Evidence

J. Michael Norwood
University of New Mexico - Main Campus
INTRODUCTION

This article surveys significant appellate court decisions construing the New Mexico Rules of Evidence during the Survey year, April 1980 through March 1981. The relevant Rules are discussed at some length in order to provide some background for understanding case law developments of these Rules.

Rule 404: Impeachment of Character Witness in a Criminal Case

The defendant in a criminal case has the option of offering the testimony of character witnesses. Often these character witnesses are educators, religious leaders, public officials, or other respected members of the community. The witness, after establishing that he is familiar with the defendant's character or his reputation for a character trait, traditionally portrays the defendant as trustworthy, good, honest, chaste, or peaceable. The character evidence is tendered by the defendant as "circumstantial" proof that he acted in conformity with his character on the occasion in question, and, therefore, could not have committed the fraud, theft, rape, or violent act of which he is accused. When a defendant uses character evidence "circumstantially," the character witness is not allowed to testify as to specific instances of the defendant's conduct, but is

*Associate Professor of Law, University of New Mexico School of Law. The author would like to express his appreciation to Mr. Fred Abramowitz for his invaluable research assistance.

1. N.M. R. Evid. 404(a)(1). Rule 404 provides that as a general rule, character evidence offered for the purpose of proving that a person acted in conformity with a character trait on a relevant occasion is inadmissible. The Rule allows for three exceptions: 1) evidence of character offered by an accused or by the prosecutor to rebut the same, 2) character of the victim in a criminal case when the evidence is offered by the accused, or by the prosecution to rebut the accused's evidence, or evidence of an accused's peacefulness when offered to rebut an inference by the accused in a homicide case that the victim was the first aggressor; 3) character evidence offered for impeachment of a witness's credibility under N.M. R. Evid. 607, 608, or 609. For elaboration on the policy behind the general rule against the use of character evidence see 2 Weinstein's Evidence ¶¶404[02] through 404[04] (1980); Note, Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime, 78 Harv. L. Rev. 426 (1964).
limited to testimony as to his opinion of the defendant or testimony as to the defendant’s reputation in the community.\(^2\)

A respectable and neutral character witness, having testified favorably for the defendant, presents the prosecution with the problem of how to discredit his testimony on cross-examination. The traditional discrediting cross-examination techniques of exposing motive, bias, interest, faulty memory, poor perception, prior inconsistent statements, or conviction of crime are often unavailable.\(^3\) Fortunately for the prosecution, N.M. R. Evid. 405(a), which prescribes the method of proving character by reputation or opinion evidence, also provides the prosecution with a technique of discrediting a character witness’s testimony. On cross-examination the prosecution is allowed to inquire into relevant specific instances of the defendant’s conduct.\(^4\)

In circumstances where the prosecutor is aware that the defendant has committed prior bad acts, the technique of cross-examining a character witness on whether he knows of these acts can be very damaging, not only to the credibility of the character witness, but to the defendant’s case on the merits. To discredit the character witness, the prosecutor inquires of a character witness whether he knew of, or has heard of, a specific bad act committed by the defendant. The witness is discredited because if the witness knows of the act, but still maintains that the defendant is of good character, his opinion is defective. If the witness has not heard of the act, the basis of his testimony is defective.\(^5\) The defendant’s case on the merits is damaged because the prosecutor is able, through the factual assertions contained in his questions, to present evidence of the defendant’s prior bad acts which would be otherwise inadmissible as irrelevant.\(^6\)

The sole purpose of allowing cross-examination of character witnesses by use of specific instances of the defendant’s conduct is

---

2. State v. Bazan, 90 N.M. 209, 561 P.2d 482 (Ct. App. 1977), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977), described this use of character evidence as “circumstantial,” and held that because of problems of relevancy, N.M. R. Evid. 404(a) and 405(a) allowed proof by reputation or opinion only. Compare N.M. R. Evid. 404(b) with 405(b), where specific instances of conduct are admissible as proof of motive or intent, or where the conduct relates to a character trait which is an essential element of the charge. The policy considerations relating to the prescribed method of proof are discussed in McCormick on Evidence §191 (2d ed. 1972).

3. Elaboration of these cross-examination techniques is found in T. Mauet, Fundamentals of Trial Techniques (1980).

4. The prosecutor also has the option of producing rebuttal witnesses who may testify as to opinion or reputation of a directly opposing bad character trait. McCormick on Evidence §191 (2d ed. 1972).


6. N.M. R. Evid. 404(a): “Evidence of a person’s character . . . is not admissible . . . except: . . . [if offered] by the prosecution to rebut [character evidence offered by an accused].”
to allow the prosecutor to test the credibility of the character witness. The danger of this type of cross-examination is that it may inject factual assertions into the trial which may unfairly prejudice the defendant's case on the merits. The statements of facts included in the prosecutor's questions often contain covert insinuations which the jury may consider for purposes other than impeachment of the character witness, regardless of the witness's answers or the judge's limiting instructions. The true issues raised by the evidence as to the offense may become confused and obscured if the trial's focus shifts toward innuendo and gossip about the character of the accused upon which the prosecutor bases his questions. To moderate this threat of unfair prejudice, trial courts have been invested with broad discretion to limit and control the prosecutor's cross-examination.

In *State v. Christopher* the New Mexico Supreme Court established guidelines for trial courts to follow in controlling the cross-examination of the character witness of the accused. The defendant, indicted for first degree murder of his wife, presented six character witnesses who testified as to his reputation for peacefulness. Over defendant's objection the witnesses, who had known the defendant for only six years, were cross-examined regarding defendant's 1957 convictions for rape, assault with intent to commit an armed robbery, and two armed robberies. One character witness was also questioned over defendant's objection about the defendant's alleged prior beating of his wife.

In reviewing the propriety of this cross-examination, the court adopted the reasoning of the United States Supreme Court in *Michelson v. United States*. That case involved cross-examination of a character witness about the defendant's arrest twenty-seven years earlier. The *Michelson* court reasoned that trial courts were correctly given wide discretion in controlling the limits of cross-examination. The Court noted, however, that "[w]ide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse."

The *Michelson* Court then noted the high standard of care exercised by the trial judge to insure that the prosecutor's ques-
sions on cross-examination of the character witness did not unfairly prejudice the defendant. On this basis, the Supreme Court affirmed the conviction.

In *State v. Christopher* the New Mexico Supreme Court noted that the trial judge had failed to exercise the high degree of care which was approved in *Michelson*, and reversed. The court held that at a minimum a trial judge, upon objection, should do three things. First, the judge should conduct an *in camera* inquiry "to determine whether the target of the prosecution’s question [is] an actual event." 13 Second, the trial judge should determine whether the probative value of the impeaching event outweighs its prejudicial effect. 14 Third, the judge should instruct the jury on the limited purpose of the prosecutor’s inquiry. 15

The threshold protection against an abuse of cross-examination of defendant’s character witness is the trial court’s limiting the examination to "actual events." In *Christopher* the court stated that no cross-examination should be permitted where there is a "significant dispute" that the subject matter of the prosecutor’s question is an actual event. 16 The court, in reviewing the cross-examination of the character witness on the alleged beating administered to his wife by the defendant, stated: "[h]ere, there was a significant dispute as to whether defendant did beat his wife, as alleged." 17 The court determined that the mere filing of a complaint by the wife for assault and battery "in light of the dispute by defendant" 18 was insufficient basis for determining the alleged beating was an actual event.

Where a trial judge determines there is "a significant dispute" as to whether cross-examination is based on an actual event, the cross-examination should be disallowed. Because virtually all cross-examination of this type is based on hearsay, it is extremely vulnerable to

---


14. See N.M. R. Evid. 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Of course, balancing vests a great deal of discretion in the trial court. Cf. United States v. Davis, 546 F.2d 583 (5th Cir.), *cert. denied*, 431 U.S. 906 (1977), which required appellant to show a clear abuse of discretion.


16. 94 N.M. at 652, 615 P.2d at 267.

17. *Id.*

18. *Id.* at 653, 615 P.2d at 268.
dispute. Whether, how, and by what standard, significant disputes as to what constitutes an actual event should be resolved, is left to the sound discretion of trial judges.

The court in Christopher also addressed the question of whether very old crimes or arrests were the proper subject for cross-examination of character witnesses. The court refused to set a flat time limit similar to that provided for prior convictions in N.M. R. Evid. 609 (b) but left the relevancy of these events to be determined by the sound discretion of trial judges. Noting that the defendant’s character witnesses had only known him for six years and that defendant himself had not put his prior record into evidence, the court held that the cross-examination on 20-year-old convictions was improper in the circumstances of the Christopher case. The question of whether old convictions may be used to impeach a character witness who was acquainted with the defendant at the time of the conviction was not addressed.

In light of Christopher, lawyers planning to present character witnesses on behalf of defendants should prepare their witnesses for a potential cross-examination on the defendant’s bad acts. Defense lawyers should become well-acquainted with the defendant’s criminal record and any other notorious bad acts of which the prosecutor may be aware, and they should insure that their character witnesses are not surprised by questions into these events. When appropriate, lawyers should also prepare to challenge the propriety of cross-examination based on specific instances of bad conduct by demonstrating that a significant dispute exists as to whether these are actual events. An argument should also be prepared that even if the subject matter of cross-examination is an actual event, its probative value is outweighed by its prejudicial effect. Finally, if cross-examination on a specific instance of bad conduct is permitted, a limiting instruction should be requested at the conclusion of the character witness’s testimony.

19. “Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement . . . whichever is later. . . .” N.M. R. Evid. 609(b).

20. The court left it to trial judges to balance probative value and prejudicial effect as provided in N.M. R. Evid. 403. But see, People v. Stanton, 1 Ill.2d 444, 445, 115 N.E.2d 630, 631 (1953), where the court stated: “The law is clear that particular acts of misconduct cannot be shown, either on cross-examination or in rebuttal of proof of good character (Citations omitted). The rule is based upon the ground that every man is presumed to be ready at all times to defend his general character but not his individual acts.”

21. Prosecutors presenting witnesses as to the character of victims should anticipate cross-examination in the same manner.

22. See Use Note to N.M. U.J.I. Crim. 40.27: “Upon request, this instruction shall be given upon completion of the testimony of the witness . . . .” (emphasis added).
Rule 609: Impeachment by Evidence of Conviction of Crime

One of the most difficult tactical decisions facing counsel representing a defendant with a prior criminal record is whether to advise his client against testifying. The possible benefit of defendant's exculpatory evidence may be outweighed by the potential of a devastating impeachment cross-examination by evidence of conviction of a crime. The scope and manner of this type of impeachment was addressed by the New Mexico Supreme Court in *State v. Day* and by the court of appeals in *State v. Mills*.

In the *Day* case the supreme court was faced with the question of whether a 1965 California robbery conviction, which may have been a misdemeanor because it was committed with a toy pistol, was a proper subject for impeachment. Rule 609(a)(2) provides that unless the crime is a felony, “evidence that . . . [the witness] has been convicted of a crime shall be admitted . . . only if the crime . . . involved dishonesty or false statement. . . .” The court reasoned that the scope of cross-examination regarding criminal convictions, including misdemeanors, was a matter for the sound discretion of the trial judge. The court further noted that because “[r]obbery involves dishonesty,” the misdemeanor-felony distinction was immaterial. The court held that the trial judge did not abuse his discretion in allowing cross-examination on the robbery conviction. The *Day* opinion reaffirms New Mexico's construction of Rule 609(a)(2) in two important ways: first, in its grant of broad trial court discretion, and second, in its definition of "dishonesty."

The New Mexico rule, which permits the impeachment of a witness's credibility by evidence of conviction of a felony, contains specific language that the impeachment is to be permitted only after the trial court has determined that its probative value outweighs the prejudicial effect to the defendant. Rule 609(a)(2) permits im-

25. Although more than ten years had elapsed since the date of conviction, less than 10 years had passed since the date of his release from confinement; therefore, the time limit imposed by N.M. R. Evid. 609(b) did not apply. See note 19 supra.
26. N.M. R. Evid. 609(a)(2).
27. 94 N.M. at 759, 617 P.2d at 148.
28. N.M. R. Evid. 609(a)(1).
29. "[E]vidence that . . . [a witness] has been convicted of a crime shall be admitted . . . only if the crime (1) was punishable by death or imprisonment in excess of one year . . . and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant. . . ." N.M. R. Evid. 609(a)(1). The prejudicial effect of this evidence may also be controlled or reduced by the trial court’s giving the limiting instruction provided for in N.M. U.J.I. Crim. 40.22 that the evidence of defendant’s prior crimes can be considered only “for the purpose of determining whether the defendant told the truth when he testified. . . ."
peachment by evidence of crimes which may be less than felonies, as long as the crimes "involv[e] dishonesty or false statement, regardless of punishment." This Rule has no directive to the court concerning weighing the prejudicial effect to the defendant. Rather, the Rule states plainly that the evidence "shall be admitted." From the language of Rule 609 it is unclear whether the trial court has any discretion to restrict cross-examination for purposes of impeaching the credibility of a witness by evidence of conviction of crime "involving dishonesty or false statement." The defendant in Day had appealed from prior trials on the same charges on two previous occasions. In both of those cases the New Mexico Court of Appeals reversed and remanded for new trials. In the second appeal, the court of appeals discussed at length the issue of whether trial courts have discretion to restrict cross-examination attacking the credibility of a witness by evidence of crimes involving dishonesty or false statement.

The court in Day II concluded that although Rule 609(a)(2) does not contain language directing the trial court to weigh the prejudicial effect of this evidence on the defendant, trial courts are granted this discretion under N.M. R. Evid. 403, and Rule 609 does not remove this discretion. The New Mexico Supreme Court in Day III approved and adopted the court of appeals' construction of Rule 609. After Day II and Day III, lawyers seeking to restrict impeachment under Rule 609 should be prepared to convince the trial court that the prejudicial effect of allowing the cross-examination outweighs its probative value.

In discussing the definition of "dishonesty" under Rule 609(a)(2), the Day court cited State v. Melendrez, a 1977 case. In Melendrez the court of appeals struggled with the proper definition of "dishonesty." The court determined that crimes involving dishonesty or

---

30. In 1976 N.M. R. Evid. 609 was amended to conform to Fed. R. Evid. 609. Before its adoption by Congress, Rule 609 went to conference committee. The Conference Committee Report states: "The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement." Fed. R. Evid. 609, Committee Commentary, App. C at 557 (1980).


33. The Day II court also concluded that the purpose of including specific language calling for a balancing of probative value against prejudicial effect in Rule 609(a)(1) was to "emphasize concern for the defendant when prior felony convictions of any witness are offered in evidence." 91 N.M. at 576, 577 P.2d at 884.

34. The court specifically held "[t]he trial court did not abuse its discretion in permitting cross-examination." 94 N.M. at 759, 617 P.2d at 148.

false statement were intended to cover crimen falsi. The court stated that crimes relating to credibility are included in this term, while violent or assaultive crimes are generally excluded. The Melendrez court was specifically concerned with misdemeanor shoplifting and concluded that shoplifting involves cheating and stealing. Such dishonest conduct reflects adversely on veracity and is therefore included in crimen falsi.

In the Day opinion the court did not attempt to alter the definition of dishonesty set out in Melendrez, but concluded that robbery also involved dishonesty. Because robbery contains elements of both violence and stealing, it can be inferred that the New Mexico Supreme Court would hold that any larceny crime would now be included in the definition of dishonesty, and evidence of conviction of any misdemeanor larceny crime could now be used to impeach a witness. This may extend the application of the “dishonesty” provision beyond the intent of the drafters.

The court of appeals addressed the question of impeachment by evidence of a prior criminal conviction in State v. Mills. In Mills, the court approved an alternative method to cross-examination for admitting evidence of a prior conviction for impeachment purposes. Defendant Mills was charged with aggravated battery. During cross-examination of Mills, the prosecutor offered an exhibit consisting of an indictment, verdict and sentence taken from district court records, a penitentiary photograph, fingerprints taken at the penitentiary, and another copy of the sentence taken from penitentiary records. The defendant was not cross-examined about any of the records. The defendant contended that the exhibit was improperly admitted because he was not cross-examined on the records. The court stated, “[e]vidence Rule 609(a) expressly permits an attack on a witness’s credibility by evidence of conviction of a crime ‘established by public record during cross-examination. . . .’” The court also noted that the photographs and fingerprints were admissible because they identified the defendant as the person indicted and convicted. The court held that the entire exhibit was properly admitted.

This kind of evidence is subject to misconstruction and overemphasis by the jury. Rule 609 does not expressly require a foundation that the defendant has either forgotten or denied the existence of a

36. 91 N.M. at 261, 572 P.2d at 1269.
38. 94 N.M. at 759, 617 P.2d at 148.
40. Id. at 20, 606 P.2d at 1114.
prior conviction before a public record of the conviction is admissible. The rule does, however, express a policy that trial judges should exercise discretion to protect the defendant from undue prejudice. If trial courts were to exercise discretion by requiring the cross-examiner to attempt and fail to establish prior convictions by oral evidence from the defendant or witness before introducing public records, the danger of overemphasizing the importance of this impeachment evidence would be reduced.

Before the adoption of Rule 609, New Mexico allowed cross-examination on prior convictions, provided that the prosecution go no farther than to establish the fact of the conviction and the name of the felony or misdemeanor of which defendant was convicted. The Mills case may have construed Rule 609 to allow the prosecutor more latitude. In the Mills case, the state was permitted to introduce a penitentiary photograph and fingerprints. The potential prejudicial impact of this evidence in the mind of a juror is unknown. It is unclear whether the court in Mills had any intent to expand the previously limited scope of inquiry. The safest course, still, for trial courts concerned with protecting the defendant from unfair prejudice under Rules 609 and 403, would be to limit evidence of prior convictions to the fact of conviction, the name of the crime, and the date and time of the conviction.

Lawyers anticipating cross-examination of criminal defendants based on evidence of prior crimes should consider reducing the impact of this examination by bringing out the damaging information on direct examination. Otherwise, they should prepare a strong argument that the evidence is inadmissible under Rule 609 because the criminal conviction is outdated, is not a felony or a crime involving dishonesty or false statement, or will have an unfair prejudicial effect. If the evidence is admitted over objection, a limiting instruction should be requested at the conclusion of defendant’s testimony.

41. N.M. R. Evid. 609(a)(1) states that evidence of a prior conviction of a felony is admissible "... only if ... the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant. ..." State v. Day, 91 N.M. 570, 577 P.2d 878 (1978), stated that the purpose of this language was to emphasize concern for the defendant when prior felony convictions of any witness are offered in evidence. See McCormick on Evidence §43 (2d ed. 1972).


43. See United States v. Tumblin, 551 F.2d 1001 (5th Cir. 1977), which adopts this guideline for use in the 5th Circuit.

44. See note 19, supra for a description of the time limits of N.M. R. Evid. 609(b).

45. N.M. U.J.I. Crim. 40.22 must be given at the conclusion of the witness's testimony and during final arguments when requested by the defense; see note 7, supra.
Rule 503: Lawyer-Client Privilege

A communication made during the course of a lawyer-client relationship for the purpose of rendering legal services is confidential where it is demonstrated that it was not intended to be disclosed to third persons.46 A person making a confidential statement may claim a privilege to prevent the statement from being disclosed.47 The burden of proving confidentiality is on the person claiming the privilege.48 In deciding whether a communication is confidential, the court looks to the totality of the circumstances surrounding the communication to determine whether or not confidence was contemplated.49

In State v. Valdez50 the New Mexico Supreme Court reviewed the validity of a claim of lawyer-client privilege. Valdez, while in jail awaiting trial for armed robbery, was approached by another prisoner, Garcia, who allegedly confessed to the crime. Valdez, who was represented by the district public defender, Alice Hector, notified her of this confession. Hector met with Garcia in the presence of Garcia's lawyer, who was also a public defender employed in her office. Garcia was advised by his attorney that Hector was not his attorney, and that any statement he made would be used at Valdez's trial and would be detrimental to his own interests. Garcia then repeated his confession to Hector and stated his willingness to testify at Valdez's trial. When called as a witness, however, Garcia exercised his fifth amendment right and refused to testify. Hector, who was no longer representing Valdez, was called to testify about Garcia's confession. Garcia's attorney objected based on the lawyer-client privilege. The objection was sustained by the trial court. Valdez was convicted of armed robbery.

On appeal, the supreme court identified three elements of N.M. R. Evid. 503 which must be met before the assertion of the lawyer-client privilege to be valid. There must be an attorney-client relationship;51

46. N.M. R. Evid. 503(a)(4). In some circumstances the scope of communications included in the lawyer-client privilege actually includes more persons than lawyer and client. See N.M. R. Evid. 503(b) in which client representatives, lawyer representatives, and lawyers of clients having a common interest with a client may all be included in confidential communications.
47. N.M. R. Evid.503(c).
48. See State v. Gallegos, 92 N.M. 370, 588 P.2d 1045 (Ct. App. 1978), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978) in which the court of appeals declined to decide whether a report or a polygraph examination of the defendant was protected by the lawyer-client privilege of N.M. R. Evid. 503. The court held that the defendant had failed to prove that a lawyer-client privilege existed with regard to that evidence.
50. 95 N.M. 70, 618 P.2d 1234 (1980).
51. The privilege of N.M. R. Evid. 503 only applies to communications "... (1) between [a client] or his representative and his lawyer or his lawyer's representative, or (2) between [a
the communication must be made for the purpose of furthering the rendition of legal services; and there must be an intent that the communication be confidential. The court, applying these elements to the facts of the case, held that an attorney-client relationship did exist between Garcia and Hector.

On the first element, the court noted that Hector was the District Public Defender and Garcia’s attorney was also a public defender who was employed in her office. The court reasoned that any statements made by Garcia to his own attorney were imputed by operation of law to Ms. Hector. The only way in which Hector could extricate herself from the responsibility of being Garcia’s lawyer would have been for her staff lawyer to seek leave of the court to withdraw as counsel for Garcia because of the existence of a conflict of interest. The withdrawal would have had to be granted before the conversation in the jail took place for there not to have been a lawyer-client relationship between Garcia and Hector.

The court, having determined that Hector was Garcia’s lawyer, next considered whether the statements made to her were made for the purpose of rendering professional legal services. The court held without elaboration that Garcia’s confession was made to further the rendition of legal service. Garcia may have had other motives for making the statement—clearing his conscience, for example, or assisting a fellow inmate—but the court did not discuss these. Apparently, the court determined that furtherance of the rendition of legal services was reasonably inferable from the nature of the communication and the fact it was made to his lawyer.

Finally, the court considered Valdez’s claim that Garcia did not

---

52. "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. . . ." N.M. R. Evid. 503(b).

53. “[A] communication is ‘confidential’ if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” N.M. R. Evid. 503(a)(4).

54. “The district public defender shall represent every person without counsel who is financially unable to obtain counsel and who is charged in any court within the district with any crime that carries a possible sentence of imprisonment.” N.M. Stat. Ann. § 31-15-10(B) (1978).

55. N.M. Code of Prof. Resp. R. 5-105(B) provides: “A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client. . . .” See Allen v. District Court in and for the Tenth Judicial District, 184 Colo. 202, 519 P.2d 351 (1974), where the court held that there is not only a right but a duty for a public defender’s office to withdraw from representation when faced with a conflict of interest between two clients.
intend his confession to Ms. Hector to be confidential. Quoting from A.L.R. 3d, the court stated,

In order that the rule as to privileged communications between attorney and client shall apply, it is necessary that the communication by the client to the attorney be confidential, and be intended as confidential. The communication must be made in confidence for the purposes of the relation of attorney and client. If it appears from the nature of the transaction or communication that confidence was not contemplated and the communication was not regarded as confidential, then testimony of the attorney or client may be compelled.\(^{36}\)

Intent is a state of mind and must often be determined by reference to the entire circumstances surrounding a communication. Here, Garcia first made his confession public by speaking to Valdez in the jail.\(^{57}\) He then repeated his confession in the presence of his own attorney, to Hector, who, he had been instructed, and presumably believed, was not his attorney.\(^{58}\) Before repeating his confession to Hector, Garcia was further advised by his own attorney that any statement he made could be detrimental to his interests and would be used at Valdez's trial.\(^{59}\) The court reasoned, however, that because Garcia invoked the fifth amendment at the time of Valdez's trial, an element of ambiguity about Garcia's intent that his confession to Hector be confidential was introduced. The court held that this refusal to testify at the time of trial was sufficient evidence to support the trial judge's finding that Garcia intended his confession to Hector to be confidential. The court held that the trial judge's refusal to permit Hector to testify was proper. Valdez's conviction of armed robbery was affirmed.

In the Valdez case, the New Mexico Supreme Court resolved a disputed claim of lawyer-client privilege in favor of the person in-

\(^{56}\) 95 N.M. at 73-4, 618 P.2d at 1236-7, quoting Annot., 9 A.L.R.3d 1420, 1422 (1966) (emphasis added and citation omitted by the court).

\(^{57}\) The court in Valdez pointed out that Garcia's confession to Valdez was not protected by the lawyer-client privilege because neither party was a lawyer and the confession was not made to further the rendition of legal services. The court held, however, that because a third party knows of certain facts and can testify about them, or even if the facts are a matter of public knowledge, a lawyer is not released to testify about them if they are received in confidence.

\(^{58}\) Ms. Hector was Mr. Garcia's attorney by operation of law. See note 55, supra. The court also pointed out that the presence of two persons in addition to Garcia did not destroy confidentiality especially when these two persons are both Garcia's lawyers. 95 N.M. at 73, 618 P.2d at 1237.

\(^{59}\) 95 N.M. at 72, 618 P.2d at 1236 (emphasis added). The Valdez opinion does not report whether Garcia testified at trial concerning his intent at the time of his confession to Ms. Hector; however, because he was claiming the lawyer-client privilege at the time of Valdez's trial, he must have been claiming that it was his intent that the confession be confidential.
voking the privilege. Justice Payne, writing the Valdez opinion, stated that the public policy underlying the privilege, "is to facilitate full and free disclosure to one's counsel in order to insure adequate advice and proper defense." The importance of this policy was of such a critical nature to the court that it resolved an ambiguous factual question of a client's intent that a statement be confidential in favor of confidentiality. In the future, a lawyer who is discussing matters with a client whom he believes does not desire that the matters remain confidential would be wise to have the client express this intent overtly, perhaps even in writing. This would be especially prudent if the matter is detrimental to the client's interests and the lawyer intends to reveal the matter publicly at a later time.

**Rule 510: Identity of Informer**

Under N.M. R. Evid. 510, the state has a limited privilege to refuse to disclose the identity of an informer who has provided information in an investigation of a possible violation of law. The privilege not to disclose the identity of the informer is limited in that Rule 510 allows for three exceptions. The first is where the informer is a witness for the state or his identity is otherwise voluntarily disclosed. The second is where the informer's testimony is reasonably necessary to the fair determination of the guilt or innocence of the accused or will be helpful to his defense. The third is where in-

---

60. 95 N.M. at 73, 618 P.2d at 1237.

61. In addition to the potential of a claim of privilege at trial under N.M. R. Evid. 503, lawyers are constrained from disclosing confidential communications from clients by the N.M. Code of Prof. Resp. R. 4-101.

62. "The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation." N.M. R. Evid. 510(a).

The Federal Rules of Evidence do not provide for a rule similar to N.M. R. Evid. 510, although such a rule was proposed to Congress. Congress did not adopt any of the proposed evidentiary privilege rules. Instead Congress substituted Fed. R. Evid. 501 which states that where otherwise specifically provided by law "the privilege of any witness, person, government, State, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience." The watershed case on the federal law of informer privilege is Roviaro v. United States, 353 U.S. 53 (1957).

The state in a criminal case in New Mexico is also permitted to refuse to disclose information to the defendant under N.M. R. Crim. P. 27(e):

"The prosecutor shall not be required to disclose any material . . . if: (1) the disclosure will expose a confidential informer; or (2) there is a substantial risk to some person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel."  

63. N.M. R. Evid. 510(c)(1).  
64. N.M. R. Evid. 510(c)(2).
formation from an informer was relied upon to establish the legality of obtaining evidence and the trial judge is not satisfied that "the information was received from an informer reasonably believed to be reliable or credible. . . ." 65

The New Mexico Court of Appeals in *State v. Hinojos"* 66 considered whether a drug enforcement agency 67 (hereinafter DEA) informer had a privilege to prevent disclosure of a current alias after appearing as witness for the state in a criminal case. 68 Hinojos appealed a conviction for trafficking in heroin and conspiracy to traffic on the ground he was improperly limited in his cross-examination of an informer. On cross-examination, defendant's counsel developed a line of inquiry into the informer's frequent use of aliases in his job as an undercover informant with the DEA. Defense counsel asked the witness to reveal the alias(es) he was currently using in Arizona. The witness declined to answer this question. The state, in support of the witness's refusal, offered to tender the witness's testimony regarding both physical dangers and reduction in his usefulness as an informant if he were required to reveal his current alias(es). The trial judge agreed with the state, and the informant was not required to reveal his current alias(es). Nevertheless, he did reveal his true name, the fact that he was currently using an alias in Arizona, and the fact that during his lifetime he had used 15,000 or 50,000 aliases. The informant was also exposed as "an almost-perpetual convict and ex-convict for approximately twenty years, an admitted heroin-user, [and] a long-time informant who occasionally 'welched' on his arrangements with the DEA and failed to report his income to the IRS. . . ." 69

Hinojos, in his argument on appeal, relied on the authority of two United States Supreme Court cases, *Smith v. Illinois"* 70 and *Alford v. United States."* 71 In *Smith v. Illinois*, the defendant, convicted of illegal sale of narcotics, had appealed on the ground that on cross-examination he had not been permitted to inquire of the principal

65. N.M. R. Evid. 510(c)(3).
68. N.M. R. Evid. 510(c) provides for the filing of a motion by the defendant requesting disclosure of an informer's identity where the state has refused to disclose his identity. The court conducts an in camera hearing, usually based on affidavits, to determine whether disclosure is necessary under Rule 510. In Hinojos such a motion and hearing were not necessary because the witness testified.
69. 95 N.M. at 662, 625 P.2d at 591.
70. 390 U.S. 129 (1968).
71. 282 U.S. 687 (1931).
prosecution witness his correct name or where he was living at the
time of trial. The Court reversed the conviction.

Justice Stewart, writing the majority opinion, stated:

[...]

When the credibility of a witness is in issue, the very
starting point in "exposing falsehood and bringing out the
truth" through cross-examination must necessarily be to ask the
witness who he is and where he lives. The witness' name and ad-
dress open countless avenues of in-court examination and out-
of-court investigation. To forbid this most rudimentary inquiry
at the threshold is effectively to emasculate the right of cross-
examination itself. 72

In Alford v. United States, the defendant, convicted of mail fraud,
appealed on the ground he had not been permitted to find out the
principal prosecution's witness's address at the time of the trial. The
Court reversed, stating: "The question, 'Where do you live?' was
not only an appropriate preliminary to the cross-examination of the
witness, but [...]. was an essential step in identifying the witness
with his environment, to which cross-examination may always be di-
rected." 73

In the Hinojos case, Judge Walters wrote the majority opinion 74
affirming Hinojos' conviction. Judge Walters distinguished the
Smith and Alford cases from Hinojos. She noted that the defen-
dant's convictions in Smith and Alford were reversed because they
were deprived of the opportunity to bring the prosecution witnesses' backgrounds before the jury for the purpose of discrediting their testimony. In Hinojos, the state's witness was never asked about his current address, and he did reveal his correct name. Except for the alias that the informer was using in Arizona at the time of trial, sixteen to twenty months after Hinojos's commission of the alleged of-
fense, his background and environment were fully exposed.

Judge Walters also noted that under N.M. R. Evid. 510 as con-
strued in the case of State v. Robinson, 75 trial judges have discretion
to limit disclosure of an informer's identity where the public interest

---

73. 282 U.S. at 693 (citations omitted). The holdings in both Smith and Alford were based
on the application of the sixth and fourteenth amendments of the United States Constitution
and may be inapplicable in civil cases.
74. Judge Lopez dissented. 95 N.M. at 663, 625 P.2d at 592. Judge Lopez based his dissent
in Hinojos on his opinion that, "... an informer who testifies for the State is not protected
by the informer's privilege." 95 N.M. at 664, 625 P.2d at 593. Judge Lopez also would have
held the non-disclosure of the informer's alias to be prejudicial error under Alford and Smith,
supra notes 71 and 72.
75. 89 N.M. 199, 549 P.2d 277 (1976).
in protecting the flow of sensitive information from informants out-
weighs the individual's right to prepare his defense. The court in
Robinson stated:

Our evidentiary Rule 510 provides a systematic method for
balancing the state's interest in protecting the flow of informa-
tion against the individual's right to prepare his defense. It gives
the trial court the opportunity to determine through an in camera
hearing whether the identity of the informer must be dis-
closed or not. Where it appears that the informer's testimony
will be relevant and helpful to the defense of an accused, or nec-
essary to a fair determination of the issue of guilt or innocence,
then the trial judge can order the state to either reveal the iden-
tity of the informer or suffer a dismissal of the charges to which
the testimony would relate. On the other hand, where it appears
to the trial judge from the evidence that the informer's testi-
mony will not be relevant and helpful to an accused's defense, or
necessary to a fair determination of the issue of guilt or in-
ocence, then the identity of the informer can remain undis-
closed, and that person is not exposed unnecessarily to the
highly dangerous position of being a known informant. Our
only concern upon appellate review of the trial court's deter-
mination is to insure that it did not abuse its discretion in this
matter.76

In Hinojos the court pointed out: "Evidence Rule 510 withdraws the
privilege of refusing to disclose the identity of the informer when he
is called as a prosecution witness."77 This was construed to mean, in
the circumstances of the Hinojos case, that the state was required to
reveal the true identity of its informer witness, which they did, but
was not necessarily required to disclose the informer's current
alias[es] if the balancing test called for in Robinson weighed in favor
of protecting the informer from unnecessary exposure to danger.
The court concluded that the trial judge did not abuse this discretion
in disallowing the evidence of the informer's current alias.

In light of Hinojos, lawyers handling cases involving a state claim
of informer privilege under N.M. R. Evid. 510 should file a motion
requesting an in camera determination by the trial judge whether the
informers's identity should be disclosed in the interest of a fair trial.
The motion should now specify all elements of an informer's iden-
tity which should be disclosed, including the informer's correct

76. 89 N.M. at 201–2, 549 P.2d at 279–80. In Robinson the court also approved, as constitu-
tional, the procedure of the trial judge's determination of the issue of non disclosure, in
camera.
77. 95 N.M. at 662, 625 P.2d at 591.
name and address, and the name or names used at the time of the commission of the alleged crime. Additionally, the motion should request the informer’s other names and addresses used in the past, and his current name or names and addresses. Under one reading of Hinojos, the trial court would have discretion to disclose the informer’s true identity, but withhold other identity information in favor of protecting the informer from unnecessary danger. Lawyers should be prepared to justify why the identifying information, in addition to true identity, is necessary to the preparation of the case.

In criminal cases, if it is known that an informant will testify at trial, all information concerning his identify should be sought and obtained before trial under N.M. R. Crim. P. 27 and 29. If it is then developed that the state and the informer intend to withhold any identity information, the trial court will rule on whether identity information must be disclosed in time for defense counsel to make use of the information in an out-of-court investigation.

Rule 608: Evidence of Character and Conduct of a Witness

Under N.M. R. Evid. 608, the credibility of a witness may be attacked or supported by extrinsic evidence in the form of opinion or reputation. In State v. Tafoya, the New Mexico Supreme Court construed Rule 608 to allow expert opinion testimony on the view of the truthfulness of a witness.

Tafoya appealed from the conviction of five felonies arising from an incident involving the sexual abuse of three minors. One of his grounds for appeal was that the trial court erred in refusing to allow the testimony of a child psychologist on the issue of the victims’ credibility. The psychologist stated that the victims, two boys, aged eleven and thirteen, and one eleven-year-old girl, "had fantasized the incident because of their budding sexual awareness; that the children were motivated to lie because they were in trouble with their parents; that the methods of collecting the evidence in this case en-

78. N.M. R. Crim. P. 27 and 29 provide that the defendant is entitled to receive from the prosecutor a list of witnesses he intends to use at trial and any witness statements in his possession. If necessary, defense counsel may seek leave of the court to take the witness’s deposition to obtain identity information.

79. N.M. R. Evid. 608(a) states: The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of a witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

80. 94 N.M. 762, 617 P.2d 151 (1980).
couraged the lie; and that the children had persisted in their story for their own self-protection.\textsuperscript{78}1

The court held that a qualified psychologist or other qualified expert witness may be permitted under N.M. R. Evid. 608(a) to impeach the credibility of other witnesses.\textsuperscript{82} Rule 608(a) limits the impeachment testimony to the expert's opinion as to the witness's "character for truthfulness or untruthfulness."\textsuperscript{83} In \textit{Tafoya} the court construed this rule to allow an expert to render an opinion on whether the child victims were untruthful\textsuperscript{84} on specific occasions, that is, when they reported the incident to their parents and to the police and when they testified in court. The term "character for untruthfulness" thus encompasses opinions on whether a witness is untruthful in his testimony.

The \textit{Tafoya} court also held that the determination of the probative value of the expert opinion testimony must be left to the sound discretion of the trial judge. In \textit{Tafoya} the child psychologist was basing her opinion that the children were untruthful on statements, dispositions and tapes of their trial testimony. She did not question the children herself and had never personally observed their demeanor. The court in \textit{Tafoya} concluded that, "[t]he trial court could properly determine that the probative value of the [expert's] testimony was slight, based upon the lack of personal observation. . . ."\textsuperscript{85}

A lawyer who intends to offer expert opinion testimony on the truthfulness of other witnesses can cite \textit{Tafoya} as authority for doing so. He should, however, be prepared to have the witness give a detailed and persuasive explanation of the basis of his opinion.\textsuperscript{86} The basis should include personal observation, and if at all possible, personal questioning.

\textit{Rules 803, 804, 805: Hearsay Exceptions}

The credibility of a witness's testimony depends on whether he has

\textsuperscript{78}1 94 N.M. at 763, 617 P.2d at 152.


\textsuperscript{84} Note that N.M. R. Evid. 608(a) permits opinion or reputation evidence supporting a witness's character for truthfulness only after a witness's character for truthfulness has been attacked.

\textsuperscript{85} 94 N.M. at 764, 617 P.2d at 153.

\textsuperscript{86} \textit{See} Four Hills Country Club v. Bernalillo County Property Tax Protest Board, 94 N.M. 709, 616 P.2d 422 (Ct. App. 1979), in which the court held that N.M. R. Evid. 705 requires an expert to satisfactorily explain the steps followed in reaching a conclusion and give his reasons for his opinion; otherwise the opinion is not competent evidence.
accurately perceived an event, has correctly recalled it, and has faithfully described it. In the Anglo-American tradition, the ideal method for judge and jury to evaluate the credibility of a witness's testimony is to have a witness with personal knowledge of an event appear in person at the solemn occasion of a trial, take an oath, and subject himself to the rigors of cross-examination. A statement made under less than these ideal conditions is considered untrustworthy and, therefore, is excluded from evidence by the hearsay rule. Exceptions to this rule, however, were developed under common law.

N.M. R. Evid. 803 and 804 have synthesized, with some revisions and developments, the common law exceptions to the hearsay rule. The justification for these exceptions is that under appropriate circumstances, hearsay statements may possess sufficient circumstantial guarantees of trustworthiness to permit the judge and jury to consider them. A review of the New Mexico appellate court cases construing Rules 803 and 804 reveals that the turning point on whether a hearsay statement is admissible or inadmissible under an

89. Hearsay is defined in N.M. R. Evid. 801(c): "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is excluded as evidence by N.M. R. Evid. 802: "Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute."


The danger of admitting hearsay into evidence is that it is not subject to the usual tests that can be applied to ascertain its truthfulness by cross-examination of the declarant. McCormick on Evidence, §245 (2d ed. 1972). It is not given under oath nor is the declarant subject to cross-examination or to the penalties of perjury. Chiordi v. Jernigan, 46 N.M. 396, 192 P.2d 640 (1942). However, there are exceptions to the hearsay rule which depend on circumstantial guarantees of reliability to substitute for the oath, cross-examination and penalties of perjury. Guarantees of reliability are and must be the key to open the door to the exceptions. (Citations omitted.) (emphasis added by the court).

90. The Advisory Committee's note on Fed. R. Evid. 803 states in part:

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.
appropriate exception to the hearsay rule in the presence or absence of circumstantial guarantees of truthworthiness.

**Rule 803(1): Present Sense Impression**

In *State v. Perry* the New Mexico Court of Appeals analyzed the admissibility of hearsay statements under N.M. R. Evid. 803(1). Perry appealed a rape conviction on the ground that the trial court admitted hearsay. The victim testified that she was raped in a motel room. She testified that at the time of the rape she screamed and threw a trash can at the window. The motel clerk testified that at the time of the rape he had received a telephone call from the people in the room adjacent to that of the victim. Over the defendant's objection, the clerk testified that the people on the phone complained about screaming and hollering going on in the next room.

In *Perry* the court noted that preliminary questions concerning the admissibility of evidence are determined by the trial judge. In order for a hearsay statement to be admissible under the present sense impression exception, the statement must be made while the event is being perceived or immediately thereafter. Judge Hendley, writing the opinion in *Perry*, interpreted this requirement to mean:

> The trial judge . . . must decide whether the time element involving the perception affects the reliability of the evidence. . . . The admissibility of the statement will depend upon the trial court’s view of the type of case, the availability of other evidence, the verifying details of the statement and the setting in which the statement is made.

A second requirement for admissibility under the present sense impression exception is that the hearsay statement be a statement describing or explaining the event or condition. This requirement, the *Perry* court noted, simply means that the statement must be relevant and does not require that the statement relate directly to the ultimate fact in issue.

The court in *Perry* concluded that the requirements of relevancy

---

91. 95 N.M. 179, 619 P.2d 855 (Ct. App. 1980).
92. "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the judge. . . . In making his determination he is not bound by the Rules of Evidence except those with respect to privileges." N.M. R. Evid. 104(a).
93. N.M. R. Evid. 803(1) states: "The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness: . . . A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."
94. 95 N.M. at 180, 619 P.2d at 856.
95. See note 93 *supra*.
and contemporaneousness had been met, stating, "basically . . . [these] requirements . . . mean . . . that there be no apparent motive to lie." In the absence of an abuse of discretion by the trial court in determining the admissibility of the motel clerk's testimony about the phone call, the trial judge's decision to admit the statement was affirmed.

**Rule 803(2): Excited Utterance and Rule 804(b)(2): Statement of Recent Perception**

In *State v. Robinson*, the New Mexico Supreme Court considered the applicability of two exceptions to the hearsay rule, excited utterance and statement of recent perception. The defendant, Robinson, was convicted on a jury verdict of two counts of first degree murder and one count of aggravated battery with a firearm. On appeal he argued that the trial court had improperly admitted hearsay statements made by one of the victims.

On the day she was killed, Christine Hitchcock went to her music class just before 1:00 p.m. Christine appeared upset and not herself according to the testimony of both her teacher and her best friend, Kathy Miller. Kathy Miller testified that she had never seen Christine so upset. When Kathy asked her what was the matter, Christine told her that the defendant had threatened her and had tried to kill her that morning. Christine then related the details of the incident to Kathy. Later, after calming down, Christine made Kathy promise not to tell anyone about the incident for fear of getting the defendant in trouble.

The court in *Robinson* first analyzed the admissibility of Christine's statements under the excited utterance exception. One of the

---

96. 95 N.M. at 180, 619 P.2d at 856.
97. In making his determination of admissibility under an exception to the hearsay rule, a trial judge is reviewed only on the question of abuse or discretion. *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977).
98. 94 N.M. 693, 616 P.2d 406 (1980).
99. N.M. R. Evid. 803(2) states: "The following is not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."
100. N.M. R. Evid. 804(b)(2) states:
The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (2) Statement of recent perception. A statement, not in response to the instigation of a person engaged in investigating, litigating or settling a claim, which narrates, describes or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear. . . .

This exception was not adopted by Congress and is not included in the Federal Rules of Evidence.
requirements of this exception is that the hearsay statement be made while the declarant is under the stress or excitement caused by the event. The excited utterance issue addressed in Robinson was whether the lapse of time between the attempt on Christine's life and her statement to Kathy was sufficient to so reduce her stress and excitement as to disqualify her statement as an excited utterance. In addressing this issue, the court stated that "... under the excited utterance doctrine, there is no definite or fixed limit on time. Admissibility depends more on circumstances than on time and each case must depend upon its own circumstances." It was noted that Kathy had been extensively examined and cross-examined about the circumstances surrounding Christine's statement before it was admitted, and all these circumstances pointed to the reliability and veracity required by the excited utterance exception.

The court concluded that, "[a] trial court is allowed wide discretion in determining whether in fact a declarant is still under the influence of the startling event when the statement is made." The trial judge's determination that Christine's statement qualified as an excited utterance was affirmed.

The Robinson court did not justify the admissibility of Christine's statement solely on the basis of excited utterance. Justice Felter, who wrote the opinion, concluded also that because Christine was unavailable as a witness, her statement was admissible under N.M. R. Evid. 804(b)(2) as a statement of recent perception. The use of this additional justification for the admission of the statement under this exception marks the first time the New Mexico Supreme Court has considered and approved of the use of this exception. This approval may pave the way for broader acceptance and use of this exception in New Mexico.

Rule 803(4)(6), 805—Medical Records and Statements for Purposes of Medical Diagnosis—Double Hearsay

In State v. Ruiz, the New Mexico Court of Appeals construed one of the foundational requirements for the admission of medical

---

101. See note 99 supra for the exact language of the rule.
102. 94 N.M. at 697, 698, 616 P.2d at 410, 411.
103. 94 N.M. at 698, 616 P.2d at 411.
104. Cf., State v. Maestas, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978) where the foundational requirements necessary to qualify statements as an excited utterance were not met because there was insufficient evidence that the statements were made while the declarant was still under the influence of a startling event.
105. See note 100 supra for the definition of a statement of recent perception.
106. The New Mexico Court of Appeals had previously approved of the use of the statement of recent perception exception in State v. Maestas, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978). Maestas was cited as authority in Robinson, but on an unrelated issue.
107. 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).
records, and analyzed the double hearsay problem posed when medical records contain hearsay within hearsay. The foundational requirement for medical records which was construed was the meaning of the phrase "custodian or other qualified witness" as used in the business records exception to the hearsay rule. The double hearsay problem addressed was the determination of the admissibility of a patient's statement to his doctor which is contained in the doctor's medical reports. The court found this evidence admissible.

Defendant Ruiz appealed from a burglary conviction. His ground for appeal was that medical reports had been improperly excluded as evidence. His theory of defense was that because he was under the influence of PCP at the time of the burglary, he was unable to form the specific intent to commit a theft. In support of this theory, Ruiz offered medical records through the testimony of Dr. Tandberg. The records contained a statement made by Ruiz to an intern who was treating the defendant in an emergency room the night of the burglary. The treatment was for PCP overdose. The statement made by defendant included the time at which he ingested the PCP.

A threshold requirement for the admissibility of any hearsay statement as an exception to the hearsay rule is a demonstration that the statement is relevant. After analyzing the nature of the evidence and theory of defense in the Ruiz case, the court of appeals determined "... [T]he excluded evidence in the emergency room records was crucial to the 'no intent' defense."

The medical records were offered under N.M. R. Evid. 803(6), as a business record. This Rule has seven foundational elements.

---

108. Medical records are business records and fall under the type of records described in N.M. R. Evid. 803(6) which states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ... (6) Records of regularly conducted activity. A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit." (emphasis added).

109. N.M. R. Evid. 402.

110. 94 N.M. at 774, 617 P.2d at 163.

111. See note 108 supra.

112. The requirements are derived from N.M. R. Evid. 803(6) and have been listed and described as follows:

a. Record is relevant.
b. Record is a "memorandum, report, record or data compilation in any form."
c. Witness is the "custodian or other qualified witness."
d. Record was "made by a person with knowledge" of the facts or was "made
One of these elements is that the tendering witness for the records be the "custodian or other qualified witness." The court held that Dr. Tandberg, although not the custodian of the medical record, was a qualified witness as required by the rule. Judge Wood, writing the opinion, defined the meaning of the term qualified witness: "Our view is that a witness is 'qualified' if able to testify to the foundation requirements stated in Evidence Rule 803(6). . . ."\(^{113}\)

This holding will facilitate the defense lawyer's preparation of his case. Because most physicians who testify in court are also familiar with the record-keeping procedures of hospitals and other medical offices, the \textit{Ruiz} case should, in most circumstances, obviate the need to bring both a doctor and a custodian of the medical records to trial for the purpose of introducing the medical records about which the doctor will testify.

The \textit{Ruiz} court also considered the double hearsay problem posed in admitting the defendant's hearsay statement made to the intern in the emergency room as recorded by that intern in the medical records.\(^ {114}\) A foundation for the admission of the medical records was established under the business records exception to the hearsay rule. To be admissible, however, the defendant's statement also had to satisfy the requirements of an appropriate exception to the hearsay rule. The defendant argued that his statement regarding when he ingested PCP satisfied the requirements of a statement made for the purposes of medical diagnosis.\(^ {115}\) The principal requirement for this exception is that the statement be reasonably pertinent to diagnosis or treatment. The court of appeals agreed that defendant's statement satisfied this requirement, stating: "Since doctors may be assumed not to want to waste their time with unnecessary history, the fact that a doctor took the information is prima facie evidence that it was

\begin{itemize}
\item from information transmitted by a person with knowledge of the facts.
\item e. Record was "made at or near the time" of the "acts, events, conditions, opinions, or diagnoses" appearing on it.
\item f. Record was made as part of "the regular practice of that business activity."
\item g. Record was "kept in the course of a regularly conducted business activity."
\end{itemize}


\(^{113}\) 94 N.M. at 775, 617 P.2d at 164.

\(^{114}\) N.M. R. Evid. 805 provides that "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

\(^{115}\) N.M. R. Evid. 803(4) states: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (4) Statements for purposes of medical diagnosis of treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."
pertinent.

In *Ruiz*, the court clearly places on the party opposing the offer, the burden of persuasion that a patient's statement made to a doctor and contained in a medical record does not satisfy the requirements of a statement made for the purpose of medical diagnosis.

The court of appeals concluded that the medical records were relevant, that a foundation for them had been laid by a "qualified witness," and that the statements contained in them satisfied the requirement that the statements be pertinent to medical diagnosis. The court determined that the exclusion of the medical records containing the defendant's statement about the PCP was prejudicial error and reversed.

**Rule 803(8): Public Records Exception**

In *State ex rel. Reynolds v. Holguin* the New Mexico Supreme Court considered, inter alia, the admissibility of evidence under the public records and reports exception to the hearsay rule. The public records and reports exception has three foundational requirements. First, the hearsay statement must be relevant. Second, it must be in the form of a public record or report. Third, in civil actions such as *Holguin*, the public record must contain "factual findings resulting from an investigation made pursuant to authority granted by law." Even if these three foundational elements are met, the trial judge has discretion to exclude the evidence if the sources of in-

---

116. 94 N.M. at 776, 617 P.2d 165, quoting from, 4 Weinstein's Evidence, ¶803(4)[01] (1979) at 803-130.
117. 95 N.M. 15, 618 P.2d 359 (1980).
118. N.M. R. Evid. 803 states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (8) Public records and reports. Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth (1) the activities of the office or agency, or (2) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (3) in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness (emphasis added).

119. N.M. R. Evid. 803(8)(c). An illustration of authentication of a public record is found in N.M. R. Evid. 901(b)(7) which states:

(b) Illustrations. By way of illustrations only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: . . . (7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement or data compilation, in any form, is from the public office where items of this nature are kept.
formation for the records and reports indicate lack of trustworthiness.

In Holguin, the state sought declaratory and injunctive relief against Holguin to terminate the unlawful diversion of public waters. The trial court entered judgment on a jury verdict against the state. The state appealed, in part, on the ground that trial court improperly refused to admit an aerial photograph into evidence.\(^\text{120}\)

For Holguin to prove he was legally entitled to divert waters from the Rio Grande to irrigate his land, he had to prove that his water rights became vested prior to the enactment of the Water Code in 1907. Even if the water rights were vested prior to 1907, they could be terminated if they were not used. During the trial the state attempted to introduce an aerial photograph purporting to show that Holguin's property was wholly unirrigated in 1935. The photograph was admitted for certain purposes as a public record, but it was excluded for the purpose of showing the state of the land in 1935. Nothing on the photograph itself indicated the flight date of the aerial survey from which it allegedly came.

The photograph was authenticated through Fred Allen, the Chief of the State Engineers Technical Bureau. Foundational evidence was offered to establish that the photograph was taken on a 1935 flight date. The evidence was: (1) a report stating that a 1935 survey had been conducted; (2) a number, 418, which appeared on the photograph. Mr. Allen claimed that the number identified the photograph as one taken of a specific quadrangle from that survey because that is what his office filing system indicated; (3) Mr. Allen's statement that the State Engineer's Office was told by someone in Washington, D.C. that the photograph was from the 1935 survey; and (4) Mr. Allen's testimony that the State Engineer's Office had received written confirmation of the oral statement from Washington, D.C. but had lost it.

The court in Holguin found a lack of personal knowledge in Mr. Allen's testimony connecting the photograph to the 1935 survey. The court reasoned that this lack of personal knowledge cast doubt on the trustworthiness of the photograph as a public record for the purpose of indicating the state of Holguin's land in 1935. In support of imposing a requirement of personal knowledge, the court stated:

\(^{120}\) In Holguin the state also offered several photographic reproductions of aerial photographs of Holguin's land taken by the International Boundary Commission in 1935, 1940, 1947, 1950 and 1955. The supreme court held that these were properly excluded by the trial judge because the Chief of the State Engineers Technical Bureau could not authenticate them as public records as required by N.M. R. Evid. 901(7), and because they did not meet the requirements for admission as self-authenticating documents under either N.M. R. Evid. 902(2), "domestic public document not under seal," or N.M. R. Evid. 902(4), "certified copies of public records."
Rule 803(8) is silent about a requirement of personal knowledge, although the introductory notes to Rule 803 state that "neither this rule nor Rule 804 dispense with the requirement of first-hand knowledge." In the case of Rule 803(8) this requirement must be interpreted flexibly, bearing in mind that the primary object of the hearsay rule is to bar untrustworthy evidence.  

The court concluded that Mr. Allen's lack of personal knowledge connecting the photograph to the 1935 aerial survey created a lack of trustworthiness which was not overcome. The court affirmed the trial court's exclusion of the photograph insofar as it was used in connection with the 1935 survey. The court, however, did not quibble with the photograph's admission for other purposes as a public record.

After the Holguin case New Mexico practitioners should be aware that the fact that an exhibit may qualify as a public record does not necessarily mean it is admissible. If a reasonable question is raised about the record's lack of trustworthiness, such as a lack of personal knowledge regarding the source of the information it contains, it may, in the court's discretion, be excluded.

Holguin presented a second evidentiary question concerning the statutory exceptions to the hearsay rule. In Holguin, the state also argued that the aerial photograph was admissible under N.M. Stat. Ann. §72-4-16 (1978). The court pointed out the photograph ex-

---

121. 95 N.M. at 18, 618 P.2d at 362, quoting 4 Weinstein and Burger, Evidence §803(8)[02] (1979 ed.).

122. The court in Holguin suggested that the lack of personal knowledge, and therefore lack of trustworthiness, over the 1935 date, could have been overcome by "witnesses with personal knowledge, such as a federal custodian of the records, who could have testified that the survey map was dated to a certain time period through the record keeping process, or through some method of self-authentication of the date of the survey map." 95 N.M. at 18, 618 P.2d at 362. The result may also have been different had the photograph indicated on its face the date it was taken.

123. In regard to the trial judge's exercise of discretion regarding the admissibility of evidence under N.M. R. Evid. 803(8) the court in Holguin stated: "[T]he determination of trustworthiness is within the discretion which is traditionally allowed the trial court in the admission of evidence if surrounding factors indicate sufficient reliability." 95 N.M. at 19, 618 P.2d at 363, quoting State v. Ramirez, 89 N.M. 635, 645, 556 P.2d 43, 53 (Ct. App. 1976).

124. N.M. Stat. Ann. § 72-4-16 (1978) states:
All reports of hydrographic surveys of the waters of any stream system, or parts thereof, and other surveys heretofore or hereafter made by the state engineer, or under his authority, or by any engineer of the United States, or any other engineer, in the opinion of the state engineer qualified to make the same, may, when made in writing and signed by the party making the same, be filed in the office of such state engineer, and the originals or certified copies thereof, made by such state engineer, shall be received and considered in evidence in the trial of all causes involving the data shown in such survey, the same as though testified to by the person making the same, subject to rebuttal, the same as in ordinary cases.
hibit did not comply with the statute because it did not bear the required signature. The court then stated:

Even if Reynolds did comply with the statute, it is limited by our rules of evidence, and the statute cannot expand them. Admissibility of evidence is procedural to be governed by rules adopted by the Supreme Court. If there is a variance between a statute and the rules of evidence adopted by this Court, the rules prevail.125

The hearsay rule reads: "Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute."126 In view of the supreme court’s pronouncement on the use of a statutory exception to the hearsay rule in Holguin, New Mexico practitioners faced with evidence offered under statutory exceptions to the hearsay rule should now argue that unless the evidence conforms to the requirements of an exception identified in the Rules of Evidence or other rules adopted by the supreme court, it is inadmissible.

**Rule 803(24): Other Exceptions**

The adoption of the Rules of Evidence created a new exception to the hearsay rule in New Mexico which can be of great benefit to imaginative trial lawyers. This exception, spelled out in N.M. R. Evid. 803(24), provides for the admission of hearsay statements which have circumstantial guarantees of trustworthiness equivalent to those in the other recognized exceptions to the hearsay rule.127

125. 95 N.M. at 17, 618 P.2d at 361.
126. N.M. R. Evid. 802 (emphasis added).
127. N.M. R. Evid. 803(24) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (1) the statement is offered as evidence of a material fact; (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (3) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant. [As amended, effective April 1, 1976.]
the case of *State v. Doe*, the New Mexico Court of Appeals approved the use of the "catch-all" exception.

In *State v. Doe*, the state sought an adjudication of delinquency based on a charge of sexual abuse. The children's court ruled that the victim, who was four years old, was incompetent to testify on the basis of his inability or unwillingness to communicate. The prosecution then sought to introduce a statement made by the victim to his parents shortly after the incident. The prosecutor had filed a Notice of Intent to Make Use of Statements Under the Exception to Hearsay Testimony as required by Rule 803(24).

A foundation consisting of five elements must be laid for hearsay statements to be admissible under Rule 803(24). First, the statement must be relevant. Second, it must be more probative on the relevant point than other evidence which the proponent could obtain through reasonable efforts. Third, the admission of the statement must be shown to be necessary to serve the interests of justice. Fourth, notice must be given to the adverse party of an intent to use the statement at a trial or hearing in sufficient time for the adverse party to prepare to meet it. Finally, the statement must be shown to possess circumstantial guarantees of trustworthiness equivalent to those contained in the other exceptions to the hearsay rule.

In *Doe* the prosecutor had little difficulty meeting the first four requirements. The victim's statement to his mother consisted of a description of anal intercourse and fellatio which he said the defendant had engaged in with him. The statement is clearly relevant. Because it was the only eye witness testimony available, it was the most probative evidence the prosecutor could reasonably obtain. Without the statement, the defendant could not be prosecuted, so the interests of justice were served by its use. Adequate notice was provided.

The requirement that the statement have equivalent circumstantial


129. The use of N.M. R. Evid. 803(24) was reviewed favorably in *State v. Ellis*, 95 N.M. 427, 622 P.2d 1047 (Ct. App. 1980), cert. denied, 95 N.M. 426, 622 P.2d 1046 (1981). *Cf. State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978) in which the court reviewed and approved, the use of N.M. R. Evid. 804(b)(6), which is the equivalent to Rule 803(24) when the declarant is unavailable.

130. The notice must include the particulars of the statement, presumably including the circumstances in which it was made, as well as the name and address of the declarant. N.M. R. Evid. 803(24). In the *Ellis case*, supra, note 126, the court of appeals raised *sua sponte*, the use of Rule 803(24) on appeal. Because neither party had raised or argued its use in trial or on appeal, the viability of the notice requirement was subject to question.
guarantees of trustworthiness was furthered when the prosecutor introduced the testimony of an expert that the child's statement to his mother was more likely to be accurate than fabricated, and that he was probably 100% accurate in the identification of the person involved.\footnote{131} The court of appeals held that the statement met all of the requirements of Rule 803(24), and that therefore the trial court did not err in exercising discretion to admit the statement.\footnote{132}

**CONCLUSION**

The Rules of Evidence were adopted by the New Mexico Supreme Court to promote the law of evidence "to the end that truth may be ascertained and proceedings justly determined."\footnote{133} The New Mexico Supreme Court and Court of Appeals are struggling to construe the issues raised under the Rules in this light. It is incumbent upon trial lawyers and judges to keep abreast of new developments and to apply them in appropriate cases. It is the author's hope that this article is of some aid in that endeavor.

---

\footnote{131}{Evidence to support the credibility of a witness is generally inadmissible until the credibility of the witness has been attacked. \textit{N.M. R. Evid.} 608(a)(2). When the credibility evidence goes to the question of admissibility of other evidence, however, it is admissible under \textit{N.M. R. Evid.} 104(a).}

\footnote{132}{The \textit{Doe} case was reversed on other grounds.}

\footnote{133}{\textit{N.M. R. Evid.} 102.}