5) the basis for the granting of the writ specifying where applicable:

(a) the citation to any opinion of the Supreme Court or Court of Appeals with which it is asserted the final order of the district court is in conflict, including a quotation from the part of the Court of Appeals or Supreme Court opinion showing the alleged conflict with the district court decision;

(b) the citation to any statutory provision, ordinance or agency regulation with which it is asserted the final order of the district court is in conflict and appropriate quotations from the statutes, ordinances or regulations showing the alleged conflict with the district court decision;

(c) what significant question of law under the Constitution of New Mexico or the United States is involved; or

(d) the issue of substantial public interest that should be determined by the Court of Appeals;

(6) a direct and concise argument amplifying the reasons relied upon for allowing of the writ, including specific references to the statement of appellate or review issues filed in the district court, showing where the questions were presented to the district court; and

(7) a prayer for relief, including whether the case should be remanded to the district court for consideration of issues not raised in the petition if the relief requested is granted.

E. **Conditional cross-petition.** Any party may, within fifteen (15) days of service of a petition for writ of certiorari, file a conditional cross-petition, to be considered only if the Court grants the petition. A conditional cross-petition shall be clearly identified as conditional on the cover. Material attached to the petition need not be attached again to a conditional cross-petition. A conditional cross-petition shall be governed by all other provisions of this rule, except as provided in this paragraph.

F. **Notice to district court.** The petitioner shall file with the clerk of the district court a copy of the petition for a writ of certiorari.

G. **Response.** A respondent may file a response to the petition within fifteen (15) days of service of the petition. The response shall not exceed ten (10) pages in length. No other response may be submitted other than a motion directed to a jurisdictional defect in the petition.

H. **Grant of petition; assignment.** If the petition for certiorari is granted by the Court, the case may be assigned to a calendar and the appellate court clerk shall give

notice of the assignment in accordance with Rule 12-210 NMRA. Upon receipt of the calendar assignment, the district court clerk shall transmit a copy of the record on appeal, which shall include the record on review filed in the district court by the administrative agency, as well as any other papers and pleadings filed in the district court.

I. **Oral argument.** Oral argument shall not be allowed unless directed by the Court of Appeals.

J. **Review by Supreme Court.** Within twenty (20) days after the disposition of a petition for writ of certiorari by the Court of Appeals, a party may seek further review from a decision of the Court of Appeals or a denial of certiorari by the Court of Appeals by filing a petition for writ of certiorari with the Supreme Court pursuant to Rule 12-502 NMRA of these rules.

[Approved, effective September 1, 1998; as amended effective September 1, 2002; November 1, 2003; as amended by Supreme Court Order 06-8300-11, effective May 15, 2006.]

ANNOTATIONS

Cross references. — For the review of final decisions of state agencies, see Section 39-3-1.1 NMSA 1978.

For the review of final decisions of state agencies, *see* Section 39-3-1.1 NMSA 1978.

For review of final decisions of state agencies by the district courts, *see* Rules 1-074 to 1-076 NMRA.

See Section 39-3-1.1 NMSA 1978 for the review of final decisions of state agencies.

The 2002 amendment, effective September 1, 2002, inserted "and any district court findings or decision leading thereto, as well as a copy of the administrative decision under review by the district court" at the end of the first sentence in Paragraph D; deleted "or within fifteen (15) days of the granting of the petition" at the end of the first sentence of Paragraph F; renumbered former Paragraphs I and J as present Paragraphs H and I and deleted former Paragraph H which read "Briefs. In the event the writ of certiorari is issued, additional briefs may be filed only as directed by the appellate court" and deleted Paragraph K which read "Failure to act. Unless otherwise ordered by the Court, any petition for a writ of certiorari not acted upon by the Court in which it is filed within thirty (30) days after filing shall be deemed denied."

The 2003 amendment, effective November 1, 2003, inserted present Paragraph E and redesignated former Paragraphs E to I as present Paragraphs F to J.

The 2006 amendment, approved by Supreme Court Order 06-8300-11, effective May 15, 2006, substitutes "or" for "and" in Subparagraph (1) of Paragraph A.

Standard of review. — This rule provides four bases for the Court of Appeals to consider a petition for writ of certiorari with regard to the review of a district court's review of a decision of an administrative agency. *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, 133 N.M. 97, 61 P.3d 806.

Scope of review. — The scope of review of the decision of an administrative agency by the Court of Appeals and Supreme Court is the same as the scope of review of the district court, i.e. whether the ruling of the administrative agency is arbitrary, capricious, an abuse of discretion, not supported by sbustantial evidence or not otherwise in accordance with law. *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, 133 N.M. 97, 61 P.3d 806.

Interpretation of a statute by an administrative agency or the district court is subject to a de novo review by the Court of Appeals or Supreme Court. *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, 133 N.M. 97, 61 P.3d 806.

Motion denied by operation of law. — There is no provision within this rule which provides that a motion not acted upon by the district court within a certain amount of time is deemed denied by operation of law. Paule v. Santa Fe County, 2005-NMSC-021, 138 N.M. 82, 117 P.3d 240.

Paragraph A(1) of rule is consistent with language in 39-3-1.1 NMSA 1978 that directs review of district court decisions by an appellate court. Dixon v. State Taxation & Revenue Dep't, 2004-NMCA-044, 135 N.M. 431, 89 P.3d 680.

And governs procedure by which aggrieved party may seek review in the Court of Appeals of a district court's determination based on a Rule 1-074 NMRA appeal authorized by 39-3-1.1 NMSA 1978. Dixon v. State Taxation & Revenue Dep't, 2004-NMCA-044, 135 N.M. 431, 89 P.3d 680.

Issues justifying writ. — The standard of when museum property is used for education purposes and its application to the facts in this case and consideration of the standard and exceptions to it are issues that bring this case within certiorari jurisdiction under this rule. Georgia O'Keeffe Museum v. County of Santa Fe, 2003-NMCA-003, 133 N.M. 297, 62 P.3d 754.

Proceedings prior to effective date of rule. — Final district court orders following appeals of decisions of administrative agencies were entered after the effective dates of 39-3-1.1 NMSA 1978 and this rule. Therefore cases before the court of appeals for review were not "pending" cases within the meaning of N.M. Const., art. IV, § 34. Hyden v. New Mexico Human Servs. Dep't, 2000-NMCA-002, 128 N.M. 423, 993 P.2d 740.

Appeals from district court. — Appeals from the district court arising out of objection to a state engineer permit to transfer water rights under 72-7-3 NMSA 1978 are governed by Rule 12-201 NMRA rather than this rule. Town of Silver City v. Scartaccini, 2006-NMCA-009, 138 N.M. 813, 126 P.3d 1177.

Time for filing notice of appeal. — Even though appellants failed to comply with the 20-day time limit imposed by this rule for seeking review on certiorari, extensions were granted where they were sought because of confusion surrounding the enactment and publication of the rule. Hyden v. New Mexico Human Servs. Dep't, 2000-NMCA-002, 128 N.M. 423, 993 P.2d 740.

Notice of appeal treated as petition for writ. — Court of Appeals may, at its discretion, elect to treat a notice of appeal as a petition for writ of certiorari if the notice of appeal was filed within twenty days after the district court’s final action. Dixon v. State Taxation & Revenue Dep’t, 2004-NMCA-044, 135 N.M. 431, 89 P.3d 680.

Extension of time to file certiorari petition. — A district court had no authority to extend the time for plaintiffs to file a certiorari petition in the Court of Appeals. Cassidy-Baca v. Board of County Comm'rs of Sandoval County, 2004-NMCA-108, 136 N.M. 307, 98 P.3d 316.

Only unusual circumstances will justify the Court of Appeals' exercise of discretion to grant motions to extend the time to file petitions for certiorari. Cassidy-Baca v. Board of County Comm'rs of Sandoval County, 2004-NMCA-108, 136 N.M. 307, 98 P.3d 316.

ARTICLE 6
Special Proceedings

12-601. Appeals from administrative entities and special statutory proceedings.

A. **Scope of rule.** This rule governs the procedure for filing and perfecting direct appeals to an appellate court from orders, decisions or actions of boards, commissions, administrative agencies or officials when the right to a direct appeal is provided by statute. To the extent of any conflict, this rule supersedes any statute providing for the time or other procedure for filing or perfecting an appeal with an appellate court. This rule does not create a right of appeal and does not govern petitions for writs filed in the Supreme Court or appeals to the district court.

B. **Initiating the appeal.** Direct appeals from orders, decisions or actions of boards, commissions, administrative agencies or officials shall be taken by filing a notice of appeal with the appellate court clerk, together with the docket fee and proof of service thereof on the agency involved and all parties in accordance with Rule 12-307 NMRA within thirty (30) days from the date of the order, decision or action appealed from. Thereafter, within thirty (30) days of the filing of the notice of appeal, the appellant shall

file a docketing statement in the Court of Appeals or a statement of the issues in the Supreme Court in accordance with Rule 12-208 NMRA and the appeal shall thereafter proceed in accordance with these rules, notwithstanding any provision of law to the contrary.

C. **Substitution of administrative entity.** Whenever in these rules a duty is to be performed by, service is to be made upon, or reference is made to the district court or a judge or clerk of the district court, the board, commission, administrative agency or official whose action is appealed from shall be substituted for the district court or a judge or clerk of the district court, except that any request for extension of time must be made to the appellate court.

[As amended, effective July 1, 1990; April 1, 1998; June 15, 2000; as amended by Supreme Court Order 07-8300-19, effective August 13, 2007.]

ANNOTATIONS

The 1998 amendment, effective for pleadings due on and after April 1, 1998, inserted "in the Court of Appeals or a statment of the issues in the Supreme Court" near the end of Paragraph B.

The 2000 amendment, effective June 15, 2000, deleted "or removal proceedings" following "petitions for writs" near the end of the last sentence of Paragraph A.

The 2007 amendment, approved by Supreme Court Order 07-8300-19, effective August 13, 2007, amended Paragraph B to remove "or complaint on appeal" in two places following "notice of appeal".

Former rule did not confer a right of appeal, because the right of appeal is a matter of substantive law and outside the supreme court's rule-making power. Durand v. New Mexico Comm'n on Alcoholism, 89 N.M. 434, 553 P.2d 714 (Ct. App. 1976) (decided under former Rule 13, N.M.R. App. P. (Civ.))

Former Rule 13, N.M.R. App. P. (Civ.) did not apply to an appeal from a district court to an appellate court and exception could not be used to apply statutory time limit over procedural time limit for filing appeals. AAA v. SCC, 102 N.M. 527, 697 P.2d 946 (1985).

Rights enforced under rule. — "Special statutory proceedings" under Rule 5(6) of former Supreme Court Rules were statutory proceedings to enforce rights and remedies created by statute and unknown to the common-law and equity practice of England prior to 1776. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941).

Phrase "Notwithstanding any other provision of law" in Paragraph B refers to any other laws addressing appellate procedure and does not confer a substantive right of

appeal that is not otherwise provided by law. Hillhaven Corp. v. State, Human Servs. Dep't, 108 N.M. 372, 772 P.2d 902 (Ct. App. 1989).

Workers' compensation cases. — Notice of appeal from a final disposition order of the workers' compensation administration had to be filed within 30 days from the date of the order as provided in Paragraph A, rather than within 30 days of mailing of the final order, provided in 52-5-8 NMSA 1978. Tzortzis v. County of Los Alamos, 108 N.M. 418, 773 P.2d 363 (Ct. App. 1989).

This rule is the controlling rule in appeals from workers' compensation actions. Maples v. State, 110 N.M. 34, 791 P.2d 788 (1990).

Workers' compensation appeals are not exempted from the jurisdictional requirements of Paragraph B. Singer v. Furr's, Inc., 111 N.M. 220, 804 P.2d 411 (Ct. App. 1990).

Even though a notice of appeal was the same notice that was filed with the worker's compensation administration (WCA) and contained a WCA caption and case number, the court of appeals had jurisdiction to resolve the appeal since the notice was timely filed and substantially complied with the provisions of Paragraph B. Mieras v. Dyncorp, 1996-NMCA-095, 122 N.M. 401, 925 P.2d 518.

Copy of notice of appeal sufficient. — In appealing from a workers compensation administration ruling it is sufficient under Paragraph B to file the notice of appeal with the appellate court and a copy of the notice with the administration within 30 days, and then file a notice with the administration at a later time. Brewster v. Cooley & Assocs., 116 N.M. 681, 866 P.2d 409 (Ct. App. 1993).

Effect of failure to comply with place-of-filing requirement. — Workers' compensation claimant's failure to comply with the place-of-filing requirement of Paragraph B deprived the court of appeals of jurisdiction, even though claimant filed a notice of appeal with the workers' compensation division within thirty days of the filing of the order dismissing his claim for benefits. Singer v. Furr's, Inc., 111 N.M. 220, 804 P.2d 411 (Ct. App. 1990).

Appeal allowed. — Appeal by state board of embalmers and funeral directors from district court judgment which set aside board's order was allowed under Rule 5(6) of former Supreme Court Rules. Gonzales v. New Mexico State Bd. of Embalmers & Funeral Dirs., 63 N.M. 13, 312 P.2d 541 (1957).

Appeal denied. — Where district attorney asked court to order issuance of subpoenas for certain witnesses, based on congressional investigation committee report on use of federal funds in construction of highways, such action was not considered special statutory proceedings within the meaning of Rule 24 of former Supreme Court Rules. State v. Wylie, 71 N.M. 447, 379 P.2d 86 (1963).

Review of condemnation proceeding. — In proceeding by coal company for condemnation, for mining purposes, of certain rights-of-way over lands of defendant, final judgment for condemnation was not appealable, as the proceeding was special and the applicable statute did not provide for appeal under former appellate procedure. Gallup S.W. Coal Co. v. Gallup Am. Coal Co., 39 N.M. 94, 40 P.2d 627 (1934) (but holding on motion for rehearing that cause could proceed on application for certiorari).

Fair hearing decision of Human Services Department. — Under former Subsection A of 27-3-4 NMSA 1978, because the requirement of the time for filing notice of appeal from a fair hearing decision of the Human Services Department lay within the supreme court's rule-making authority, and because it was covered by supreme court rules, the rule rather than the statute applied and the time ran from the date of the decision under Paragraph A of this rule, not from receipt of the decision under former Subsection A of 27-3-4 NMSA 1978. James v. New Mexico Human Serv. Dep't, 106 N.M. 318, 742 P.2d 530 (Ct. App. 1987).

Review of constitutionality of regulatory act not authorized. — The court of appeals was without authority to review the constitutionality of the New Mexico Mining Act in the case of an appeal challenging regulations on their face. Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 908 P.2d 776 (Ct. App. 1995).

Rule 12-201 NMRA governs filing of cross-appeals. — This rule does not provide that the Rules of Appellate Procedure governing appeals from the district court do not commence to apply until after the filing of the docketing statement by the appellant in an administrative appeal. Nothing in this rule authorizes a party to file his notice of cross-appeal more than ten days from the date the appellant files its notice of appeal, as provided by Rule 12-201A NMRA. Rodriguez v. McAnally Enters., 117 N.M. 250, 871 P.2d 14 (Ct. App. 1994).

Law reviews. — For 1984-88 survey of New Mexico administrative law, 19 N.M.L. Rev. 575 (1990).

For survey of 1990-91 appellate procedure, see 22 N.M.L. Rev. 623 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 2 Am. Jur. 2d Administrative Law § 639 et seq.

73A C.J.S. Public Administrative Bodies and Proceedings §§ 208 to 212.

12-602. Appeals from criminal contempt of the Court of Appeals.

A. **How taken.** A notice of appeal from an appealable judgment of criminal contempt of the Court of Appeals shall be filed with the Court of Appeals clerk within thirty (30) days after filing of the judgment appealed from. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits set by this paragraph.

B. **Docketing statement or statement of the issues; further procedure.** Within thirty (30) days of the filing of the notice of appeal, the appellant shall file a docketing statement in the Court of Appeals or statement of the issues in the Supreme Court in accordance with Rule 12-208 NMRA. Thereafter, the appeal shall proceed in accordance with these rules.

C. **Duties of clerk.** The duties required by these rules to be performed by the district court and the clerk thereof shall be performed by the Court of Appeals clerk.

[As amended, effective April 1, 1998.]

ANNOTATIONS

The 1998 amendment, effective for pleadings due on and after April 1, 1998, inserted "in the Court of Appeals or statement of the issues in the Supreme Court" following "docketing statement" and deleted "together with the docket fee, in the Supreme Court" at the end of the first sentence in Paragraph B.

12-603. Appeals in actions challenging candidacies or nominating petitions; primary or general elections; school board recalls.

A. **Scope.** This rule governs appeals taken pursuant to Section 1-8-18 NMSA 1978, Section 1-8-35 NMSA 1978, Section 1-14-5 NMSA 1978, Section 22-7-9.1 NMSA 1978 and Section 22-7-12 NMSA 1978.

B. **Notice of appeal.** Notice of appeal with proof of service on all parties to the action shall be filed in the district court within the time period specified by the statute pursuant to which the appeal is taken. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits set by this paragraph.

C. **Content of notice of appeal.** The notice of appeal shall state that it is taken to the Supreme Court and shall specify that the appeal is:

(1) a candidacy appeal pursuant to Section 1-8-18 NMSA 1978;

(2) a nominating petition appeal pursuant to Section 1-8-35 NMSA 1978;

(3) an election contest appeal pursuant to Section 1-14-5 NMSA 1978;

(4) a school board member recall appeal pursuant to Section 22-7-9.1 NMSA 1978; or

(5) an appeal challenging a school board member recall petition pursuant to Section 22-7-12 NMSA 1978, as the case may be.

D. **Docketing.** Immediately upon the filing of a notice of appeal the district court clerk shall forward the entire original court file to the Supreme Court clerk. Within five (5) days after filing notice of appeal the appellant shall cause the appeal to be docketed in the Supreme Court by paying to the Supreme Court clerk the appropriate docket fee and filing a certificate of counsel, or if the appellant is not represented by counsel, with proof of service on all parties. The certificate shall include:

(1) the name or names of the real parties in interest, if any, when the respondent is a justice, judge or other public officer or employee, court, board or tribunal, purporting to act in the discharge of official duties;

(2) the names, business addresses and telephone numbers of all counsel appearing in the district court and of those parties not represented by counsel;

(3) a statement of the nature of the proceeding;

(4) date of entry of the decision appealed from and date of filing notice of appeal;

(5) a concise statement of the facts material to consideration of the questions presented; and

(6) a concise statement of the points relied upon for reversal, including a concise, accurate statement of the case summarizing all facts material to a consideration of the points presented, but without unnecessary detail. General conclusory statements such as "the judgment of the trial court is not supported by the law or facts" will not be accepted.

E. **Involuntary dismissal.** If the appellant fails to docket the appeal within the time and in accordance with the requirements of Paragraph D of this rule, the Supreme Court clerk shall promptly return the original court file to the district court clerk and the appeal shall be dismissed forthwith by the district court.

F. **Notice of setting.** Immediately upon docketing, the Supreme Court clerk shall notify the chief justice of the docketing of the appeal. The chief justice shall set the date, time and place of hearing, and shall advise the Supreme Court clerk thereof. The Supreme Court clerk shall give notice of the setting in the most expeditious manner practicable.

G. **Briefs.** Briefs may be filed only upon, and in accordance with, the directions of the court.

H. **Hearing.** For the purpose of making available such portions of the district court proceedings as may not appear in the court file, the appellant shall, unless a complete transcript of proceedings is available, have present at the hearing:

(1) the court reporter who reported the district court proceedings, with the reporter's notes; and

(2) any audio recording of the district court proceedings or any part thereof made by the court monitor or other court-designated official, together with equipment and personnel necessary to play back such portions as may be required.

At the hearing appellant shall be limited to the points specified in the certificate filed upon docketing. Appellee is not limited to a response to such points but may present any issue directed toward affirmance of the trial court's decision.

I. **Disposition.** Disposition of the appeal shall be by order of the court which may, but need not be, accompanied by a written opinion. The order of the court shall be effective upon filing the same with the Supreme Court clerk and there shall be no rehearing. Upon filing the order the Supreme Court clerk shall forthwith furnish to each party to the appeal a certified copy of the order and shall return the original district court file to the district court clerk together with a certified copy of the order. The order shall constitute the mandate of the Supreme Court.

[As amended, effective October 11, 2005.]

ANNOTATIONS

Cross references. — For election proceedings in the district court, *see* Rule 1-087 NMRA.

The 2005 amendment, approved by Supreme Court Order 05-8300-18, effective October 11, 2005, amended Paragraph A to add Sections 1-14-5, 22-7-9.1 and 22-7-12 NMSA 1978, deleted the time for filing a notice of appeal in Paragraph B and inserts "the time period specified by statute", added Paragraph C relating to the content of the notice of appeal and redesignated former Paragraphs C through H as Paragraphs D through I.

Annotations. — **For statutory time period for appeals under the Election Code,** *see Eturriaga v. Valdez*, 109 N.M. 205, 784 P.2d 24 (1989).

12-604. Removal of public officials.

A. **Scope.** This rule governs all proceedings for removal of public officials where jurisdiction is conferred on the Supreme Court by the constitution or by statute.

B. **Filing of charges.** Charges alleging specific facts constituting one or more constitutional or statutory grounds for removal will be entertained by the court upon presentment by the governor, the attorney general or any regularly impanelled grand jury. Any such grand jury presentment shall be immediately certified to the Supreme Court by the district court clerk where such presentment is filed.

C. **Prosecution.** All charges so presented to the court shall be prosecuted by the attorney general unless the attorney general shall decline to act, except that the governor, in case of presentment by the governor, may request the designation of another attorney, in either of which events the court will appoint another attorney.

D. **Service.** Upon any such presentment, the court shall make and enter its order directing service upon the accused and specifying the time for appearance and answer.

E. **Answer.** Within the time prescribed in such order, the accused may, by way of answer, object to the sufficiency of any charge or specification or deny the truth thereof. Any charge or specification legally sufficient and not denied shall be taken as admitted.

F. **Failure to appear.** If the accused shall not appear, the court will proceed to hear and determine the charges in the accused's absence.

G. **Trial.** The issues shall be tried to the court without a jury. To the extent that such are applicable and do not conflict with the rules of this court, the Rules of Civil Procedure for the District Courts and the Rules of Evidence shall govern the conduct of the trial. The prosecution shall have the burden of proof.

H. **Judgment.** The decision and judgment of the court shall be final. Unless the judgment shall expressly provide otherwise, no motion for rehearing or for new trial shall be permitted, and the judgment shall take effect at once.

I. **Fees.** No docket fee or filing fee shall be required in any removal proceedings. Witness fees and other costs shall be taxed in such manner as may be determined by the court in its discretion.

[As amended, effective December 1, 1993.]

ANNOTATIONS

The 1993 amendment, effective December 1, 1993, substituted "unless the attorney general" for "unless he" and "by the governor" for "by him" in Paragraph C and substituted "the accused's" for "his" in Paragraph F.

Constitutional right to remove terminated. — Official could not be removed from office after repeal and reenactment of constitutional provision creating office, for misconduct prior to repeal, under former appellate procedure, since constitutional right to remove commissioner from that office was terminated when provision creating office was repealed. In re Thaxton, 78 N.M. 668, 437 P.2d 129 (1968).

Equitable and legal actions not distinguished. — Rule 26 of former Supreme Court Rules did not differentiate between actions at law and equitable proceedings. Koran v. White, 69 N.M. 46, 363 P.2d 1038 (1961).

Supreme court would not try the case de novo when the plaintiff failed to attack the findings of the trial court in equitable action under former Supreme Court Rules. Koran v. White, 69 N.M. 46, 363 P.2d 1038 (1961).

Findings of trial court accepted. — The appellant's proposed finding was in direct conflict with the finding made by the trial court, which was not attacked, and, being supported by substantial evidence, was required to be accepted by appellate court. Hyde v. Anderson, 68 N.M. 50, 358 P.2d 619 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 205 to 207, 222 to 231.

12-605. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated April 17, 2000, this rule pertaining to removal of a cause from the State Corporation Commission is withdrawn effective June 15, 2000.

12-606. Certification from the Court of Appeals.

Any certification of a matter to the Supreme Court by the Court of Appeals pursuant to Subsection C of Section 34-5-14 NMSA 1978 shall be accompanied by the file in said cause, including all copies of transcripts and briefs filed therein, which shall thereafter be treated as filed with the Supreme Court. The Court of Appeals clerk shall give prompt notice to all parties of the certification of any matter to the Supreme Court. After certification, the parties shall be entitled to file in the Supreme Court such additional briefs and other documents within such time as they would have been entitled to file in the Court of Appeals had the matter not been so certified. The Supreme Court may direct the filing of other or supplemental briefs and may limit the questions to be argued therein. A party may file a request for oral argument within fifteen (15) days of the date of certification, and otherwise in accordance with Rule 12-214 NMRA.

[As amended, effective January 1, 1997.]

ANNOTATIONS

The 1997 amendment, effective January 1, 1997, substituted "fifteen (15) days" for "ten (10) days" in the last sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 967 et seq.

12-607. Certification from other courts. *[Approved effective May 12, 2008 until May 12, 2009.]*

A. **Power to answer.**

(1) The Supreme Court may answer by formal written opinion questions of law certified to it by a court of the United States, an appellate court of another state, a tribe, Canada, a Canadian province or territory, Mexico or a Mexican state if the answer may be determinative of an issue in pending litigation in the certifying court and the question is one for which answer is not provided by a controlling:

(a) appellate opinion of the New Mexico Supreme Court or the New Mexico Court of Appeals; or

(b) constitutional provision or statute of this state.

(2) The Supreme Court may answer by formal written opinion questions of law certified to it by a New Mexico stream adjudication court if:

(a) the answer may materially advance the ultimate resolution of the adjudication; and

(b) the question is one for which answer is not provided by a controlling:

(i) appellate opinion of the New Mexico Supreme Court or the New Mexico Court of Appeals; or

(ii) constitutional provision or statute of this state.

B. **Method of invoking.** The court certifying a question of law shall issue a certification order and forward it to the Supreme Court.

C. **Contents of certification request.** A certification order must contain:

(1) the names and addresses of counsel of record and parties appearing without counsel;

(2) the question of law to be answered;

(3) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose. If the parties cannot agree on a statement of facts, the certifying court shall determine the relevant facts and state them as part of its certification order; and

(4) a statement acknowledging that the Supreme Court may reformulate the question.

D. **Response.** The Supreme Court shall notify the certifying court of acceptance or rejection of the question and, in accordance with notions of comity and fairness, respond to an accepted certified question as soon as practicable.

E. **Briefs.** Unless otherwise ordered by the Supreme Court, the court, in its acceptance of certification, shall designate which party shall file the first brief in the court on the question certified. Unless otherwise ordered, the first brief shall be filed with the court within thirty (30) days of mailing of notification by the court that it will answer the question certified. The opposing party shall file its answer brief or briefs within thirty (30) days of service of the first brief. A reply brief may be filed within fifteen (15) days of service of the answer brief. The time for filing briefs may be extended as provided for in Paragraph C of Rule 12-309 NMRA of these rules. Briefs and service thereof shall be in the manner and form provided in Rules 12-213, 12-302, 12-305, 12-307 and 12-308 NMRA.

F. **Oral argument.** Oral argument shall be as provided in Rule 12-214 NMRA for appeals.

G. **Record.** The Supreme Court, on its own motion or upon motion of any party, may request that copies of all or any portion of the record before the certifying court be filed with the Court.

H. **Opinion.** The Supreme Court shall forward to the certifying court and all parties a copy of its formal written opinion answering the question certified.

[As amended, effective December 1, 1993; January 1, 1997; December 4, 1998; provisionally approved and amended by Supreme Court Order 07-8300-14, effective June 13, 2007; by Supreme Court Order, adopted for one additional year, effective June 9, 2008.]

ANNOTATIONS

Cross references. — *See* Sections 39-7-1 to 39-7-13 NMSA 1978 for the Uniform Certification of Questions of Law Act.

For statutory stream system adjudication suits, see Rules 1-071.1 NMSA 1978 et seq.

The 1997 amendment, effective January 1, 1997, substituted "fifteen (15) days" for "ten (10) days" in the fourth sentence in Paragraph F.

The 1998 amendment, effective December 4, 1998, rewrote Paragraphs A through C, deleted former Paragraphs D and E, relating to filing of a certification request and acceptance of certification, added a new Paragraph D, and redesignated Paragraphs F through H as Paragraphs E through H.

The 2007 amendment, approved by Supreme Court Order 07-8300-14, effective June 13, 2007, added new Subparagraph (2) providing for certification from a New Mexico stream adjudication court.

Intent of certification. — The intent of the certification of facts and determinative answer requirements is that the supreme court avoid rendering advisory opinions. Schlieter v. Carlos, 108 N.M. 507, 775 P.2d 709 (1989).

Sufficiency requirements for certification. — It is sufficient if the certification of facts and the record contain the necessary factual predicates to the supreme court's resolution of the question certified, and it is clear that evidence admissible at trial may be resolved in a manner requiring application of the law in question. Schlieter v. Carlos, 108 N.M. 507, 775 P.2d 709 (1989).

Considerations in granting certification. — The degree of uncertainty in the law and prospects for judicial economy in the termination of litigation are considered in deciding whether to accept pretrial certification from federal court. These considerations, however, are appropriately weighed against the advantages of normal appellate review in determining whether to accept certification. Schlieter v. Carlos, 108 N.M. 507, 775 P.2d 709 (1989).

Certification properly declined. — Certification was declined, where certified questions regarding the constitutionality of the New Mexico Medical Malpractice Act were not accompanied by sufficient nonhypothetical evidentiary facts to allow the supreme court to adequately determine the constitutionality of the act, and even if the court were able to answer the questions certified, its answer would not be determinative of the issue out of which they arose. Schlieter v. Carlos, 108 N.M. 507, 775 P.2d 709 (1989).

12-608. Certification from the district court.

Any certification of a matter to the Court of Appeals by the district court pursuant to Section 39-3-1.1 NMSA 1978 shall be accompanied by the district court file, including all copies of transcripts of the agency and briefs filed in the district court, which shall thereafter be treated as filed with the Court of Appeals. The clerk of the district court shall give prompt notice to all parties of the certification of any matter to the Court of Appeals. After certification, the court shall issue a calendar notice and the case shall proceed in accordance with Rule 12-210 NMRA. The Court of Appeals may direct the filing of other or supplemental briefs and may limit the questions to be argued therein. A party may file a request for oral argument within fifteen (15) days of the date of certification, and otherwise in accordance with Rule 12-214 NMRA.

[Approved, effective January 1, 2000.]

Table Of Corresponding Rules

The first table below reflects the disposition of the former Rules of Appellate Procedure for Civil Cases and Rules Governing Original Proceedings in the Supreme Court (App. P. - Civ.); and the Rules of Appellate Procedure for Criminal, Children's Court, Domestic Relations Matters and Workers' Compensation Cases (App. P. - Crim.). The left-hand column contains the former rule number, and the right-hand column contains the corresponding present Rule of Appellate Procedure.

The second table below reflects the antecedent provisions in the former Rules of Appellate Procedure for Civil Cases and Rules Governing Original Proceedings in the Supreme Court (App. P. - Civ.); and the Rules of the Appellate Procedure for the Criminal, Children's Court, Domestic Relations Matters and Workers' Compensation Case (App. P. - Crim.) (right-hand columns) of the present Rules of Appellate Procedure (left-hand column).

App. P.—Civ. Former Rule	NMRA
1	12-101
2	None
3	12-201, 12-203
4	12-202
5	12-207
6	12-208
7	12-209
8	12-211
9	12-213, 12-215
10	12-503
11	12-216
12	12-504
13	12-601
14	12-605
15	12-604
16	12-309
17	12-305
18	12-214
19	12-404
20	12-402
21	12-301
22	12-307
23	12-308
24	12-302
25	12-310
26	12-401
27	12-403
28	12-502
29	12-606
30	12-311
31	12-312
32	12-603
33	12-607

App. P.—Crim. Former Rule	NMRA
101	12-101
102	None
103	None
201	12-202
306	12-302
307	12-310
308	12-216
401	12-205

202	12-201
203	12-203
204	12-204
205	12-208
206	12-209
207	12-210
208	12-211
209	12-212
301	12-307
302	12-308
303	12-303
303.1	12-304
304	12-305
305	12-311
402	12-309
403	12-309
404	12-312
405	12-401
406	12-606
501	12-213
502	12-215
503	12-213
504	12-214
601	12-405
602	12-404
603	12-502
804	12-402

NMRA	Former Rule	
	App. P.—Civ.	App. P.—Crim.
12-101	1	101
12-102	none	none
12-201	3	202
12-202	4	201
12-203	3	203
12-204	none	204
12-205	none	401
12-206	none	none
12-207	5	none
12-208	6	205
12-209	7	206
12-210	none	207
12-211	8	208
12-212	none	209
12-213	9	501, 503
12-214	18	504
12-215	9	502
12-216	11	308
12-301	21	none
12-302	24	306
12-303	none	303
12-307	22	301
12-308	23	302
12-309	16	402, 403
12-310	25	307
12-311	30	305
12-312	31	404
12-313	none	none
12-401	26	405
12-402	20	604
12-403	27	none
12-404	19	602
12-405	none	601
12-501	none	none
12-502	28	603
12-503	10	none
12-504	12	none
12-601	13	none
12-602	none	none
12-603	32	none
12-604	15	none
12-605	14	none

12-304	none	303.1	12-606	29	406
12-305	17	304	12-607	33	none
12-306	none	none			