NEW MEXICO LAW REVIEW

Volume 13
Issue 2 *Spring 1983*

Spring 1983

Evidence I

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EVIDENCE I

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INTRODUCTION

During the Survey year, New Mexico appellate courts decided more than forty cases in which a major issue was the application and interpretation of the New Mexico Rules of Evidence. Rather than present a catalogue of these decisions, this article will discuss in depth a few selected cases to highlight frequently occurring problems. The theme of this discussion is that issues of relevance and materiality require careful, step-by-step analysis to determine the correct application of the rules.

SPECIFIC INSTANCES OF CONDUCT

Although the rules of evidence generally form a coherent and consistent system, there are occasions when a court interprets one rule in a way that contradicts the intent of another. In *State v. Wyman*,[1] the New Mexico Court of Appeals upheld the introduction under Rule 608(b)[2] of evidence of acts underlying a juvenile adjudication even though Rule 609(c)[3] expressly declares inadmissible evidence of the juvenile adjudication itself.

The language of Rules 608 and 609 does not make clear the relationship between the two. Because

> the first sentence of Rule 609(d) [N.M. R. Evid. 609(c)] bars only the use of a juvenile adjudication to impeach "under this rule," there is room to argue that the bar does not reach cross-examination of a witness under Rule 608(b) concerning the acts underlying the juvenile adjudication. It has been suggested that most jurisdictions which have considered this question have allowed such cross-examina-

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*Notes and Comments Editor, *New Mexico Law Review*, 1982–83. The author wishes to express her gratitude to Professor Lee E. Teitelbaum for his unfailing willingness to discuss the issues raised by these cases.

1. 96 N.M. 558, 632 P.2d 1196 (Ct. App. 1981).
2. N.M. R. Evid. 608(b) reads in pertinent part:
   > (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness. . . .
3. N.M. R. Evid. 609(c) provides in pertinent part: "Evidence of juvenile adjudications is generally not admissible under this rule. . . ." The corresponding federal rule is Fed. R. Evid. 609(d).

> tion.[77] As is true in connection with acts underlying convictions excludable for other reasons under Rule 609, it seems that this approach substantially undercuts the protections which Rule 609 seeks to provide, and for this reason should not be taken.[4]

In addition to the above policy reason for finding that Rules 608 and 609 do not overlap—that one rule ought not be interpreted so as to interfere with the protection afforded by another rule—the organization of the rules themselves lends support to the position that they should be applied separately and under distinct conditions. Rule 609 governs impeachment by evidence of conviction of crime; Rule 608(b) addresses impeachment by evidence of specific instances of conduct which did not result in a conviction for a crime. Because "cross-examination of a witness concerning his own prior convictions is separately regulated by Rule 609, it is apparent that prior bad acts . . . encompasses acts which may be criminal but which have not resulted in a conviction, and acts of a non-criminal nature as well."[5]

The distinct categories falling under Rules 608 and 609 suggest that they are mutually exclusive rules. That is, if a conviction or adjudication has been obtained, Rule 609 controls; Rule 608 comes into play only where the specific instances of prior bad conduct have not resulted in conviction or adjudication. Under this analysis, the two rules would never be in conflict and Rule 608(b) could not be used to circumvent the policy considerations embodied in Rule 609(c).

The controversy about the relationship of Rule 608 to Rule 609 reflects the tension between the social policy basis for Rule 609's exclusion of evidence of juvenile adjudication and a perception that in some cases fairness requires the disclosure of the acts underlying the excluded adjudication. Thus, the Second Circuit, upholding a conviction in which cross-examination of the defendant included questions about his previous youthful offender adjudication, remarked:

> Despite the distinction between a conviction and a youthful offender adjudication, it would be unfair to the government to permit a defendant who had been adjudicated a youthful offender to create the erroneous impression that he was lily-white by implying to the jury, which cannot be expected to draw such fine distinctions, that he had never committed any offense at all.[6]

On the other hand, some courts have found that the policy of 609(c)

4. 3 D. Louisell & C. Mueller, Federal Evidence § 322, at 370 (1979) [hereinafter cited as Louisell & Mueller]. The footnote number 77 reference in the original is to Comment, *Use of Adjudications of Juvenile Delinquency and Specific Acts of Misconduct Committed by Juveniles*, 33 N.Y.U. L. Rev. 406, 408–410 (1958).

5. Louisell & Mueller, *supra* note 4, § 305, at 224–25.

6. United States v. Canniff, 521 F.2d 565, 570 (2d Cir. 1975).

supersedes the need for this information. As early as 1941, the desirability of different treatment for juvenile transgressions was recognized by the United States Court of Appeals for the District of Columbia,[7] which articulated the special status of minors. Discussing the rules that bar the admission of evidence of juvenile adjudication, that court stated:

> Their enactment is founded upon strong social policy, and their aim is amnesty and oblivion for the transgressions of youthful offenders. . . . It would be a serious breach of public faith, therefore, to permit these informal and presumably beneficent procedures to become the basis for criminal records, which could be used to harass a person throughout his life.[8]

The New Mexico courts, however, apparently subscribe to the Second Circuit's "fairness" doctrine. The *Wyman* trial court, noting that the defendant had put his good conduct in issue, stated that the prosecution could not "ask him if he has ever been convicted of his juvenile record, but they have a right to show that he is just not a number-one, one hundred percent all American good boy, which is the impression the jury is going to get without asking these questions."[9] The court of appeals cited this statement with approval and upheld the trial court's decision that the probative value of the questions pertaining to auto theft, residential burglary, and larceny, which the defendant admitted having committed as a juvenile, outweighed their prejudicial effect.[10] The prosecution was thereby allowed to circumvent Rule 609 entirely by invoking Rule 608(b).

USE OF A GUILTY VERDICT TO IMPEACH

In *State v. Keener,*[11] the New Mexico Court of Appeals confronted for the first time the question of whether a jury verdict may be used for impeachment purposes before judgment has been entered on that verdict.[12] In keeping with the decisions of several of the circuits,[13] the court held

7. Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941).

8. *Id.* at 908–909. The logic of this reasoning suggests that evidence of acts of juvenile transgressions which have *not* resulted in adjudication should also be inadmissible. Otherwise, "amnesty and oblivion" would be achieved only for those juveniles brought to court for their transgressions. This result would be contrary to the underlying principle that all young people should have the chance to begin adulthood with a clean slate.

9. 96 N.M. at 560, 632 P.2d at 1198.

10. *Id.*

11. 97 N.M. 295, 639 P.2d 582 (Ct. App. 1981), *cert. denied,* 98 N.M. 50, 644 P.2d 1039 (1982).

12. 97 N.M. at 298, 639 P.2d at 585.

13. *See* United States v. Vanderbosch, 610 F.2d 95 (2d Cir. 1979); United States v. Duncan, 598 F.2d 839 (4th Cir. 1979); United States v. Klein, 560 F.2d 1236 (5th Cir. 1977), *cert. denied,* 434 U.S. 1073 (1978); United States v. Rose, 526 F.2d 745 (8th Cir. 1975), *cert. denied,* 425 U.S. 905 (1976); United States v. Canaday, 466 F.2d 1191 (9th Cir. 1972).

that a jury verdict of guilty falls within the meaning of "convicted" under Rule 609 and may therefore be used to impeach a witness.[14]

The holding that a jury verdict is sufficient to allow impeachment on the ground of prior conviction provides an interpretation of Rule 609(a) that is consistent with the rule stated in 609(d).[15] Rule 609(d) provides that the pendency of an appeal will not bar use of the conviction for impeachment purposes. "The rule rests on a presumption of correctness attending judicial proceedings, which finds support in the fact that an overwhelming majority of criminal appeals result in affirmance."[16] By the same reasoning, this "presumption of correctness" supports allowing evidence of a jury verdict before entry of judgment if courts deny the "overwhelming majority" of motions for judgment N.O.V. Although no empirical studies have been done to document whether courts routinely deny motions for judgment N.O.V., theoretically, at least, the burden of proof in criminal cases is an indication that criminal convictions are generally reliable. Because "the conviction represents a jury's conclusion that evidence proves the witness's guilt beyond a reasonable doubt,"[17] and because of the constitutional and procedural safeguards built into the criminal justice system,[18] a jury verdict of guilty may be presumed to be highly resistant to judgment N.O.V. as well as to appeal.

There is one way, however, in which a motion for judgment N.O.V. differs from appellate review. If the presumption that judicial proceedings will reach a correct result arises only upon the completion of a particular proceeding, then the presumption cannot attach to a trial until after the decision on the motion for judgment N.O.V. because the trial is not concluded until that decision is made. A motion for judgment N.O.V. allows the trial judge to review the proceedings and correct an erroneous

14. 97 N.M. at 298, 639 P.2d at 585.

15. N.M. R. Evid. 609 reads in pertinent part:

> (a) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment. . . . (d) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

16. 3 Louisell & Mueller, *supra* note 4, § 323, at 371.

17. Note, *Impeachment of Witnesses by Prior Convictions Pending Appeal*, 46 U. Chi. L. Rev. 499, 512 (1979).

18. The rules of evidence afford protection against the admission of hearsay, N.M. R. Evid. 802, and irrelevant, immaterial, or highly prejudicial evidence, N.M. R. Evid. 401-403. The fourth, fifth, and sixth amendments, U.S. Const. amends. IV, V. & VI, provide protection against unreasonable search and seizure, double jeopardy, self-incrimination, loss of life, liberty or property without due process of law, and further create procedural guarantees such as the grand jury and the right to a speedy trial.

jury verdict. This procedural device may be one of the safeguards which give rise to the presumption of correctness of judicial proceedings. Motions for a new trial and appeals, on the other hand, are true post-trial motions which are made only after the termination of the original proceeding, which is presumed to have been correctly decided. Whether it would be proper to admit evidence of a prior conviction by jury verdict while a motion for judgment N.O.V. was pending was not an issue in *Keener* because Keener did not move for judgment N.O.V. in his first trial.[19]

Although evidence of a jury verdict of guilty is therefore generally admissible for impeachment purposes, Keener might have been able to exclude this evidence if he had made the correct objection at trial. The conviction Keener sought to exclude was used to impeach his wife's and his own testimony and pertained to their joint conviction for possession of marijuana with intent to distribute. Keener was co-defendant with both his wife and son on that charge and all three were convicted. Keener was subsequently tried for assault on a police officer. At the second trial both Keener and his wife responded to questions about their prior convictions but neither specified that they involved marijuana.[20]

Keener might have prevailed if he had objected on the basis of unfair prejudice[21] to the use of his wife's prior conviction to impeach her testimony. Because the testifying witness was Keener's wife, Keener could have argued that allowing the prosecution to present evidence of her conviction to the jury created the possibility that the jury would infer that Keener was a member of a family that engaged in criminal activity and was therefore likely to be a criminal himself. The risk that the jury will confuse impeachment evidence with substantive evidence forms the basis for the exclusion of propensity evidence under Rule 404.[22] At the very least, Keener was entitled to a limiting instruction on the use of this

19. Telephone communication from Keener's trial counsel, Gilbert Bryan, Esq., through his secretary (June 24, 1982).

20. 97 N.M. at 297–98, 639 P.2d at 584–85. In fact, the state asked only one question. On cross-examination the prosecutor asked Mrs. Keener, "And Mrs. Keener, have you been convicted of a crime punishable by imprisonment within the past 10 years?" She answered, "Yes." Transcript of Proceedings, *State v. Keener*, at 113 [hereinafter cited as Transcript]. The prosecutor also asked the defendant, "Mr. Keener, have you been convicted of a crime punishable by imprisonment in excess of one year within the past ten years?" His response was, "Not except last week. I hadn't been convicted on it yet." Transcript at 122 (the Transcript is available at the University of New Mexico Law Library).

21. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.M. R. Evid. 403.

22. N.M. R. Evid. 404 reads in pertinent part: "(a) Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. . . ."

evidence. The court of appeals did not consider his objection under Rule 403 because he had not raised the objection in the trial court.[23]

Keener also waived a second possible objection under Rule 403 for lack of timely objection. Keener might have argued that evidence of his wife's conviction was prejudicial in that the prosecution did not specify the nature of the offense. There is some authority that evidence of a prior crime is not admissible unless the prior offense is named,[24] particularly where the subsequent offense is a different crime. If the jury assumed that Mrs. Keener had been convicted of aggravated assault upon a police officer, they may have also assumed that her husband was prone to committing the same offense.

The court's decision in *Keener* comports with the general policy determination underlying Rule 609—that evidence of prior convictions for serious crimes is relevant on the issue of credibility and is therefore admissible unless outweighed by its prejudicial effect to the defendant. A contrary ruling by the court would not, however, have automatically excluded all evidence of prior crimes. If the court had held that the only evidence admissible under Rule 609 was evidence of prior convictions on which judgment had been entered, Rule 608[25] would still have allowed impeachment of a witness by evidence of specific instances of conduct that relate to truthfulness. Although Rule 608 forbids the introduction of extrinsic evidence to show prior bad acts, it allows cross-examination of witnesses about acts such as perjury, forgery,[26] and perhaps drug trafficking,[27] which courts consider probative of truthfulness.

Further, in Keener's case evidence of the prior crime may have been

23. 97 N.M. at 298, 639 P.2d at 585.

24. Riggs v. United States, 280 F.2d 750 (5th Cir. 1960); United States v. Pennix, 313 F.2d 524 (4th Cir. 1963).

25. N.M. R. Evid. 608 provides in pertinent part:

> (b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

26. United States v. Field, 625 F.2d 862 (9th Cir. 1980).

27. The court in United States v. Ortiz, 553 F.2d 782 (2d Cir. 1977), *cert. denied*, 434 U.S. 897 (1977), recognized that "a narcotics trafficker lives a life of secrecy and dissembling in the course of that activity, being prepared to say whatever is required by the demands of the moment, whether the truth or a lie." 553 F.2d at 784. The court therefore concluded that evidence of a conviction for drug trafficking is probative of truthfulness. *Id.*

New Mexico has adopted an expansive definition of crimes which may be used for impeachment purposes. The supreme court found shoplifting indicative of veracity in State v. Melendrez, 91 N.M. 259, 572 P.2d 1267 (Ct. App. 1977), and included robbery among the crimes probative of truthfulness in State v. Day, 94 N.M. 753, 617 P.2d 142, *cert. denied*, 449 U.S. 860 (1980).

admissible substantively under Rule 404(b).[28] The prior convictions of Keener and his wife arose out of the same incident as did Keener's indictment for assault on a police officer. Possession of marijuana would be relevant to the assault charge to show that Keener had a motive for seeking to prevent police officers from searching his house. Keener asserted that his reason for emerging from the bedroom with a loaded pistol was that his house had been previously broken into and his dog had been shot.[29] Therefore, evidence that at the time of the arrest he was in possession of a large quantity of marijuana[30] would be relevant to discredit his explanation and supply a motive suggesting that he knew he was confronting police officers and that he had a vested interest in keeping them out of his house.

ADMISSIBILITY OF EVIDENCE OF INSURANCE

Evidence of insurance coverage, or lack thereof, is the subject of a special rule governing its admissibility.[31] Rule 411 defines the limited purposes for which a court may admit such evidence and contains an absolute prohibition of the use of this evidence to show negligence. The reason for this special rule is not clear; in fact, the rule appears superfluous because "it operates to exclude evidence which probably does not meet the requirements of Rules 401 through 403"[32] and allows the admission of evidence which does meet the relevancy criteria set forth in Rules 401 through 403. Nevertheless, Rule 411 passed without controversy in Congress.[33]

In *Martinez v. Teague*,[34] the court of appeals reaffirmed that in New Mexico the introduction of evidence of insurance will not constitute re-

28. N.M. R. Evid. 404(b) provides:

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

N.M. R. Evid. 404. See Teitelbaum & Hertz, *Evidence II: Evidence of Other Crimes as Proof of Intent, post* at 423, for a lengthier discussion of Rule 404 and its application.

29. Transcript at 118.

30. *Id.* at 130.

31. N.M. R. Evid. 411 and Fed. R. Evid. 411 both read:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership or control, or bias or prejudice of a witness.

32. 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶411 [02], at 411–15 [hereinafter cited as Weinstein & Berger].

33. 2 Louisell & Mueller, *supra* note 4, § 192, at 362–63.

34. 96 N.M. 446, 631 P.2d 1314 (Ct. App. 1981). For a discussion of other aspects of this case, see Otten & McBride, *Torts, post* at 473.

versible error unless the evidence was so prejudicial that its admission amounted to an abuse of discretion.[35] Relying on *Grammar v. Kohlhaas Tank & Equipment Co.*,[36] the court defined four rules that govern the admissibility of evidence of insurance. The rules make evidence of the existence of or lack of insurance coverage inadmissible to show that a person acted negligently but admissible for other purposes where the probative value of this evidence is not substantially outweighed by its prejudicial effect.[37] New Mexico Rule 411, which is identical to the federal rule, thus leaves the question of admissibility of evidence of insurance to the discretion of the trial court in all cases where a party offers the evidence for a purpose other than to show negligence or wrongful conduct.

The mention of insurance in *Martinez* came about through a tortuous chain of testimony. The plaintiff, Mrs. Martinez, had been driving her car when she collided with a horse owned by Mr. Teague. A psychiatrist, Dr. Engleman, testified for the defense. He had interviewed Mrs. Martinez once[38] and had read her medical records, including a report from another psychiatrist, Dr. Wood.[39] Dr. Engleman testified that in his opinion Mrs. Martinez' problems were not related to her accident with the horse but rather were a means of solving her financial problems through litigation.[40] He further stated that Mrs. Martinez' concurrent workmen's compensation suit, arising out a separate accident, might also be a "chance to make some money by starting a lawsuit."[41]

On cross-examination, Mrs. Martinez' counsel attempted to discredit Dr. Engleman's testimony. Dr. Engleman had read portions of Dr. Wood's report indicating that Mrs. Martinez had difficulty relating to authority figures and that she had a separate workmen's compensation lawsuit in

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35. 96 N.M. at 449, 631 P.2d at 1317.

36. 93 N.M. 685, 604 P.2d 823 (Ct. App. 1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980). For an analysis of this case, see Gonzales, *Evidence, Survey of New Mexico Law: 1979–80*, 11 N.M.L. Rev. 159, 166–69 (1980–81) [hereinafter cited as Gonzales].

37. (1) Evidence that a person was or was not insured against liability is *not* admissible upon the issue whether he acted negligently or otherwise wrongfully.
(2) Evidence that a person was or was not insured against liability *is* admissible when offered for any other purpose which is relevant and basic to a fair trial.
(3) The trial court may, in its discretion, admit evidence of insurance coverage if it believes that its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Contrariwise, in its discretion, the trial court may exclude evidence of insurance coverage.
(4) The trial court's ruling can only be held to be reversible error in the event of an abuse of that discretion.
96 N.M. at 449, 631 P.2d at 1317.

38. Transcript of Hearing held April 24, 1980, at 134, *Martinez v. Teague* (available at the University of New Mexico Law Library).

39. *Id.* at 135.

40. *Id.* at 144.

41. *Id.* at 146.

progress.[42] Mrs. Martinez' attorney wanted to highlight areas of Dr. Wood's report that he thought were favorable to his client. The attorney's purpose was to show that Dr. Engleman was biased, and that he selected from Dr. Wood's report only those sections which could be interpreted as unfavorable to Mrs. Martinez. The main thrust of the cross-examination was to show that Dr. Wood had in fact suggested that Mrs. Martinez "suffered some very real sequeli of her accident,"[43] and that she had not recovered anything from the compensation suit. This information was offered to refute the accusation that Mrs. Martinez had learned from her experience in the compensation suit to "milk the legal system for a lot of money."[44]

Counsel then read a portion of Dr. Wood's report into the record, ostensibly to demonstrate that the reason Mrs. Martinez was pressing the compensation suit was that she did not trust the attorney who represented her in that action and that she was concerned about losing her home.[45] The reference to her lack of trust in her previous attorney included the statement that she thought he was "siding with the insurance company and employing a variety of delaying tactics."[46] When this segment of Dr. Wood's report was read, defendant Teague moved for a mistrial,[47] which the court denied.[48]

The court of appeals, discussing the propriety of the denial of the mistrial, held that the evidence of insurance was relevant to discredit Dr. Engleman's opinion that Mrs. Martinez was trying to solve her financial problems through lawsuits.[49] The relevance of this evidence to the stated purpose is not, however, readily apparent. The contested issue was Mrs. Martinez' motive in bringing the lawsuit. She alleged injury as a result of the collision with Mr. Teague's horse; the defense asserted that she suffered no real injury and was improperly using the courts to advance a get-rich-quick scheme. Mrs. Martinez' distrust of her previous lawyer, and the reasons underlying that distrust, do not seem to make it more or less probable that her claim was genuine. Nor does her fear of losing her home lead to an inference about the likelihood that she was in fact injured in the accident with Mr. Teague's horse. The statement containing the reference to the insurance was relevant to the issue of whether Mrs.

42. *Id.* at 171.
43. *Id.*
44. *Id.* at 190.
45. *Id.* at 193.
46. *Id.* at 192.
47. *Id.* at 193.
48. Transcript of Hearing held April 25, 1980, at 5, *Martinez v. Teague* (available at the University of New Mexico Law Library).
49. 96 N.M. at 449, 631 P.2d at 1317.

Martinez distrusted her previous attorney, but that issue was not material to the case before the court.

Even if the court of appeals had declared the evidence of insurance inadmissible, it is likely that the error would not have resulted in reversal of the trial court decision. The evidence in *Grammar v. Kohlhaas Tank & Equipment Co.*,[50] the leading New Mexico case on the issue, was also not relevant on any material issue,[51] but the court of appeals upheld its admission as within the discretion of the trial court. The basis for this affirmation appears to have been the court of appeals' belief that knowledge of insurance coverage is so widespread among jurors that actual mention of such coverage is harmless.[52] This view corresponds to the suggestion that admission of evidence of insurance should constitute reversible error only in "those instances of gross misconduct in which counsel has made a deliberate and apparently successful attempt to prejudice the jury."[53] That suggestion will be meaningful only when the courts have developed some method for assessing whether an attempt to prejudice the jury has been successful. At present, there is no way to ascertain that information.

PRESUMPTION OF DUE EXECUTION OF A WILL

During this Survey year, the court of appeals decided a case illustrating the proposition that " 'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.' "[54] *In re Estate of Padilla*[55] dealt with the presumption of due execution of a will under the former New Mexico rule on presumptions.[56] That rule placed

50. 93 N.M. 685, 604 P.2d 823 (Ct. App. 1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980).

51. Gonzales, *supra* note 36, at 169.

52. 93 N.M. at 691, 604 P.2d at 829. The New Mexico Court of Appeals is not alone in this belief. For example, the court in B-Amused Co. v. Millrose Sporting Club, Inc., 168 F. Supp. 709 (E.D. N.Y. 1958), stated:

> In this day and generation, nearly every juryman knows that the average negligence case is being defended by an insurance company. . . . The idea seems to die hard that what jurors know in their everyday business experience they close their minds to, when deliberating as jurors; this court is unwilling to give countenance to such a view.

168 F. Supp. at 710. That case, however, was a negligence action in which the defendants filed a third-party complaint against the insurer. The insurer then moved to sever the third-party action, a motion which the court denied because a central issue to the main case was the question of insurance coverage.

53. 2 Weinstein & Berger, *supra* note 32, ¶411 [02], at 411–17.

54. E. Cleary, McCormick's Handbook of the Law of Evidence § 342, at 802–803 (2d ed. 1972) [hereinafter cited as Cleary].

55. 97 N.M. 508, 641 P.2d 539 (Ct. App. 1982). See Alcock, *Estates and Trusts, ante* at 395, for a discussion of the issue of a pretermitted child raised by this case.

56. "In all cases not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." N.M. R. Evid. 301 (1978), in effect in 1979 when the validity of the will was contested.

the burden of producing evidence to rebut the presumption upon the contestants to the will and also shifted to them the burden of persuasion. The current rule[57] allocates only the burden of production to the contestants and leaves the burden of persuasion with the proponents of the will. In some circumstances described below, the change from the old to the new rule might have affected the outcome of this case, but it does not appear that the presumption of due execution was truly the controlling factor in *Padilla*. Although the court purportedly based its opinion on the effect of the presumption, the case is better understood as reflecting policy considerations peculiar to the construction of wills.

The term "presumption" as it is used generally and in Rule 301[58] implies a relationship between two facts such that proof of the existence of fact A (the base fact) leads to a presumption of the existence of fact B (the presumed fact). The presumed fact may or may not be circumstantially related to the base fact, but the presumption is always judicially or legislatively created to achieve one or more of a variety of results thought desirable for policy reasons.[59] The creation of a presumption always allocates to the opponent of the presumption the burden of going forward

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

N.M. R. Evid. 301 (Cum. Supp. 1982). The new rule has been in effect since 1980.

58. Other uses of the word include the terms "conclusive presumption" and "presumption of innocence." Neither of these categories is a true presumption. The conclusive presumption is a substantive rule of law and the presumption of innocence is an assumption not based on fact but on policy considerations. *See generally* 1 Louisell & Mueller, *supra* note 4, § 67, and Cleary, *supra* note 54, § 342, at 802–806.

59. 1 Louisell & Mueller, *supra* note 4, § 68, at 541–42, list a number of examples of presumptions based on different policies.

> Some presumptions are based primarily on factors of procedural fairness. For example, proof that freight was delivered in good condition to the first carrier gives rise to the presumption, when damage occurs in transit, that it was caused by the last carrier. The access of the respective carriers to the facts, as contrasted with that of the shipper, bespeaks a fundamental fairness in favor of this presumption. Other presumptions have less concern with fairness but more with procedural economy, regularity or convenience. An example is the presumption under specified circumstances of death after at least seven years' unexplained absence. Still others are grounded primarily in probability, as illustrated by the presumption that a letter properly addressed, stamped and mailed was duly delivered to the addressee in the regular course of the mails, although the inherent difficulty of proving delivery of mail but for this presumption is doubtless part of its justification. One of the most widely recognized standard presumptions, that against suicide, which provides that proof of a violent death, so long as it remains unexplained, requires the conclusion of accident rather than suicide, seems also to be grounded primarily in probability, although its justification is interlaced with considerations of public policy. In 1973 the Supreme Court added to the category of presumptions based on public policy, holding that a conclusion of segregative school board actions in a part of a school system created a presumption of unlawful segregative design in other parts.

with sufficient evidence to rebut the presumption[60] and thereby avoid a directed verdict that the presumed fact is true. In some jurisdictions a presumption also shifts the burden of persuasion, the "burden of convincing the trier of fact, whether judge or jury, that the fact relied upon by a party as a part of his substantive case, is true."[61] The evidence rule pertaining to presumptions in the particular jurisdiction[62] controls whether a presumption shifts the burden of persuasion.

Although some courts treat presumptions as evidence,[63] the better view is that presumptions cannot meaningfully be used as evidence.[64] Presumptions are procedural devices allocating the burden of production and sometimes the burden of persuasion, rather than factual propositions that can be weighed. In a jurisdiction like New Mexico, which adheres to the generally accepted "bursting bubble" theory of presumptions,[65] once the initial burden of production is met by the introduction of sufficient evidence to support a finding contrary to the presumed fact, the presumption that the presumed fact exists disappears. If the presumption shifts only the burden of production and has been rebutted, the proponent of the presumed fact must introduce enough evidence apart from the presumption so that the factfinder is persuaded by a preponderance of the evidence that the presumed fact exists. In jurisdictions where the presumption shifts the burden of persuasion as well as the burden of production, the opponent of the presumed fact must convince the factfinder by a preponderance of the evidence that the presumed fact does not exist. The presumption is thus a procedural mechanism for controlling the production of evidence and the burden of persuasion. It cannot logically be weighed against substantive evidence because "it is psychologically impossible to weigh a rule of law against evidence."[66]

At issue in *Padilla* was the common law presumption of due execution

60. Gausewitz, *Presumptions in a One-Rule World*, 5 Vand. L. Rev. 324, 325 (1952) [hereinafter cited as Gausewitz].

61. 1 Louisell & Mueller, *supra* note 4, § 66, at 527.

62. Gausewitz, *supra* note 60, at 325.

63. 1 Louisell & Mueller, *supra* note 4, § 69, at 556–57, 559–63. *See* Annot., 5 A.L.R.3d 19 (1966).

64. 1 Louisell & Mueller, *supra* note 4, § 69, at 558–59.

65. This theory is also known as the "Thayer theory," named after Professor Thayer, who was the first to expound it clearly. Under a somewhat different theory, the "modified Thayer" rule, the presumption persists until rebutted by "substantial" evidence. Under a balancing theory, the presumed fact persists until the jury is convinced that its non-existence is "at least as probable as its existence." Under the Pennsylvania rule, the presumed fact persists until the jury finds "that the non-existence of the presumed fact is more probable than its existence." E. Morgan, Forward to the American Law Institute Model Code of Evidence, *reprinted in* J. Maguire, J. Weinstein, J. Chadbourn, & J. Mansfield, Cases and Materials on Evidence 1051–53 (6th ed. 1973).

66. Gausewitz, *supra* note 60, at 334.

of a will where two subscribing witnesses have duly witnessed the will.[67] At the hearing to determine the validity of the will, a sister and an illegitimate son of the testator introduced evidence to rebut the presumption of due execution. This evidence consisted of the testimony of both witnesses to the will that they neither saw the testator sign the will nor signed as witnesses in each other's presence.[68] If this consistent and uncontradicted testimony was true, then the signing ceremony did not conform to the statutory requirements. The attestation clause, although signed by two witnesses, would have been an inaccurate recital of the circumstances surrounding the signing. Because an improperly executed will is invalid, the Padilla will could not have been admitted to probate.[69]

The court of appeals found, however, that the presumption of due execution arising from the signed attestation clause[70] saved the will. This presumption required the court to conclude from the base fact (the genuine signatures of the witnesses) that the presumed facts (that the testator signed in the presence of the witnesses[71] and that the witnesses signed in the presence of each other) were true unless the opponent of the presumption came forward with evidence to prove that it was more probable that the will had been improperly executed.

The presumption rule then in effect placed upon the contestants to the will, as the persons against whom the presumption of due execution was directed, the burden of proving that it was more probable that the will had been improperly executed. In order to prevail, the contestants had to persuade the factfinder by a preponderance of the evidence that the witnesses had not complied with the statutory requirements for execution. Although all the testimony in the case supported the contention of an

67. The New Mexico Supreme Court adopted this common law presumption in *In re* Akin's Estate, 41 N.M. 556, 570, 72 P.2d 21, 35 (1937).

68. 97 N.M. at 511, 641 P.2d at 541. Although the court of appeals' opinion analyzes the case as though the testimony were clear on this issue, in fact the witnesses were at least somewhat equivocal about whether they saw each other sign. Compare the testimony of witness Lueras, Transcript of Jan. 25, 1979, hearing at 7, *In re Estate of Padilla* [hereinafter cited as Transcript] with his later testimony, Transcript at 28 (the Transcript is available at the University of New Mexico Law Library).

69. The statute in effect at the time the testator executed his will was N.M. Stat. Ann. § 30-1-6 (1953), which reads in pertinent part: "The witnesses to a written will must be present, see the testator sign the will . . . and must sign as witnesses at his request in his presence and in the presence of each other."

70. 97 N.M. at 510, 641 P.2d at 541.

71. Although neither the trial court nor the appellate court addressed the issue, the attestation clause in *Padilla* gave rise only to the presumption that the testator signed in the presence of the witnesses. The New Mexico statute, *supra* note 69, however, requires that the witnesses "see the testator sign the will," a more stringent test than the "presence" requirement. The presumption of due execution with regard to the testator's signature therefore could not arise in this case, and the testimony of the witnesses that they did not see the testator sign, Transcript at 26, 28, should have been conclusive on this issue. If established, the failure of the witnesses to see the testator sign would have been sufficient to invalidate the will and dispose of the case.

invalid execution, the trial court, relying on the presumption, found that the will was valid.[72]

The approach of the court can be understood if the presumption may be considered to be evidence. If it is, then the court was weighing one kind of evidence—the testimony of the two witnesses to the will—against another kind of evidence—the presumption of due execution. In such a case, the judge would be able to find that the will was properly executed in either of two circumstances. First, if the judge found the weight of the presumption to be greater than the evidentiary weight of the testimony of the witnesses, he could properly find for the proponent of the will. This situation would arise if the judge did not believe the testimony of the witnesses. Second, if the judge found the weight of the two sorts of evidence to be equivalent, he could still find for the proponent of the will because the old presumption rule shifted the burden of persuasion to the opponent of the presumption. The contestants to the will therefore had the burden of proving that it was more probable that the will had been improperly executed than it was that the will had been properly executed. When the evidence is evenly distributed, the party bearing the burden of persuasion will lose because the factfinder must be persuaded by a preponderance of the evidence.[73] If the testimony of the witnesses did not rise to at least that level, the trial court would have been correct in finding that the will was valid, assuming that a presumption may be accorded the status of evidence.

Those explanations, however, present some difficulty. There is no indication from the record that the trial judge in *Padilla* questioned either the veracity or the motivation of the two witnesses to the will about the circumstances surrounding the signing.[74] No evidence other than the attestation clause of the will was introduced to support the presumed fact against the testimony of apparently credible and disinterested witnesses. In an effort to give effect to the testator's clear intent, and in spite of the defects reported by the two attesting witnesses, the trial judge upheld the

72. 97 N.M. at 511, 641 P.2d at 542.

73. If the court had found the weight of the evidence to be equivalent, and had therefore decided for the proponents of the will on the basis of the presumption, a different outcome would be expected under the current New Mexico rule. Because Rule 301, *supra* note 57, no longer shifts the burden of persuasion, the burden of proving the validity of the execution would remain with the proponent of the will, so that if the evidence were evenly distributed, the court would be compelled to find for the contestants.

74. The record reflects that the trial judge interpreted the witnesses' testimony as indicating that they could not remember the events surrounding the signing of the will. "These men don't really recall for certain whether they were there or not." Transcript at 30. The court further stated that "[t]he most important thing is to try to abide by the desires of the deceased in distributing his bounty." Transcript at 20. Although this statement provides some indication of why the trial court was able to discount the testimony of both witnesses that they did not sign in the presence of the testator or of each other, Transcript at 25, 28, the court of appeals did not address this issue.

validity of the will.[75] This decision thereby raises the issue of whether a judge may disregard uncontradicted and consistent testimony from disinterested witnesses.

Although there is some disagreement among the jurisdictions,[76] in New Mexico the general rule is that "the trier of the facts may not disregard the undisputed relevant testimony of a witness on a material issue."[77] This rule is subject to several exceptions. The factfinder is not obligated to accept uncontradicted testimony that is inherently improbable, concerns a transaction surrounded by suspicious circumstances, is susceptible of conflicting inferences, or is impeached.[78] The trial judge in *Padilla* would therefore have been incorrect in disregarding the testimony of the witnesses to the will but for a quirk that appears to be peculiar to the evaluation of testimony pertaining to the due execution of a will.

Many jurisdictions hold that "the testimony of an attesting witness to the contrary of the facts which he had attested tends to impeach his credibility, and to indicate that if he is not intentionally misstating the facts he is at least mistaken in that respect."[79] The rationale for this position is that an attesting witness with a faulty memory or an improper motive can too easily defeat the intent of the testator.[80] This tendency to view the contrary testimony of an attesting witness with "great caution" and "great suspicion"[81] may be the equivalent of the above-noted exception permitting the factfinder to reject uncontradicted evidence that concerns a transaction surrounded by suspicious circumstances.

Another theory would also allow the court to find against the contestants of the will in spite of the testimony of the attesting witnesses. If the court considered the signed attestation clause a prior inconsistent statement by the attesting witnesses, the clause would be admissible not only for its impeachment value, but also as substantive evidence.[82] Viewed this way, the clause would constitute contradictory evidence which would allow an inference of due execution. The testimony of the attesting witnesses would then no longer be undisputed and could be weighed against the conflicting evidence of the attestation clause. If courts consider the contrary testimony of an attesting witness to be inherently suspicious or to be contradicted

75. 97 N.M. at 511, 641 P.2d at 542.

76. *See* Annot., 61 A.L.R.2d 1191 (1958).

77. Lopez v. Maes, 81 N.M. 693, 696, 472 P.2d 658, 661 (Ct. App.), *cert. denied*, 81 N.M. 721, 472 P.2d 984 (1970).

78. Samora v. Brandford, 81 N.M. 205, 465 P.2d 88 (Ct. App. 1970). *See also* Alto Village Services Corp. v. New Mexico Pub. Serv. Comm'n, 92 N.M. 323, 587 P.2d 1334 (1978).

79. Annot., 40 A.L.R.2d 1223, 1234 (1955).

80. *Id.*

81. *Id.* at 1235.

82. N.M. R. Evid. 801(d)(1) provides: "Statements which are not hearsay. A statement is not hearsay if: (1) . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony."

by the attestation clause, then something more than just this testimony might logically be required to rebut the presumption of due execution based on the presence of an attestation clause.

It is not clear, however, what that "something more" could be in cases like *Padilla*. It is probable that no lawyer had participated in the drafting of the will,[83] and no testimony given by the witnesses to the will would be sufficient to overcome the presumption of due execution. Where the attesting witnesses admit to an inability to recall the actual signing, the presumption of due execution properly operates to validate the will. Where the memory of the attesting witnesses is accurate but they are suspected of falsifying their testimony to defeat the will for some improper motive, the opportunity to cross-examine the witnesses provides protection against wilful distortion of the truth. In this situation, courts should rely on the opportunity to cross-examine, and not on the presumption of due execution, to provide the evidence necessary to validate the will.

83. *See* Transcript at 20.