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## Evidence

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# EVIDENCE

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## I. INTRODUCTION

The focus of this Survey Article is on cases which have articulated important or novel theories in handling evidentiary questions and which are likely to affect the lawyer preparing for future trials. The Article begins with a discussion of the New Mexico Supreme Court's issuance of clear warnings about improper attempts to use an innuendo of misconduct as impeachment. Two cases—a criminal case decided by the supreme court and a civil case decided by the court of appeals—identifying interesting hearsay problems involved in expert opinion testimony, with the latter case perhaps raising more questions than it answers, will be the focus of the second part of this Article. The third section will address a case in which the court of appeals provided further interpretation of the recently adopted standards for admission of polygraph results. The Article will conclude with an examination of a New Mexico Supreme Court opinion which recognized a waiver of attorney-client privilege where a witness, in explaining his reason for testifying, volunteered information regarding a discussion with his attorney.

## II. IMPEACHMENT: SPECIFIC INSTANCES OF MISCONDUCT

In *State v. Robinson*,<sup>1</sup> the New Mexico Supreme Court reversed the defendant's convictions for the armed robbery of a Kinney Shoes store and the murder of Police Officer Phil Chacon on the ground that the prosecution used an innuendo of misconduct in an attempt to impeach the credibility of a key witness to the robbery. In *Robinson*, Brian Iwanski, one of two employees of Kinney Shoes robbed at gunpoint, was called as a prosecution witness at trial. He testified during cross-examination by defense counsel that the defendant was not the robber. The prosecution then introduced "specific acts" evidence of Iwanski's prior misconduct in order to discredit his testimony. The "specific acts" evidence was introduced during the redirect examination of the other Kinney Shoes employee, Renee Gonzales. Following questions posed to Mr. Gonzales,

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1. 99 N.M. 674, 662 P.2d 1341 (1983).

both on direct and cross-examination, as to statements made by Mr. Iwanski regarding police threats, the prosecution elicited Mr. Gonzales' testimony that Kinney Shoes had fired Mr. Iwanski after an inventory audit revealed a \$1,600 shortage.

On appeal, the supreme court noted that Rule 609<sup>2</sup> governing "Impeachment by Evidence of Conviction of Crime," did not govern because there was "no allusion to a conviction and the prosecuting attorney was apparently never prepared to offer documentary proof of a conviction."<sup>3</sup> The supreme court concluded, nonetheless, that the principles implicit in Rule 609—requiring the prosecution to have proof of misconduct available in an admissible form—apply to impeachment under Rule 608:<sup>4</sup>

Mr. Gonzales' testimony concerning suspicions of embezzlement did not amount to evidence of misconduct. The impeachment by a witness by insinuations based on unsubstantiated allegations of prior misconduct provides the trier of fact with no information relevant to the witness's credibility and carries a great potential for prejudice. Where, as in the instant case, the testimony relates to collateral matters and has no bearing upon the crime with which the defendant is charged, there is also a danger that the real issues of the case may become confused. The State's questions served no purpose except to arouse the prejudices of the jury against Mr. Iwanski.<sup>5</sup>

Once the error was identified, the supreme court found such error was not harmless, pointing out that the credibility of the defendant's key identification witness was central to his defense.<sup>6</sup>

Rule 608(b) prohibits the use of extrinsic evidence to prove specific instances of misconduct, but permits inquiry to be made of a witness on cross examination as to specific acts bearing on truthfulness.<sup>7</sup> The *Robinson* decision leaves open the question of what level of proof is necessary

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2. N.M. R. Evid. 609(a) provides in part:

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.

3. 99 N.M. at 676, 662 P.2d at 1343.

4. N.M. R. Evid. 608(b) provides in part:

[Specific instances of conduct] may, . . . 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. . . .

5. 99 N.M. at 676, 662 P.2d at 1343 (citing *State v. Rowell*, 77 N.M. 124, 419 P.2d 966 (1966)).

6. 99 N.M. at 677, 662 P.2d at 1344.

7. N.M. R. Evid. 608(b), *quoted in part supra* note 4.

to justify questions going to the witness's knowledge of specific acts of misconduct. Does *State v. Robinson* require evidence of a criminal conviction in order for the offering party to be able to inquire as to the witness' knowledge of misconduct? Probably not,<sup>8</sup> although the supreme court's opinion did not suggest when specific instances of misconduct may be discussed absent a record of conviction. The supreme court noted that, although Mr. Gonzales testified that the inventory shortages ceased after Iwanski's dismissal, there was "no evidence that either Mr. Iwanski or another employee who was fired was responsible for the deficit."<sup>9</sup> Would a store investigator's conclusion that a particular person had been involved in embezzlement be enough to satisfy the court's concerns in *Robinson*? The answer is not clear. While not explaining what level of proof is required in order to constitute a valid basis for inquiry into a witness's knowledge of misconduct, the supreme court has taken a first step in making it clear that "mere innuendo" or "suspicion" of misconduct is not enough.

### III. HEARSAY PROBLEMS IN EXPERT OPINION TESTIMONY

One of the often-quoted principles of modern evidence is that expert witnesses are permitted to rely on hearsay in formulating their opinions.<sup>10</sup> A more subtle aspect of this rule is the extent to which the matters relied on by an expert may properly be disclosed to the jury. Two cases during the survey year reveal the importance of careful consideration by the trial attorney of the effect of an expert's reliance on outside information before offering the expert's opinion in court.

Rule 702<sup>11</sup> does not obviate the requirement of independent proof of the essential facts on which an expert bases his opinion. In *State v. Guzman*,<sup>12</sup> the defendant called a psychopharmacologist to testify con-

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8. Cf. *State v. Worley*, 100 N.M. 720, 676 P.2d 247 (1984), wherein no error was found in the prosecutor's questioning of key alibi witness on specific instance of witness's commission of criminal sexual penetration, where no reference was made to adjudication as a juvenile for that crime.

9. 99 N.M. at 676, 662 P.2d at 1343 (emphasis in original).

10. See, e.g., *State v. Chambers*, 84 N.M. 309, 311, 502 P.2d 999, 1001 (1972).

N.M. R. Evid. 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

See also Fed. R. Evid. 703 advisory committee note: "[T]he rule is designed to broaden the basis for expert opinions. . . ."

11. N.M. R. Evid 702 provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."

12. 100 N.M. 756, 676 P.2d 1321 (1984).

cerning the effect of intoxicants consumed by the defendant on the night of the murder for which he was being tried. While the trial court permitted the expert to respond to hypothetical questions as to certain medications and their combined effect with alcohol, it did not permit the expert to testify as to the defendant's description of his consumption of medicine and alcohol prior to the murder. In affirming the limits placed by the trial court on the expert's testimony, the supreme court concluded that under Rule 702, the expert "could not testify as to the particular effect on Guzman until the 'evidence' or 'fact in issue' was properly in evidence."<sup>13</sup> The "evidence" or "fact in issue" referred to was the use by Guzman of drugs or alcohol; there was no independent evidence at trial to show the defendant had taken drugs or alcohol. The supreme court cautioned that "[t]o allow otherwise would permit a defendant to offer testimony which he wishes to be admitted into evidence without it being subjected to cross-examination."<sup>14</sup>

The limitation on expert testimony affirmed in *Guzman* serves as a reminder of a corollary principle. Where the offering party fails to establish any factual basis for the expert's opinion, the opinion may properly be subject to a motion to strike.<sup>15</sup> Indeed, the discretion traditionally accorded a trial court in determining the order of proof and which still exists under Rule 705 can lead to a prohibition on opinion testimony until the factual basis for the opinion is established.<sup>16</sup>

No attempt appears to have been made to argue that the matters related by defendant Guzman to the psychopharmacologist were statements made "for purposes of medical diagnosis or treatment," so as to come within Rule 803(4), or to otherwise establish a hearsay exception for the information.<sup>17</sup> Significantly, however, the court did not simply rule that Guzman's statements were "inadmissible hearsay," but rather that to admit such statements as substantive evidence would be "unfair" because of the lack of opportunity to challenge or to cross-examine the defendant on these critical statements.<sup>18</sup> Thus, while Rule 703 explicitly permits the expert to rely on hearsay or otherwise inadmissible data, the rule does not serve as a back-door means to admit and insulate critical information.

The common sense rationale for exclusion of the information relied on

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13. *Id.* at 762, 676 P.2d at 1327.

14. *Id.*

15. *Lamphere v. Agnew*, 94 N.M. 146, 149, 607 P.2d 1164, 1167 (Ct. App. 1979).

16. *Cf. State ex rel. State Highway Dep't v. Fox Trailer Court*, 83 N.M. 178, 489 P.2d 1176 (1971).

17. *Cf. State v. Eaton*, 30 Wash. App. 288, 633 P.2d 921 (1981), in which the trial court was reversed for refusing to permit a psychiatrist to rely on the defendant's account until the defendant testified about the incident at trial. *See also* S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 467 (3rd ed. 1982).

18. 100 N.M. at 762, 676 P.2d at 1327.

by the expert in *State v. Guzman* is fairly easy to understand. A similar ruling in *Sewell v. Wilson*,<sup>19</sup> a civil decision in which the court of appeals held the admission of an opinion letter written by a non-testifying physician to be reversible error, is more difficult to analyze.<sup>20</sup>

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19. 101 N.M. 486, 684 P.2d 1151 (Ct. App. 1984).

20. Perhaps my own minor role as one attorney representing the hospital-defendant, which was not a party on appeal, has caused me to search this opinion more carefully than most. Certainly, my knowledge of the careful way in which the trial judge considered every evidentiary objection raised by counsel has led me to question the impact of the *Sewell* opinion for future trials involving opinion testimony by expert witnesses.

Following remand, the district court judge, The Honorable Leon Karelitz, Eighth Judicial District, State of New Mexico, wrote to all counsel advising them of his interpretation of the appellate decision and its application in future trials:

The opinion in Docket No. 7110, Court of Appeals, in *Sewell vs. Wilson*, is the law of the case, and I am going to apply that law, as best as I understand it, in the new trial. If a party puts on an expert witness, and advises the court that his expert will give an opinion, I am going to excuse the jury and determine what opinions are to be given by the expert. If his opinions are based upon facts received in evidence, there is no problem. . . . If [on the other hand] I find reasonable reliance upon [nonadmitted] facts or data of a type that other experts in that field use routinely in forming their opinions, then I will permit the expert on direct examination to testify about his opinion, but I will not let him in any way refer orally to the inadmissible facts or data upon which he founds his conclusion, nor will I permit any written document not admitted in evidence to be referred to by the expert or to be received for any purpose.

In short, if I find that the expert is entitled to express an opinion upon the basis of reasonably relied upon facts or data (opinions excluded), not admitted in evidence, I will let the witness express his opinion, but I will not permit the jury to test the validity of the opinion by learning what he relied upon in forming that opinion.

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With respect to cross-examination, I will of course permit the opposing party to compel the expert to disclose the underlying facts or data, not admissible, upon which there has been reliance. In such case, I believe that I will refuse to give a limiting instruction to the effect that such underlying facts or data are before the jury solely to permit them to test the weight to give to the opinion of the expert, but instead will permit disclosure for the truth of the material included within the underlying facts or data. This, on the theory that Rule 703 was intended to permit in evidence facts or data relied upon, not otherwise admissible, with a limiting instruction that the inadmissible facts or data should not be considered for the truth of their contents, and now that that cannot be done further, there is no reason to give the cross-examiner the benefit of a limiting instruction under Rule 705; this, then, would put the cross-examiner in the position of ignoring the opposing witness or building up his opinion by showing the reasonableness of the inadmissible, underlying facts or data relied upon.

In short, each party in this case would be well advised to hark back to the older days, when no expert could testify except upon the basis of facts in evidence.

The procedure outlined above with respect to underlying facts or data not admitted, is of course awkward and time-consuming.

[With the appellate decision in *Sewell*] [w]e have deviated substantially from the Federal Rules of Evidence, and I will no longer accept the authority of federal cases in the interpretation of the New Mexico Rules of Evidence, 703 and 705.

Letter, dated August 8, 1984, from The Honorable Leon Karelitz, to all counsel in *Sewell v. Wilson*, Case No. 17161, contained in the trial court record.

The factual issue for the jury's decision in *Sewell*, as outlined by the court of appeals, was whether the plaintiff's loss of hearing and vestibular function were caused by administration of certain drugs, including Gentamycin, after the plaintiff's cardiac bypass surgery.<sup>21</sup> The letter in question was written by Dr. John B. Roberts, described by the appellate court as an "eye, nose and throat specialist," and was addressed to the plaintiff, himself a general medical practitioner.<sup>22</sup> The section of the letter deemed critical on appeal stated: "I suspect the dizziness relates to the operated left ear and not to the drugs that you received."<sup>23</sup>

In urging admission of the letter, defense counsel identified Dr. Roberts' letter as a record or report reviewed by a Dr. Kilgore, who was testifying as a medical expert for the defendant doctors.<sup>24</sup> In objecting to the admission, the plaintiff conceded that it was proper for Dr. Kilgore "to testify about what he has relied on" but urged that admission of the documents into evidence was improper on the grounds of hearsay.<sup>25</sup> Defense counsel's response was that the letter was offered to show the information upon which Dr. Kilgore relied.<sup>26</sup> The trial court, citing Rule 703, permitted admission of the letter as disclosing the facts or data on which Dr. Kilgore based his opinion.<sup>27</sup>

In reviewing the propriety of the admission, the court of appeals noted that in response to defense counsel's question as to whether he relied on Dr. Roberts' letter, Dr. Kilgore stated: "'Again, *I had my opinion already before I read this.* My interpretation of Dr. Roberts' letter is that his opinion is essentially the same as Dr. Bicknell's.'"<sup>28</sup> The court of appeals used a three-part analysis in finding error:

- (1) Was the letter hearsay? Conclusion: Yes.<sup>29</sup>
- (2) Was the letter admissible? Conclusion: No.<sup>30</sup>
- (3) Was admission of the letter harmless error? Conclusion: No.<sup>31</sup>

Under the first step of this analysis, the court of appeals found that although the defense counsel attempted to avoid a hearsay problem by not offering the document for the truth of the matter asserted, Dr. Kilgore's testimony contradicted this asserted purpose. The court of appeals interpreted Kilgore's testimony as a statement that he had already formed his

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21. 101 N.M. at 488, 684 P.2d at 1153.

22. *Id.* at 491, 684 P.2d at 1156.

23. *Id.* at 488, 684 P.2d at 1153.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 488-89, 684 P.2d at 1153-54.

28. *Id.* at 489, 684 P.2d at 1154 (emphasis in opinion).

29. *Id.* at 488, 684 P.2d at 1153.

30. *Id.* at 489, 684 P.2d at 1154.

31. *Id.* at 490, 684 P.2d at 1155.

opinion before he read the letter and that, therefore, the Roberts letter was not the basis of his opinion.<sup>32</sup>

On the second level question of admissibility, the court of appeals held that Rule 703 does not afford a basis for admissibility of hearsay, even though it permits the expert to consider such matters in arriving at his opinion.<sup>33</sup> Further, it rejected the defendant's reliance on the 1980 New Mexico Court of Appeals opinion in the case of *In the Matter of Dean*,<sup>34</sup> distinguishing *Sewell* on the basis that, unlike the expert in *Dean*, where a psychiatric nurse testified that her opinion was based in part on the opinions expressed in non-testifying doctors' reports, Dr. Kilgore had formed his opinion independently.

Rule 705<sup>35</sup> was asserted on appeal as an alternative basis for admission of the letter. The court of appeals found three problems with the application of this rule:

- 1) The letter contains Dr. Roberts' opinion, which does not fall within "facts or data." See, *O'Kelly [v. State, 94 N.M. 74, 607 P.2d 612 (1980)]*.
- 2) This letter was admitted during direct examination, not cross-examination.
- 3) Dr. Kilgore's testimony was that he had formed his opinion *before* he read the letter. Rule 705 is not applicable.<sup>36</sup>

The court of appeals also rejected arguments that Dr. Roberts' letter was admissible in whole or in part under hearsay exceptions, either as a statement for purposes of medical diagnosis or treatment under Rule 803(4)<sup>37</sup> and *State v. Ruiz*,<sup>38</sup> or as a business record under Rule 803(6).<sup>39</sup> It rejected these arguments on the grounds that they were raised for the first time on appeal and that no foundation for these hearsay exceptions had been laid before the trial court.<sup>40</sup> The court of appeals did not accept

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32. *Id.* at 489, 684 P.2d at 1154.

33. *Id.*

34. 94 N.M. 45, 607 P.2d 132 (Ct. App. 1980).

35. N.M. R. Evid. 705 provides in part:

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

36. 101 N.M. at 490, 684 P.2d at 1155 (emphasis in original).

37. N.M. R. Evid. 803(4).

38. 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

39. N.M. R. Evid. 803(6).

40. The court stated:

The question of the admissibility of the letter under these rules [803(4) or 803(6)] has been raised for the first time in the appeal and has been presented on the basis that the letter was admissible, under either of the two rules, as a matter of law. That is incorrect.

101 N.M. at 490, 684 P.2d at 1155.

the defendant's contention that the burden of objecting to the lack of foundation was on the plaintiff at trial.

In considering the final point of analysis—harmless error—the court of appeals analyzed each expert physician's opinion offered by the defendants and concluded that Dr. Roberts' opinion was not cumulative because of the distinction of his medical specialty from that of the other doctors and because of the conflict in evidence regarding Dr. Roberts' earlier views of the actual cause of plaintiff's dysfunction.<sup>41</sup>

There are several areas of concern for trial lawyers attempting to apply *Sewell v. Wilson* in future cases. First, there is the question of whether the plaintiff's hearsay objection fairly alerted the trial court and opposing counsel to the objection subsequently argued on appeal. The objection was made in response to a motion for admission of a group of documentary exhibits into evidence, and it is apparent from the record that defense counsel, the trial judge, and perhaps even plaintiff's counsel, thought that Dr. Kilgore had testified to his reliance on all of the documents. There appears to have been no objection by plaintiff that the letter was not part of the foundation of Dr. Kilgore's opinion nor was there any stated objection to Dr. Roberts' letter as containing opinion.

Second, the opinion in *Sewell* is significant in that it may reflect a decision on the part of the court of appeals to adopt a "restrictive" view of Rules 703 and 705,<sup>42</sup> without acknowledging the existence of a strong, opposing viewpoint. If the holding in *Sewell v. Wilson* is interpreted as a prohibition on disclosure to the jury of "otherwise" inadmissible hearsay relied on by the expert, the very purpose of the broader rules permitting an expert to consider outside information has been frustrated. There is growing support for the interpretation of Rules 703 and 705 as creating an implicit, although limited, exclusion from the hearsay rules for information not independently admitted or admissible, but which is reasonably relied on by experts:

Facts, data or opinions reasonably relied upon under Rule 703 may be disclosed to the jury on either direct or cross-examination to assist the jury in evaluating the expert's opinion by considering its bases. This is true even if the facts, data or opinions have not themselves been admitted and thus may not be considered for their truth. The court may instruct the jury that facts, data, or opinions reasonably relied upon by the expert under Rule 703 may be considered "solely

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41. *Id.* at 491, 684 P.2d at 1156.

42. Proposed Fed. R. Evid. 703 advisory committee note. *But see* 68.16.5 Acres of Land v. United States, 411 F.2d 834, 839-40 (10th Cir. 1969) (citing *Taylor v. B. Heller & Co.*, 364 F.2d 608, 613 (6th Cir. 1966): "We agree that 'expert opinion may not be based upon the opinion of others, either in evidence or not in evidence.'" See *supra* notes 10 & 35 (quoting N.M. R. Evid. 703 and N.M. R. Evid. 705, respectively).

as a basis for expert opinion and not as substantive evidence." For most but not all practical purposes, Rule 703 operates as the equivalent of an additional exception to the rule against hearsay.<sup>43</sup>

In further commentary on the application of Rule 703, it has been noted:

Rule [703] does not indicate whether the expert can state for the jury the factual basis of an opinion if the facts are of a type generally excluded from evidence. Rule 705 is not helpful on this point either. The best reading of Rule 703 in our view is to read the word "otherwise" into the last sentence of the Rule before the word "admissible." The result of this reading is that the expert can rely not only on facts reasonably relied upon by experts in his field, but also can give a full account to the jury, which is necessary to insure that the jury has a basis for properly assessing the testimony. Evidence not otherwise admissible is not admitted under this Rule for its truth; it is admitted to explain the basis of the expert opinion. A limiting instruction often should be required to explain this to the jury. However, we would emphasize that Rule 403 could be used to keep such evidence out where its admission might be unfair to an opposing party.<sup>44</sup>

Review of *Sewell* identifies a third problem for attorneys and judges: the continuing question of the admissibility of double level opinion. Under the present state of New Mexico case law, a conflict exists as to the effect of a testifying expert's reliance on outside opinion. Under *In the Matter of Dean*,<sup>45</sup> a psychiatric nurse was permitted to testify as to her opinion of the subject's sanity in an involuntary commitment proceeding where her opinion took into account the opinions of non-testifying doctors. The reports of the doctors were held admissible because of her reliance. It is clear the drafters of the Federal Rules of Evidence anticipated a testifying expert's reliance on "opinions" of others in formulating and stating an expert opinion at trial:

[A] physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.<sup>46</sup>

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43. M. Graham, *Handbook of Federal Evidence* § 703.1, at 631, and Supplement at 149 (1981). See *supra* note 10 (quoting N.M. R. Evid. 703).

44. S. Saltzburg & K. Redden, *supra* note 17, at 467.

45. 94 N.M. 45, 48, 607 P.2d 132, 135 (Ct. App. 1980).

46. Fed. R. Evid. 703 advisory committee note.

The opposing view which has found support in New Mexico suggests that a testifying expert's opinion may become inadmissible where he testifies that his opinion is based on the oral or written opinion of another. In *O'Kelly v. State*,<sup>47</sup> the New Mexico Supreme Court noted, "there is substantial authority which holds that an expert cannot base his opinion upon the oral or written opinion of another expert."<sup>48</sup> Where the proffering party establishes his expert's reliance on an outside opinion, under *Sewell v. Wilson*, a future appeal issue may still exist because of the double level opinion created.<sup>49</sup>

The decision in *Sewell* may to some extent be misleading in its focus on "hearsay" as the threshold question. In contrast, in *State v. Guzman*,<sup>50</sup> the defendant's statements to the psychotherapist also were hearsay, but the focus of the supreme court's decision was not on hearsay. Rather, the court was concerned by the lack of opportunity for confrontation—the "unfairness" of permitting a party to admit critical information before the jury while prohibiting the opposing party from cross-examination of the source to test its trustworthiness. The analysis in *Guzman* is consistent with the less restrictive interpretation of Rules 703 and 705 suggested by the legal commentaries.<sup>51</sup> In the type of problem posed by the outside doctor's report in *Sewell*, where there is a real concern about permitting a party to bolster his testifying doctor's opinion with the outside opinion of another, Rule 403 is available to exclude such opinion if a limiting instruction is deemed insufficient to prevent the jury from placing undue weight on the report.<sup>52</sup>

#### IV. POLYGRAPH EXAMINERS: QUALIFICATIONS FOR EXPERT TESTIMONY

At the time of this writing, New Mexico continues as the first and only state to admit testimony concerning the results of polygraph examinations at trial in the absence of stipulation by both parties.<sup>53</sup> The use of polygraph

47. 94 N.M. 74, 607 P.2d 612 (1980).

48. *Id.* at 77, 607 P.2d at 615.

49. Compare *Wilson v. Leonard Tire Co.*, 90 N.M. 74, 559 P.2d 1201 (Ct. App. 1976), wherein any error in permitting a testifying doctor to refer to the medical recommendation of a clinic was held harmless, and further, there was no error in the trial court's refusal to receive in evidence medical reports of non-testifying experts used on cross-examination.

50. 100 N.M. 756, 676 P.2d 1321 (1984). See *supra* notes 11-18 and accompanying text.

51. See *supra* notes 42-44 and accompanying text.

52. See N.M. R. Evid. 403. Following his analysis of the appellate opinion in *Sewell v. Wilson*, Judge Karelitz advised counsel on remand that:

I will not permit the jury to test the validity of the [expert] opinion by learning [on direct examination] what he relied upon in forming that opinion.

This will be conducive to a situation in which a party puts on an expert witness, can go no further than to ask for the opinion, and the defendant will then waive the witness off the stand, and that will be the end of that witness.

Letter, *supra* note 20.

53. See *State v. Anthony*, 100 N.M. 735, 737 n.1, 676 P.2d 262, 264 n.1 (Ct. App. 1983).

results continues to be controversial in New Mexico, as demonstrated by the rather unusual procedural history of *State v. Anthony*.<sup>54</sup>

The issue before the court of appeals in *Anthony* was whether it was an abuse of discretion for the trial court to permit the polygrapher to testify as to the results of the defendant's test "without showing the examiner was properly qualified to conduct the test."<sup>55</sup> In *Anthony*, the defendant suffered from a painful eye irritation at the time of his test. While admitting that pain may affect the validity of the polygraph test results, the examiner who administered the test simply dismissed, without explanation, the possible effect on the polygraph of the defendant's eye problem. The state did not oppose the defendant's argument for reversal on appeal, conceding error on the part of the trial court in permitting the report to be admitted under the particular facts. The state argued that New Mexico should preclude evidence of the test in conformity with the decisions of other jurisdictions or should restrict admissibility to cases wherein admissibility was a subject of mutual stipulation by the parties.<sup>56</sup>

The court of appeals declined to address the state's arguments, "since the New Mexico Supreme Court has expressly determined that polygraph evidence is sufficiently reliable to be admissible as evidence in court."<sup>57</sup> The court of appeals noted that, subsequent to the trial court's decision in *Anthony* but prior to the date of the court of appeals' decision, the supreme court had amended Rule 707 to provide minimum qualifications for polygraph examiners.<sup>58</sup> The state's concession regarding the lack of

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54. 100 N.M. 735, 676 P.2d 262 (Ct. App. 1983).

55. *Id.*

56. *Id.* at 737, 676 P.2d at 264.

57. *Id.*

58. N.M. R. Evid. 707 provides in part:

(b) *Minimum qualifications of polygraph examiner.* To be qualified as an expert witness on the truthfulness of a witness, a polygraph examiner must have at least the following minimum qualifications:

(1) at least five years experience in administration or interpretation of polygraph examinations or equivalent academic training;

(2) conducted or reviewed the examination in accordance with the provisions of this rule; and

(3) successfully completed at least twenty hours of continuing education in the field of polygraph examinations during the twelve month period immediately prior to the date of the examination.

(c) *Admissibility of results.* Subject to the provisions of this rule, the opinion of a polygraph examiner may in the discretion of the trial judge be admitted as evidence as to the truthfulness of any person called as a witness if the examination was performed by a person who is qualified as an expert polygraph examiner pursuant to the provisions of this rule and if:

(1) the polygraph examination was conducted in accordance with the provisions of this rule;

(2) the polygraph examination was quantitatively scored in a manner that is generally accepted as reliable by polygraph experts;

(3) prior to conducting the polygraph examination the polygraph examiner was informed as to the examinee's background, health, education and other relevant information;

(4) at least two relevant questions were asked during the examination; and

(5) at least three charts were taken of the examinee.

qualifications in the particular case, combined with the amendment of Rule 707, made it easy for the court to conclude that the admission in *Anthony* was reversible error.

In reaching its decision, the *Anthony* court provided some additional understanding of how the question of qualifications should be handled by the trial court. The examiner must, of course, possess the minimum qualifications expressed in case law and Rule 707. In addition, a foundation must be established that the examiner: (1) was aware of any mental or physical condition affecting the examinee at the time of the test;<sup>59</sup> and (2) that the examiner had the proper expertise to evaluate the effect of the particular condition on the examinee.<sup>60</sup> The implication is that the examiner must have specific training in psychology or physiology, as necessary, to do the particular testing.

In addition to finding the qualifications of the examiner insufficient to evaluate the effect of *Anthony's* eye condition on the test results, the court of appeals also reviewed the substantive nature of the "relevant" questions asked by the examiner:

Experts are virtually unanimous that unless the "relevant" questions are carefully formulated, the test results are suspect. A relevant question means a "clear and concise question which refers to specific objective facts directly related to the purpose of the examination and does not allow rationalization in the answer." Evidence Rule 707(a)(4). See also *State v. Brionez*, 91 N.M. at 295, 573 P.2d at 229.<sup>61</sup>

The court examined the two "relevant" questions asked: (1) "Did you hock a rifle to Eugene Mathis for \$50"; and (2) "Did Eugene Mathis loan you \$50 on a rifle?"<sup>62</sup> It concluded that the questions did not meet the test of Rule 707(a)(4) and were sufficiently ambiguous to provide further reason for reversal.<sup>63</sup> It is apparent from review of the decision in *Anthony* that, although the court of appeals could not accept the state's invitation to reject polygraph results in the absence of stipulated use, it will apply a strict standard of review for admission of the results.

#### V. ATTORNEY-CLIENT PRIVILEGE: WAIVER

In the most recently published decision in the complicated appellate history of *State v. Ballinger*,<sup>64</sup> the testimony by an immunized witness that he discussed "turning state's evidence" with his attorney was held

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59. 100 N.M. at 739, 676 P.2d at 266.

60. *Id.*

61. *Id.*

62. *Id.* at 736, 676 P.2d at 263.

63. *Id.* at 739, 676 P.2d at 266.

64. 100 N.M. 583, 673 P.2d 1316 (1984), *rev'g* 99 N.M. 707, 663 P.2d 366 (Ct. App. 1983).

to be at least a partial waiver of the witness's attorney-client privilege. The issue framed by the New Mexico Supreme Court was as follows: "The question presented for review is whether the testimony of a former co-defendant who turned state's evidence waived the attorney-client privilege as to the communication with his former attorney, and if it did, what was the extent of the waiver."<sup>65</sup>

The issue arose out of the following facts: Ballinger and John Rizzo were both indicted for the murder of Warren Uecker. Shortly after the trial began, Rizzo agreed to testify against co-defendant Ballinger in exchange for immunity. The grant of immunity and subsequent testimony against Ballinger came after a change in Rizzo's legal counsel. Rizzo's testimony inculpated Ballinger, conflicting sharply with the testimony of Ballinger's wife.<sup>66</sup> This testimony was given approximately a year after the murder charges were first brought; during that year, Rizzo never told the police his story of Ballinger's involvement.<sup>67</sup>

At trial, Ballinger's attorney attempted to question Rizzo and Rizzo's first attorney regarding discussions between them about any incriminating evidence against Ballinger and about the possibility of immunity. Rizzo testified on direct examination that one reason he remained silent for a year was because he understood his first attorney's discussion of turning state's evidence as a request for him to "confess to something [he] did not do."<sup>68</sup> On cross-examination, Rizzo and his first attorney both asserted the attorney-client privilege. The trial judge, on the basis of the invocation of the privilege, refused to allow Rizzo and his first attorney to be questioned by defense counsel regarding Rizzo's discussions with the attorney about immunity.<sup>69</sup> The defendant was convicted and appealed.

In its original opinion, the court of appeals ruled that Ballinger's conviction should be reversed and remanded for a new trial and that Rizzo "could be examined regarding the entire subject matter of immunity and the facts suggesting it which were discussed with his first attorney."<sup>70</sup> On certiorari, the New Mexico Supreme Court ordered the court of appeals to withdraw its opinion and to remand the case to the trial court for the limited purpose of determining, after hearing testimony on the issue of immunity, whether a new trial should be granted. The court of appeals revised its opinion, ordered remand, and again concluded that Rizzo had

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65. 100 N.M. at 584, 673 P.2d at 1317.

66. 99 N.M. at 708, 663 P.2d at 367.

67. *Id.* at 711, 663 P.2d at 370.

68. *Id.*

69. *Id.*; 100 N.M. at 584, 673 P.2d at 1317.

70. 100 N.M. at 584, 673 P.2d at 1317 (quoting *State v. Ballinger*, 21 N.M. Bar Bull. 1222, 1226 (Ct. App. 1982) (reversed by the New Mexico Supreme Court on February 28, 1983 in an unpublished opinion)).

waived the attorney-client privilege.<sup>71</sup> The court of appeals, in its second opinion, appeared to contemplate a broad inquiry arising from Rizzo's waiver:

If Rizzo and his former attorney discussed immunity, it is inconceivable that they did not also discuss facts which would form the justifications for obtaining immunity. Rule 511 establishes waiver if "any significant part of the matter or communication" is disclosed. Certainly, any discussion of "turning State's evidence" is a significant part of the subject matter counsel wished to inquire into.<sup>72</sup>

On a second petition for writ of certiorari, the New Mexico Supreme Court ruled that the remand, as fashioned by the court of appeals, was too broad in scope:

We determine that because Rizzo testified that his prior attorney had not explained the meaning of turning state's evidence to him, the respondent is only entitled to inquire whether Woodbury [the first attorney] had explained immunity to Rizzo. The opinion of the Court of Appeals on remand is reversed insofar as it relates to the issue of attorney-client privilege.<sup>73</sup>

Unfortunately, although the supreme court specifically defined the issue for its review on the second petition for a writ of certiorari as including the "extent of the waiver" of attorney-client privilege, its opinion did not set forth the legal basis for permitting only a limited inquiry on remand. It is unclear whether the limited remand ordered by the supreme court reflects a view that there had been only a partial waiver of the attorney-client privilege or whether the court merely found there was a narrow range of relevant evidence for purposes of deciding the motion for new trial. A review of the series of opinions in *Ballinger*, however, leads to the conclusion that the limitation on the inquiry into Rizzo's discussions with his first attorney should not be interpreted as a limitation on the extent of waiver created by voluntary disclosure of an otherwise privileged communication. The limitation imposed by the New Mexico Supreme Court appears more consistent with a limitation on the issues relevant to the motion for new trial.

The finding of a waiver of the attorney-client privilege, even if limited in nature, may be useful for trial attorneys in civil as well as criminal

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71. 99 N.M. at 712, 663 P.2d at 371.

72. *Id.* at 711, 663 P.2d at 370. Rule 511 suggests no evidentiary limitation on the scope of a waiver of the attorney-client privilege. N.M. R. Evid. 511 provides in part: "A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. . . ."

73. 100 N.M. at 585, 673 P.2d at 1318.

cases. Where the testimony of a witness or a party changes following discussions with his attorney and the impact of the attorney's discussion can be established, under *Ballinger* there may be an unintended, but nonetheless effective, waiver of the attorney-client privilege, thus permitting the opposing party to attack more completely the credibility of the altered testimony.