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Settlement without Sacrifice: The Recovery of Expert Witness Fees as Costs under New Mexico's Rule 1-068

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I. INTRODUCTION

Expert testimony is important to many facets of civil litigation. However, fees for expert witnesses are often substantial because experts typically demand a fee in accordance "with their education, experience, and field of expertise." Given these substantial expert witness expenses, "prevailing parties have ample incentive to seek reimbursement of these fees as a 'cost' of litigation." In New Mexico, the prevailing party in a civil action is generally entitled to recover costs for expenses incurred in that action. The specific items of recoverable costs are determined by "statute, Supreme Court rule and case law." The New Mexico Supreme Court has identified section 38-6-4(B) of the New Mexico Statutes as the statutory authority for the recovery of expert witness fees as costs. The court has strictly interpreted the statute to allow recovery only when two conditions are met: first, the witness must qualify as an expert, and second, the expert must testify in the case, either at trial or by deposition. In addition to this statutory provision, Rule 1-054 is the New Mexico Rule of Civil Procedure governing the recovery of costs. Prior to 2008, the rule provided that while expert witness fees for services, meaning those in addition to mileage and per diem, were generally recoverable, their recovery was expressly limited by section 38-6-4(B). In light of section 38-6-4(B), the New Mexico Supreme Court held in Fernandez v. Españaola Public School District that a plaintiff who settles a claim pursuant to

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3. Id.
5. Rule 1-054(D)(2) NMRA.
6. NMSA 1978, § 38-6-4(B) (1983) states:
The district judge in any civil case pending in the district court may order the payment of a reasonable fee, to be taxed as costs, in addition to the per diem and mileage as provided for in Subsection A of this section, for any witness who qualifies as an expert and who testifies in the cause in person or by deposition. The additional compensation shall include a reasonable fee to compensate the witness for the time required in preparation or investigation prior to the giving of the witness's testimony. The expert witness fee which may be allowed by the court shall be limited to one expert regarding liability and one expert regarding damages unless the court finds that additional expert testimony was reasonably necessary to the prevailing party and the expert testimony was not cumulative.
8. Id.
9. Rule 1-054(D) NMRA.
10. See Rule 1-054(D)(2)(g) NMRA. Specifically, the old rule provided that "expert witness fees for services as limited by Section 38-6-4(B) NMSA 1978" are generally recoverable as costs. Id.
Rule 1-068 could not recover expert witness fees as costs. Justice Bosson, in a specially concurring opinion, took issue with the court’s rigid interpretation of section 38-6-4(B) in the context of Rule 1-068 settlement agreements. He argued that the statute produced a result that was antithetical to New Mexico’s public policy of encouraging settlement and reducing the “burdensome cost of litigation.” He urged that for policy reasons “our courts need a rule that provides trial judges with discretion to award costs even when parties do not engage in full-blown litigation.”

Since Fernandez, the New Mexico judiciary has, in line with Justice Bosson’s opinion, taken steps to address this problem by way of amendment to Rule 1-054. The amended rule allows for the recovery of expert witness fees including those “provided by Section 38-6-4(B) NMSA 1978 or when the court determines that the expert witness was reasonably necessary to the litigation.”

This article considers the amendment to Rule 1-054 in the context of Rule 1-068 settlement agreements, and concludes that the amended rule not only resolves the inconsistency noted by Justice Bosson in Fernandez, but is also likely to lead to increased settlement under Rule 1-068. This article begins by examining New Mexico’s system of costs-recovery in civil actions through discussion of Rules 1-068 and 1-054 in addition to applicable case law. The New Mexico Supreme Court’s decision in Fernandez has particular relevance to this article in that it highlights the need for the recent amendment to Rule 1-054. As such, the holding, facts, and rationale underlying the decision are covered in detail.

Part III of this article demonstrates that Justice Bosson was correct in his assertion that the court’s interpretation of section 38-6-4(B) in the context of Rule 1-068 settlement agreements produced a result inconsistent with New Mexico public policy of encouraging settlement. This section concludes that the amendment to Rule 1-054 was the only practical way to ameliorate this inconsistency. Part IV considers the implication of the newly amended rule and demonstrates that the rule is likely to increase settlement under Rule 1-068, particularly in cases where the plaintiff, as the prevailing party, incurs substantial expert witness fees. This section also offers practical considerations for both plaintiffs and defendants contemplating Rule 1-068 settlement offers. Finally, this article identifies a procedural inefficiency created by section 38-6-4(B)’s requirement that a witness be certified as an expert prior to recovery of expert witness fees as costs, and suggests a solution for remedying this inefficiency.

12. Id. ¶¶ 14, 119 P.3d at 167–68 (Bosson, C.J., specially concurring).
13. See id. ¶ 16, 119 P.3d at 168.
14. Id. ¶ 14, 119 P.3d at 168.
15. Rule 1-054 NMRA.
17. The plaintiff is the prevailing party in a Rule 1-068 settlement agreement. Dunleavy v. Miller, 116 N.M. 353, 354, 862 P.2d 1212, 1213 (1993) (stating that the party who receives a judgment under Rule 1-068 is considered to be the prevailing party in the action).
II. BACKGROUND

A. Rule 1-068: The Offer of Settlement Rule

New Mexico public policy favors the resolution of disputes through settlement rather than through litigation.\(^{18}\) New Mexico Rule 1-068 embodies the supreme court's policy of reducing the burdensome cost of litigation through settlement.\(^{19}\) In application, Rule 1-068 encourages parties to "think very hard about whether continued litigation is worthwhile"\(^{20}\) by increasing a party's potential of being awarded or taxed with costs if the case proceeds to trial.\(^{21}\)

Prior to 2003, Rule 1-068 was known as the offer of judgment rule.\(^{22}\) The rule gave defendants an incentive to make reasonable offers of judgment prior to trial because it allowed defendants to recover costs, even if the defendant was ultimately the losing party.\(^{23}\) Specifically, if the defendant made an offer of settlement that was rejected by the plaintiff and the plaintiff prevailed in the case but recovered less than the defendant's offer, the plaintiff would be required to pay the defendant's post-offer costs.\(^{24}\) In this situation, the plaintiff would also be prevented from recovering his own post-offer costs.\(^{25}\) To avoid this outcome, the plaintiff was encouraged to accept reasonable offers of judgment.

In 2003, the nomenclature and content of Rule 1-068 changed from the offer of judgment rule to the offer of settlement rule.\(^{26}\) The rule, as amended, encourages

\(^{18}\) Fernandez, 2005-NMSC-026, ¶ 16, 119 P.3d at 168 (Bosson, C.J., specially concurring); see also 15A AM. JUR. 2D. Compromise and Settlement § 5 (2000).

\(^{19}\) Rule 1-068 NMRA.

\(^{20}\) Baber v. Desert Sun Motors, 2007-NMCA-098, ¶ 18, 164 P.3d 1018 (quoting Lang v. Gates, 36 F.3d 73 (9th Cir. 1994)).

\(^{21}\) See Rule 1-068(A) NMRA.

\(^{22}\) Id. (Committee Commentary, 2003 Amendment).

\(^{23}\) Id.


\(^{25}\) See id.

\(^{26}\) Rule 1-068(A) NMRA. Rule 1-068(A) provides:

Except as provided in this rule, at any time more than ten (10) days before the trial begins, any party may serve upon any adverse party an offer to allow an appropriate judgment to be entered in the action in accordance with the terms and conditions specified in the offer. A claimant may not make an offer of settlement under this rule until one hundred twenty (120) days after the filing of a responsive pleading by the party defending against that claim. If within ten (10) days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon such judgment may be entered as the court may direct. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

If an offer of settlement made by a claimant is not accepted and the judgment finally obtained by the claimant is more favorable than the offer, the defending party must pay the claimant's costs, excluding attorney's fees, including double the amount of costs incurred after the making of the offer. If an offer of settlement made by a defending party is not accepted and the judgment finally obtained by the claimant is not more favorable than the offer, the claimant must pay the costs, excluding attorney's fees, incurred by the defending party after the making of the offer and shall not recover costs incurred thereafter.

The fact that an offer has been made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of settlement, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten (10) days prior to the commencement of hearings to determine the amount or extent of liability.
both plaintiffs and defendants to make reasonable settlement offers prior to trial by allowing either party to make an offer of settlement at least ten days before trial.\textsuperscript{27} The committee commentary to the rule provides that, “allowing either party to make offers of settlement increases the likelihood that settlement will occur and provides equality of opportunity to all parties to initiate the settlement process.”\textsuperscript{28} Under the amended rule, if the plaintiff makes an offer of settlement that is rejected and then obtains a judgment in an amount greater than the offer, the defendant must pay double the plaintiff’s post-offer costs.\textsuperscript{29} Since the prevailing party is ordinarily entitled to costs anyway, the rule provides for double the costs to give plaintiffs an incentive to make offers of settlement and for defendants to accept such offers.\textsuperscript{30} As under the prior rule, if the plaintiff rejects the defendant’s offer of settlement and receives a judgment less than the offer, the plaintiff must pay the defendant’s post-offer costs and cannot recover his own costs.

Rule 1-068 only dictates that costs are recoverable when the parties are unable to settle disputes prior to trial.\textsuperscript{31} However, parties who successfully achieve settlement under Rule 1-068 may also be entitled to costs accrued under the provisions of Rule 1-054.\textsuperscript{32} It should also be noted that even in situations where Rule 1-068 governs the recovery of costs, meaning when a settlement offer was made but rejected and the case was resolved through trial, cost recovery is still subject to Rule 1-054.\textsuperscript{33} Notably, Rule 1-054 affords the trial court discretion to disallow costs, even those that are mandatory under Rule 1-068.\textsuperscript{34}

B. Rule 1-054: Costs

Prior to 1999, Rule 1-054 provided that “[e]xcept when express provision therefore is made either in a statute or in these rules, costs shall be allowed as a matter of course to the prevailing party unless the court otherwise directs.”\textsuperscript{35} The phrase “unless the court otherwise directs” has been interpreted to be “an equitable principle...[that] vests in the district court a sound discretion over the allowance, disallowance, or apportionment of costs in all civil actions.”\textsuperscript{36}

In 1999, the rule was amended to include language that “[c]osts shall be recoverable only as allowed by statute, Supreme Court rule, local district court rule and case law.”\textsuperscript{37} In 2000, the rule was amended further to provide that “[c]osts generally are recoverable only as allowed by statute, Supreme Court rule and case

\footnotesize{27. See id.}
\footnotesize{28. Rule 1-068 NMRA (Committee Commentary, 2003 Amendment).}
\footnotesize{29. Id.}
\footnotesize{30. Id.}
\footnotesize{31. Id.}
\footnotesize{32. See Dunleavy v. Miller, 116 N.M. 353, 362, 862 P.2d 1212, 1221 (1993).}
\footnotesize{34. See Dunleavy, 116 N.M. at 362, 862 P.2d at 1221 (1993). But see Montoya v. Pearson, 2006-NMCA-091, ¶ 22, 142 P.3d 11, 17 (holding that the trial court had no discretion to disallow costs under Rule 1-068 because pursuant to the rule, costs are mandatory).}
\footnotesize{35. Rule 1-054(E) NMRA 1996.}
\footnotesize{37. Rule 1-054(D)(2) NMRA 1999.}
38.  Id. (2000)
39.  Id.
41.  Id. at 323, 757 P.2d at 793.
42.  A costs bill is an “a itemized statement of the amount of costs owed by one litigant to another, prepared so that the prevailing party may recover the costs from the losing party.” BLACK’S LAW DICTIONARY 173 (8th ed. 1999).
43.  Jimenez, 107 N.M. at 324, 757 P.2d at 794.
44.  Id. at 327, 757 P.2d at 797.
45.  Id. at 324, 757 P.2d at 794.
46.  Id. at 327, 757 P.2d. at 797.
47.  Id.
48.  Id.
50.  Id. at 231, 910 P.2d at 307.
51.  Id.
trial, in person or by deposition, in order for the prevailing party to recover costs for expert witness fees.\textsuperscript{52}

Unlike the losing party in Jimenez, in Pierce the State argued that while costs may be limited under section 38-6-4(B), there is no such restriction on the court's discretion under Rule 1-054.\textsuperscript{53} Pierce was decided before the 1999 amendment to Rule 1-054 and, therefore, was binding at a time when the rule provided that "[e]xcept when express provision therefor is made either in a statute or in these rules, costs shall be allowed as a matter of course to the prevailing party unless the court otherwise directs."\textsuperscript{54} The Pierce court acknowledged that while the New Mexico Supreme Court has imposed no limitations upon a trial court's discretion to award costs pursuant to Rule 1-054, it has cautioned lower courts to use their discretion sparingly when considering costs not authorized by statute or precedent.\textsuperscript{55} The court then considered whether recharacterizing the costs as those for the preparation of an affidavit rather than those for expert witness fees would allow the court to award these costs within its discretion under Rule 1-054.\textsuperscript{56} The court determined that costs for preparation of an affidavit are not specifically authorized by statute or precedent and, as such, are within a trial court's discretion under Rule 1-054.\textsuperscript{57} However, the court ultimately concluded that the trial court abused its discretion because the costs involved in preparing the affidavits for summary judgment were preliminary and not directly connected with the trial.\textsuperscript{58}

The Pierce decision, in its discussion of discretion, referenced Dunleavy v. Miller,\textsuperscript{59} a case in which the New Mexico Supreme Court clearly articulated the extent of a trial court's discretion to award costs under Rule 1-054.\textsuperscript{60} While not central to its holding, the court in Dunleavy took issue with the New Mexico Court of Appeals' suggestion that the recovery of costs must be authorized by statute or by rule of court.\textsuperscript{61} Thus, in Dunleavy the New Mexico Supreme Court stated that while it is generally true that the recovery of costs must be authorized by statute or court rule, when neither specifically enumerates those costs that are recoverable, "the allowance or disallowance of particular costs is confided primarily to the discretion of the district court."\textsuperscript{62}

Dunleavy cited section 38-6-4(B) as an example of a statute granting trial courts discretion to award additional expert witness fees beyond the statutorily permitted one witness for liability and one witness for damages, if the court finds "that the additional expert testimony was reasonably necessary to the prevailing party and the

\textsuperscript{52} Id.
\textsuperscript{53} Id. at 231, 910 P.2d at 307.
\textsuperscript{54} Rule 1-054(E) NMRA 1996.
\textsuperscript{55} Pierce, 121 N.M. at 231, 910 P.2d at 307 (citing Dunleavy v. Miller, 116 N.M. 353, 862 P.2d 1212 (1993)).
\textsuperscript{56} Id.
\textsuperscript{57} Id. The court's recharacterization of the item of costs in Pierce illustrates that even before the amendment to Rule 1-054, the prevailing party to an action may have been able to recover costs for a non-testifying expert if able to successfully convince the court to characterize the expense as a type the court could award as costs in its discretion under Rule 1-054.
\textsuperscript{58} Id.
\textsuperscript{59} 116 N.M. 353, 862 P.2d 1212 (1993).
\textsuperscript{60} Id. at 363, 862 P.2d at 1222.
\textsuperscript{61} Id. at 362, 862 P.2d at 1221.
\textsuperscript{62} Id. (quoting 20 AM. JUR. 2d Costs § 52 (1965)).
expert testimony was not cumulative." Additionally, Dunleavy stated that there were other costs that have already been found to be within the discretion of the court, including costs for "transcript fees, special masters' fees, filing fees, fees for recording notices of lis pendens, fees for service of process, and receivers' fees," costs for the expense of depositions not used at trial, and costs of photocopies taken of depositions.

1. Fernandez v. Española Public School District

Unlike in earlier cases interpreting section 38-6-4(B), in Fernandez v. Española Public School District, the New Mexico Supreme Court considered whether a plaintiff who accepted a defendant's offer of judgment pursuant to Rule 1-068 was entitled to recover expert witness fees as costs. The case arose when Plaintiffs Eric and Veronica Fernandez filed a wrongful death action against the Española Public School District in November 1998 after their minor son Leon Fernandez was killed "in an accident involving an ATV on school grounds." On March 2, 2001, the Española Public School District, pursuant to the offer of judgment rule, offered to settle the claims against them for $95,000 plus costs. On March 15, 2001, Eric and Veronica Fernandez accepted this offer of judgment. On April 2, 2001, the court entered judgment for the plaintiffs in the amount of $95,000 plus costs accrued through March 2, 2001. On April 17, 2001, the Fernandezes filed their first costs bill claiming a total of $117,999.48, the majority of which was for expert witness fees totaling $89,274.25. Included within these fees was $450 for a medical doctor and $23,766.72 for three different psychologists.

The school district objected to the expert witness fees, arguing that section 38-6-4(B) mandates that expert witness fees are only recoverable as costs when the expert testifies in the case. Following a hearing on the plaintiffs' costs bill, the trial court agreed with the school district. The Fernandezes appealed to the court of appeals, which, by unanimous opinion, affirmed the district court and held that since the plaintiffs' experts did not testify at trial or by deposition, their expert witness fees were non-recoverable as costs by virtue of section 38-6-4(B).

The New Mexico Supreme Court granted certiorari and affirmed the court of appeals and the district court by holding that the Fernandezes could not recover

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63. Id. at 363, 862 P.2d at 1222 (quoting NMSA 1978, § 38-6-4 (1987)).
64. Id. (citing Pioneer Sav. & Trust v. Rue, 109 N.M. 228, 231, 784 P.2d 415, 418 (1989)).
65. Id. (citing Davis v. Severson, 71 N.M. 480, 490, 379 P.2d 774, 784 (1963)).
66. Id. (citing Budagher v. Sunnyland Enters., Inc., 90 N.M. 365, 367, 563 P.2d 1158, 1160 (1977)).
67. The Fernandez case was filed in the district court in 1998. At that time, Rule 1-068 was known as the Offer of Judgment rule. See Rule 1-068 NMRA (Committee Commentary, 2003 Amendment).
69. Id.
71. Id.
72. Id. at 2. These are the costs addressed in the plaintiff's brief; the remaining costs accrued by the plaintiff are not included in the brief. See id.
73. Id.
75. Id.
76. Id. ¶ 11, 92 P.3d at 692.
their expert witness fees as costs. The court found that the plain language of section 38-6-4(B) establishes two requirements for the recovery of expert witness fees: (1) the witness must be certified as an expert, and (2) must have “testified in the cause in person or by deposition.”

The plaintiffs argued on appeal that while section 38-6-4(B) allows a district court to award costs for the fees of testifying experts, it does not preclude a trial court from exercising its discretion to award costs when the expert witness does not testify in the cause. The New Mexico Supreme Court affirmed the court of appeals and rejected this argument as “particularly untenable in light of the plain language in the statute.” In addition to the plain language of the statute, the court relied on its 1988 decision in Jimenez as controlling precedent, concluding that expert witness fees were not recoverable unless the expert actually testified at trial.

The plaintiffs argued that the court’s more recent opinions in Dunleavy v. Miller and Gillingham v. Reliable Chevrolet, Inc. represented a departure from the court’s strict interpretation of section 38-6-4(B) in Jimenez and argued that the court should rely on these cases instead. In Dunleavy the New Mexico Supreme Court stated that a trial court should “exercise [its] discretion sparingly when considering expenses not specifically authorized by statute or precedent.” The plaintiffs in Fernandez argued that the Dunleavy court’s acknowledgment that a trial court has discretion to award costs meant that courts have discretion to award expert witness fees as costs, even when the witness does not testify at trial. The court disposed of this argument by pointing out that the recovery of expert witness fees as costs is governed by statute and, therefore, does not fall within the confines of the trial court’s discretion acknowledged in Dunleavy.

Notably, the discretion discussed in Dunleavy specifically referenced a trial court’s discretion to award costs not covered by statute or precedent. In fact, Dunleavy specifically addressed section 38-6-4(B) and described it as an example of statutory authority for the recovery of costs. Plaintiffs claimed that when referencing section 38-6-4(B) in its discussion, the Dunleavy court showed no intention of modifying, limiting, or restricting its earlier statement that a trial court should exercise its discretion sparingly. The Fernandez court disagreed and stated

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78. Id. ¶ 4, 119 P.3d at 165. The court explained that the goal of any statutory construction is “to give full effect to the intent of our Legislature.” Id. The court will give words of a statute their plain meaning unless the legislature expressly and clearly expresses a contrary intent. Id.
79. Id. ¶ 6, 119 P.3d at 165.
81. Id. ¶ 5, 119 P.3d at 165.
83. 1998-NMCA-143, 966 P.2d 197.
84. Fernandez, 2005-NMSC-026, ¶ 7, 119 P.3d at 166.
85. Id.
86. Dunleavy, 116 N.M. at 363, 868 P.2d at 1222.
87. Fernandez, 2005-NMSC-026, ¶ 8, 119 P.3d at 166.
88. Id.
89. Id.
90. Id.
91. Id.
that by including the statute as an example of statutory authority for the recovery of expert witness fees as costs, it firmly distinguished the recovery of expert witness expenses from those costs that could be awarded sparingly within the court’s discretion. Thus, as shown by Fernandez, the supreme court has been unwilling to create a separate category of costs for expert witness fees that are recoverable within the trial court’s discretion.

In addition, the Fernandez court found there was no support for the plaintiff’s argument that Dunleavy represented a departure from Jimenez. To the contrary, the court claimed Dunleavy offered support for its holding in Jimenez. In discussing section 38-6-4(B), the court in Dunleavy commented that the statute granted a trial court discretion to award costs for expert witness fees, even when those expert fees exceed the cost recovery permitted for one liability expert and one damages expert. However, this discretion is limited, narrowly, by the requirement that a court find “that the additional expert testimony was reasonably necessary to the prevailing party and the expert testimony was not cumulative.” It is the use of the word “testimony” here that the court claims supports the conclusion in Jimenez that an expert must testify in the case in order for costs to be recoverable.

The court further cited its holding in Pierce v. State as additional support for its adherence to Jimenez and to counter the plaintiffs’ argument that Dunleavy represented a shift away from Jimenez. In Pierce, the trial court awarded the State, as the prevailing party, costs for affidavits prepared by expert witnesses submitted in support of summary judgment. The New Mexico Supreme Court, using Jimenez as its authority, overturned the trial court and held that the State was not entitled to recover these costs because the witnesses were not qualified as experts and did not testify at trial, in person or by deposition.

Fernandez also overturned a portion of Gillingham v. Reliable Chevrolet, which potentially supported the plaintiffs’ interpretation of section 38-6-4(B). In Gillingham, the court “awarded costs for two potential expert witnesses who did not testify at trial.” The court of appeals upheld this award of costs by relying on its earlier opinion in Bower v. Western Fleet Maintenance. In Bower, the court considered the recovery of costs under section 52-1-35, a worker’s compensation

92. Id.
93. See id.
94. See id.
95. Id.
96. Id. (quoting Dunleavy v. Miller, 116 N.M. 353, 363, 862 P.2d 1212, 1222 (1993)).
97. Id.
100. Id.
101. Id.
103. Fernandez, 2005-NMSC-026, ¶ 9, 119 P.3d at 166.
104. Id.
105. 104 N.M. 731, 726 P.2d 885 (1986).
106. NMSA 1978, § 52-1-35(B) (repealed 1986) liberalized the standard by which a court may award certain costs in worker’s compensation cases by applying an abuse of discretion standard. See Fernandez, 2005-NMSC-026, ¶ 9, 119 P.3d at 166.
provision, rather than section 38-6-4(B), as was the case in *Gillingham.* The *Fernandez* court found that *Gillingham* erred by relying on a case that did not interpret the recovery of expert witness fees as costs under 38-6-4(B) and thus, overturned the portion of *Gillingham* that allowed for the recovery of expert witness fees when the witness did not actually testify in the case.

2. Justice Bosson’s Specially Concurring Opinion in *Fernandez v. Española Public School District*

Justice Bosson “reluctantly” concurred in the majority opinion. He asserted his preference to interpret section 38-6-4(B) as “allowing a more discretionary role for the trial judge in awarding costs” but agreed that New Mexico statutes, court rules, and precedent do not allow trial courts to award expert witness fees as costs when the expert does not testify at trial. He further agreed with the majority that *Dunleavy* and *Gillingham* were not adequate authority for an alternative interpretation of section 38-6-4(B). He wrote separately to argue that, as a matter of public policy, a rule is needed that would “allow the district court discretion to award additional compensation to ‘include a reasonable fee to compensate the witness for the time required in preparation or investigation prior to the giving of the witness’s testimony.’”

A major premise of Justice Bosson’s argument was that “considerations of promoting economy in litigation” demand that trial courts have this discretion. While the award of costs is mandatory under Rule 1-068, he contended that Rule 1-068 is still subject to the limitations imposed by Rule 1-054. The recovery of expert witness fees under Rule 1-054 is expressly limited by section 38-6-4(B) and thus parties “who rely on the offer of settlement rule may only recover expert witness fees as costs if the witnesses testify at trial or by deposition.” Thus, he concluded a party might reject an offer of settlement “for the sole reason that the party has no chance to recover costs for expert witness fees, costs that might be prohibitive, short of going to trial.”

While Justice Bosson agreed with the majority that the court’s holding in *Dunleavy v. Miller* did not support an alternative construction of section 38-6-4(B), he cited *Dunleavy* as support for his policy argument that allowing discretion to

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108. *Id.*
109. *Id.* (Bosson, C.J., specially concurring).
110. *Id.*
111. *Id.*
112. *Id.* In that Justice Bosson advocated for an alternative construction of the statute and a more flexible court rule, why didn’t he dissent? It is possible that his gracious concurrence reflects both respect for stare decisis and a pragmatic strategy; amending a court rule requires building consensus among the judiciary. Additionally, the court can’t nullify a statute in an opinion; it must do so through a court rule. *See* N.M. CONST. art. III, § 1.
113. *Fernandez,* ¶ 19, 119 P.3d at 169 (quoting NMSA 1978, § 38-6-4(B) (1983)).
114. *Id.*
115. *Id.*
116. *Id.* ¶ 15, 119 P.3d at 168.
117. *Id.*
118. *Id.* ¶ 16, 119 P.3d at 168.
award expert witness fees as costs would facilitate settlement.\(^{119}\) In *Dunleavy*, the court acknowledged this policy when it stated that the "district court should carefully scrutinize all costs submitted by the prevailing party in the interest of reducing insofar as possible the burdensome cost of litigation."\(^{120}\) Justice Bosson argued that these same policy considerations should apply to costs for expert witness fees in the context of settlement agreements.\(^{121}\) He also noted other policy goals affected by the court’s strict interpretation of section 38-6-4(B), such as "promoting offers of settlement, allowing liberal discovery and discouraging litigation."\(^{122}\)

While Justice Bosson agreed with the court’s interpretation of section 38-6-4(B), he also stated that granting trial courts discretion to award costs for expert witnesses outside of the statutory requirements is consistent with the legislature’s approach to cost recovery.\(^{123}\) He noted that section 38-6-4(B) expressly allows trial courts discretion to award additional compensation for expert witnesses beyond per diem and mileage; therefore, he argued that the circumstance of this provision applying only when the expert testifies at trial shows not that the legislature intended to expressly limit the recovery of expert witness fees to trial-type situations, but rather that the legislature did not contemplate settlements when enacting the statute.\(^{124}\) Thus, Justice Bosson seemed to argue that a court rule granting discretion to the trial courts to award expert witness fees as costs, even when the expert does not testify at trial, is not inconsistent with the legislature’s framework for costs recovery and, therefore, a flexible court rule promulgated by the judiciary would not necessarily create a conflict with the legislature.\(^{125}\)

D. The New Mexico Judiciary’s Rule-Making Authority

Justice Bosson’s advocacy of a flexible court rule vesting trial courts with discretion to award expert witness fees as costs assumes, without explanation, that the judiciary has authority to promulgate a procedural rule that appears to conflict with a statute as interpreted by the court. In New Mexico, it is firmly established that, pursuant to the state constitution, the judiciary has authority to govern matters of pleading, practice, and procedure.\(^{126}\) This authority is not exclusive. It is a power shared with the legislature. The court will give effect to statutes regulating procedure unless there is a conflict between statute and court rule governing a

\(^{119}\) Id. \& 18, 119 P.3d at 168.
\(^{120}\) Id. (internal quotation marks omitted).
\(^{121}\) Id.
\(^{122}\) Id.
\(^{123}\) See id. \& 17, 119 P.3d at 168.
\(^{124}\) Id.
\(^{125}\) See id.
\(^{126}\) See State ex rel. Anaya v. McBride, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975) ("[O]ur constitutional power under N.M. Const. art. III, \& 1 and art. VI, \& 3 of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government.").

Article III, section 1 of the New Mexico Constitution is the express separation of powers provision, which directs that "[t]he powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of those departments, shall exercise any powers properly belonging to either of the others." N.M. CONST. art. III, \& 1.
matter of procedure. In the event of a conflict, the court rule prevails. Given the judicial supremacy over matters of procedure, if costs are considered a matter of procedure, then the judiciary acted within its authority when it amended Rule 1-054 to grant trial courts discretion to award expert witness fees as costs when the witness was reasonably necessary to the litigation.

1. Are Costs Procedural?

The remaining question in determining the judiciary’s authority to amend Rule 1-054 to grant courts discretion to award expert witness fees as costs outside the narrow confines of section 38-6-4(B) is whether costs are procedural or substantive. The boundary between substance and procedure is often “elusive” but in light of case law and the language of Rule 1-054, it is clear that in New Mexico costs are deemed to be procedural.

On its face, the language of Rule 1-054 provides support for a determination that costs are procedural. The rule states “[c]osts generally are recoverable only as allowed by statute, Supreme Court rule and case law.” The supreme court’s assertion of authority allowing for the recovery of certain costs by rule is an implicit determination that costs are at least partly procedural. Being procedural, costs are ultimately governed by the judiciary pursuant to its rule-making authority. This argument can be criticized as “boot-strapping” because the amended rule seemingly reflects only the judiciary’s understanding of the governance of costs. However, the co-governance of costs existed well before the amendment to Rule 1-054. Additionally, case law supports a finding that costs are procedural in New Mexico. In Ammerman v. Hubbard Broadcasting, Inc., the New Mexico Supreme Court considered whether a statute creating a privilege protecting journalists from revealing their confidential informants in a judicial proceeding constituted a matter of procedure. In holding that it did, the court stated that in promulgating the statute at issue, the legislature attempted to create a rule of evidence comparable to other privileges already contained in the New Mexico Rules of Evidence. The court further stated:

[T]here is no real question about rules of privilege being rules of evidence, when considered in the context of being exceptions to the general requirement and liability of everyone to give testimony or furnish evidence upon all facts inquired of in a court of justice. They are so considered by every authority about whom we know who has discussed such rules.

130. Ammerman, 89 N.M. at 310, 551 P.2d at 1357.
131. Rule 1-054(D)(2) NMRA.
132. See Dunleavy v. Miller, 116 N.M. 353, 362, 862 P.2d at 1221 (1993) (discussing the general rule that trial courts have authority to award costs pursuant to “rule of court or statute”).
133. Ammerman, 89 N.M. at 307, 551 P.2d at 1354.
134. Id. at 309, 551 P.2d at 1356.
135. Id.
Therefore, in Ammerman, the question became whether a rule of evidence is procedural rather than substantive. The court found that the rules of evidence are largely—and possibly entirely—procedural, in part because “[t]he very fact of adoption of the New Mexico Rules of Evidence...by this court, is conclusive of its determination that at least these rules as adopted are procedural.”

In the more recent case of Albuquerque Rape Crisis Center v. Blackmer, the New Mexico Supreme Court affirmed its reasoning in Ammerman. In Blackmer, the court considered whether a statutorily created privilege protecting information disclosed by a rape victim to a rape counselor was procedural. In finding that this evidentiary privilege constituted a matter of procedure, the court cited Ammerman’s explanation that “rules of privilege are to be considered rules of evidence, and rules of evidence are procedural.” In light of this reasoning, costs are clearly a matter of procedure in New Mexico. Since costs are governed by Rule 1-054 (a procedural rule), and are codified in the New Mexico Rules of Civil Procedure (which are adopted by the court), costs are treated as procedural. Accordingly, costs are within the judiciary’s rule-making authority. To the extent that the court-modified Rule 1-054 conflicts with section 38-6-4(B), a procedural statute, the rule supersedes the statutory provision.

III. ANALYSIS

Without Justice Bosson’s specially concurring opinion in Fernandez, the significance of the costs determination when the parties reach a settlement agreement pursuant to Rule 1-068 would have gone unrecognized by the court. Unlike previous Rule 1-054 cases, the parties in Fernandez took advantage of Rule 1-068, a rule promulgated by the court specifically to encourage parties to settle disputes and avoid the burdensome cost of litigation. The end result was that the Fernandez plaintiffs accepted an offer of judgment for $95,000 plus costs, and unwittingly forfeited the recovery of over $89,000 in expert witness fees as costs.

While it may appear that the Fernandezes’ only option to avoid such a financial loss was to decline the defendant’s offer of judgment, that was not the case. Under Rule 1-068, the parties were free to negotiate the recovery of expert witness fees using traditional contract principles. Thus, rather than accept the defendant’s offer of judgment plus costs, the plaintiffs in Fernandez could have proposed a counter-offer with an amount that included expert witness fees and other specified costs while waiving an additional separate assessment of costs by the trial court.

136. Id. at 310, 551 P.2d at 1357.
138. Id. ¶ 9 n.2, 551 P.2d at 823 n.2 (citing Ammerman, 89 N.M. at 309–10, 551 P.2d at 1356–57).
139. Ammerman, 89 N.M. at 312, 551 P.2d at 1359.
141. See id. It makes no sense that the plaintiffs would accept a judgment of $95,000 believing they had $85,000 worth of unrecoverable expert witness fees. Thus, it seems fair to conclude that the plaintiffs believed these costs would be recoverable when they accepted the defendant’s offer of judgment for $95,000.
142. See id. ¶ 16, 119 P.3d at 168 (Bosson, C.J., specially concurring).
143. See Shelton v. Sloan, 1999-NMCA-048, ¶ 23, 977 P.2d 1012, 1016 (interpreting an agreement under Rule 1-068, the offer of judgment rule, by applying traditional contract principles).
144. See id. While Sloan interpreted the language of Rule 1-068 before it became the offer of settlement rule, the new rule contains the same ten-day timeframe for an offeree to accept an offer of settlement.
The underlying facts in *Fernandez*, however, illustrate the potential difficulties that may arise when parties attempt to recover substantial expert witness fees through settlement negotiations. In *Fernandez*, the defendant's offer was for $95,000 plus costs. The plaintiff's expert witness fees totaled over $89,000. Thus, a counter-offer that included expert witness fees would almost double the original offer of judgment. It is unlikely the defendant would have accepted a counter-offer that practically doubled its liability. Indeed, it is hard to imagine a circumstance that would permit these parties to reach a settlement that included full recovery of the plaintiffs' expert witness fees. Thus, the particular facts underlying *Fernandez* demonstrate that the insertion of the recovery of substantial expert witness fees into the negotiation process could serve as a practical impediment to parties settling disputes pursuant to Rule 1-068.

One way to resolve this potential impediment to settlement is to grant trial court's discretion to award costs even when the parties do not go to trial. Justice Bosson seems to have argued that a court rule allowing trial courts discretion to award costs for the work that resulted in compromise and avoidance of litigation would not cause conflict with the legislature because the new rule would be consistent with legislative intent, as demonstrated by a provision of section 38-6-4(B). Specifically, he argued that in enacting the statute, the legislature contemplated trial courts having discretion to tax expert witness fees as costs because the statute provides that a court award reasonable fees for the witness's pre-trial preparation, albeit, as interpreted by the court, only when the expert testifies in the cause.

Justice Bosson may well be correct in his assertion that discretion to award expert witness fees is in accord with the legislature's approach to costs. Indeed, other statutes governing costs show a clear legislative intent to give judges discretion to award costs or disallow costs when necessary in the case. For example, section 39-3-30 directs that “[i]n all civil actions or proceedings of any kind, the party prevailing shall recover his costs against the other party unless the court orders otherwise for good cause shown.” Section 39-2-9 states costs for witnesses shall not “exceed four witnesses, on each side, unless under the discretion of the court, and in the court’s discretion the same may be necessary.” In each of these statutory provisions, the trial court is granted discretion in the administration of costs. In light of these statutes, it appears incongruous to interpret section 38-6-4(B) as prohibiting a trial court from exercising its discretion to award expert witness fees as costs when the expert's services were reasonably necessary to the parties reaching compromises and avoiding litigation.

147. See *Fernandez*, 2005-NMSC-026, ¶ 17, 119 P.3d at 168 (Bosson, C.J., specially concurring).
148. Id. ¶ 17, 119 P.3d at 168 (Bosson, C.J., specially concurring); see *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 13, 120 P.3d 820, 824 (interpreting a statute governing privilege as consistent with court rule governing privilege so that there was no conflict between the procedural statute and court rule).
151. Id. § 39-2-9 (1953). Further, § 39-2-10 (1953) provides that when the court is taxing costs for more than four witnesses, it must "certify upon the record that the attendance of more than four witnesses was necessary in the case." Id.
However, this type of argument was unlikely to convince the court to reinterpret section 38-6-4(B) to allow trial courts discretion to award expert witness fees as costs when the expert does not testify at trial. This is because the plain language of section 38-6-4(B) unambiguously states that the witness must be certified as an expert and the expert must testify in the case, either by deposition or in person, before costs may be awarded. "When a statute contains language which is clear and unambiguous, [the court] must give effect to that language and refrain from further statutory interpretation." In addition, case law firmly establishes that the statute requires that the expert witness testify for costs to be recoverable. Thus, the only practical solution to the recovery of expert witness fees under Rule 1-068 was for the judiciary to exercise its power under Ammerman to amend Rule 1-054, thereby superseding section 38-6-4(B). In effectuating this amendment, the judiciary furthered the important policies of discouraging litigation, encouraging settlement and reducing the burdensome cost of litigation.

There is no good reason for preventing New Mexico courts from having this discretion, particularly since it is consistent with New Mexico public policy. It could be argued that application of section 38-6-4(B) reduced the burdensome cost of litigation because it discouraged plaintiffs from incurring substantial expert witness fees in the early stages of litigation if the parties anticipated settling the case. Even if that were true, the statutory bar to the recovery of these expenses was an overly restrictive means of accomplishing that goal. Expert witnesses are in many cases necessary to a party fully developing a claim or a defense. In such cases, a case could easily be dismissed if not for the expert witness. In cases where the expert is not legally necessary, the expert may still "serve as an indispensable force of persuasion." Further, a more moderate rule allowing courts authority to award expert witness fees as costs only when the expense is reasonably necessary to the litigation cautions attorneys to exercise restraint in incurring pre-trial expert witness fees, thereby still reducing the burdensome cost of litigation.

A potential criticism of the new rule is that the reasonably necessary language is too ambiguous and will lead to increased litigation regarding its meaning. While this may be true, it is important to recognize that the trial court will make this determination in a costs hearing. Thus, any expenses or costs associated with this matter would be in the form of attorney's fees and therefore would not implicate expert witness fees.

IV. IMPLICATIONS OF AMENDMENT TO RULE 1-054

In light of the foregoing considerations, the New Mexico Supreme Court amended Rule 1-054 in 2008 to allow the trial court discretion to award expert witness fees as costs when "the court determines that the expert witness was reasonably necessary to the litigation." The amendment to Rule 1-054 is likely

155. Id.
156. Id.
157. See Rule 1-054 NMRA.
to result in increased settlement under Rule 1-068. As illustrated by the facts underlying Fernandez v. Española Public School District, requiring a plaintiff to recover expert witness fees solely through settlement negotiations is likely to preclude parties in wrongful death actions and other actions involving significant damages from achieving settlement. Under the new rule, parties now have the ability to agree to a specified damage award and leave the determination of costs, particularly those for substantial expert witness fees, to a neutral decision-maker—the trial judge.

Such a position begs the question of why a party incurring substantial expert witness fees would chance their non-recovery in post-settlement hearings assessing costs. Answering this question requires examination of the plaintiff’s other options after the defendant has made an offer of settlement under Rule 1-068. The plaintiff can deny the defendant’s offer of settlement and take a chance at trial, invariably incurring more expenses, including expert witness trial preparation and testimony fees. If the plaintiff loses the case, the plaintiff will recover no costs. Even if the plaintiff prevails in the cause, if the plaintiff recovers a judgment less than the defendant’s offer of settlement, the plaintiff must pay the defendant’s post-offer costs and cannot recover her own post-offer costs.

Given the substantial consequences of rejecting a defendant’s reasonable settlement offer, it is not difficult to imagine the plaintiff electing to agree to a specified damage award and then leaving the recovery of costs for expert witness fees in the hands of the trial judge. Granting trial courts the discretion to award expert witness fees as costs thus encourages a plaintiff with substantial expert witness expenses to resolve disputes by accepting a defendant’s offers of settlement and then leaving the determination of costs to the court.

Defendants are also encouraged to make offers of settlement under Rule 1-068 and leave the determination of costs to the trial judge. The rule grants trial courts discretion to award expert witness fees that were reasonably necessary to the litigation. The “reasonably necessary” language cautions plaintiffs to exercise restraint when incurring expert witness fees in the pre-trial phase of litigation and protects defendants from being automatically taxed with substantial expert witness fees when entering into Rule 1-068 settlement agreements.

This benefit to defendants under the new rule should not be interpreted to discourage defendants from making offers of settlement inclusive of a specified amount for costs. For example, the defendant could offer $75,000 in damages plus $25,000 in costs. Given such a scenario, the defendant would have made an offer

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158. Rule 1-068 NMRA.
159. Id.
160. See Fernandez, 2005-NMSC-026, ¶ 20, 119 P.3d at 169 (Bosson, C.J., specially concurring) ("I believe the district court, if given discretion, is in a good position to make an honest assessment of the work that went into reaching a compromise.") Indeed, in Fernandez the trial court stated, in dicta, that if it were later determined to have discretion to award any of the plaintiff’s $89,274.25 in costs it would award $450.00 for Michael Baten, M.D., $16,814.41 for Dr. Robert Wright, Ph.D., $4,379.20 for Thom Thompson. Plaintiff-Petitioner’s Brief in Chief at 2, Fernandez, 2005-NMSC-026, 199 P.3d 163 (No. 28,648). Presumably, these were the expert witness expenses the court found necessary to the litigation.
of settlement in the total amount of $100,000 instead of just $75,000 if costs had not been added to the offer. This larger offer could present some practical advantages for the defendant in the event the plaintiff rejects the defendant’s offer of settlement. This is because under Rule 1-068, the prevailing plaintiff has to pay the defendant’s costs if the plaintiff recovers less than the offer of settlement. Thus, the plaintiff would have to make a stronger case for damages in order to receive a judgment that is not less than $100,000, rather than just $75,000, if costs had not been added to the offer. To determine the total amount of the judgment finally obtained under Rule 1-068, the court will add to the jury award any pre-offer costs awarded to the plaintiff. Thus, if the jury awards the plaintiff with a $75,000 judgment and the court then awards $10,000 for costs incurred prior to the defendant’s offer of settlement, the total award considered when determining costs under Rule 1-068 would be $85,000. In this example, the total judgment, composed of the jury award plus pre-offer costs, does not reach the $100,000 offer of settlement and thus the plaintiff would have to pay the defendant’s post-offer costs and could not recover her own post-offer costs. Alternatively, if the court awarded $26,000 in pre-offer costs, which was then added to the $75,000 jury award, the plaintiff would then have exceeded the defendant’s $100,000 offer of settlement and, in this situation, the defendant would have to pay double the plaintiff’s post-offer costs. Thus, the defendant should consider any pre-offer costs the plaintiff may have incurred when determining the amount of an offer of settlement.

V. A PROCEDURAL PROBLEM FOR THE RECOVERY OF EXPERT WITNESS FEES AS COSTS UNDER SECTION 38-6-4(B)

Finally, while the amendment to Rule 1-054 successfully remedies the limitations on the recovery of expert witness fees to prevailing plaintiffs in a rule 1-068 settlement, the first requirement of section 38-6-4(B) creates a procedural problem that is inconsistent with New Mexico policy of conserving judicial resources. While there is no case law on point, the statutory requirement that the witness must qualify as an expert likely means that a trial court must determine that the expert testimony is admissible under Rule 11-702 of the New Mexico Rules of Evidence.

The first requirement under Rule 11-702 is that the testimony concern “scientific, technical or other specialized knowledge.” When scientific knowledge is at issue, the trial court must assess the validity of the particular theory or technique underlying the testimony by considering the factors enumerated by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* The trial court does this by conducting a “Daubert” hearing or an on the record voir dire. Thus, pursuant to section 38-6-4(B), when the parties reach a settlement under Rule 1-068, the trial court may be required to conduct a separate hearing to qualify the witness as an expert. This produces an incongruous result when parties reach settlement

163. *See* Rule 11-702 NMRA.
164. *Id.*
166. *See* State v. *Fry*, 2006-NMSC-001, ¶ 54, 126 P.3d 516, 540–41; *see also* *Daubert*, 509 U.S. 579.
under Rule 1-068, because the rule is aimed, in part, at conserving over-taxed judicial resources.

One potential solution to this incongruity is for the parties to come to an agreement regarding the qualifications of witnesses prior to asking the court to enter judgment for the plaintiff. In fact, rather than chance their non-recovery on the basis of witness qualifications, it would be prudent for plaintiffs to seek stipulation of the expert’s qualifications as part of the negotiation under Rule 1-068. Another idea is for the judiciary to create a presumption that the witness qualifies as an expert if the plaintiff identifies this witness on her expert witness list and the opposing party does not challenge the witness’s qualifications. While this presumption would not necessarily increase the likelihood of the prevailing party recovering expert witness fees as costs, it would rectify the inconvenient procedural problem created by the first requirement under section 38-6-4(B) when the witness’s qualifications are uncontested.

Further, the judiciary has the authority to incorporate this presumption into Rule 1-054 through both its procedural rule-making authority, as discussed in Part I of this article, and its inherent authority. Pursuant to Article VI, § 1 of the New Mexico Constitution, the judiciary “retains certain inherent authority to oversee and manage its caseload.” 167 This inherent power exists independent of, and cannot be subject to, statute. 168 While the judiciary shapes the contours of its own inherent authority, New Mexico courts have limited the definition of inherent authority to “powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others.” 169 Included within these necessary powers is the court’s power to regulate its docket, promote judicial efficiency, and deter frivolous lawsuits. 170 Thus, under this inherent authority, the court has the ability to revise procedure that is inconsistent with judicial efficiency. The express requirement under section 38-6-4(B), that the witness be certified as an expert, constitutes a procedure that is inconsistent with judicial efficiency and, therefore, can be amended pursuant to the court’s inherent authority.

VI. CONCLUSION

The 2008 amendment to Rule 1-054 resolves the inconsistency created by the prior restrictions to the recovery of expert witness fees as costs under Rule 1-068. While adding new language to the rule allows the trial courts the discretion to award costs for experts who were “reasonably necessary” to the litigation, the language of the new rule may lead to increased litigation by virtue of its ambiguity. Such additional litigation may be worth the expense in attorney’s fees when substantial expert witness fees are at issue.

170. Baca, 120 N.M. at 1, 896 P.2d at 1148.
While the amendment to Rule 1-054 helps the prevailing party in a settlement action by increasing the likelihood that the party will recover expert witness fees as costs, section 38-6-4(B) of the New Mexico Statutes creates a procedural hurdle that is inconsistent with the state policy of preserving judicial resources. This hurdle could be remedied through the parties stipulating to a witness’s qualifications prior to the court entering judgment pursuant to Rule 1-068. In addition, the judiciary could add a presumption of a witness’s qualifications as expert when the plaintiff includes the expert in the witness list and the witness’s qualifications are unchallenged. Even with the currently existing procedural hurdle, however, the amendment to Rule 1-054 promotes the policy of encouraging settlement and may, in fact, increase Rule 1-068 settlement agreements. The amended rule, thus, represents a change in the law that may be beneficial to litigants in New Mexico who wish to resolve disputes without time-consuming and expensive trials.