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Ted Occhialino

CIVIL PROCEDURE

MARIO E. OCCHIALINO*

INTRODUCTION

Changes in New Mexico civil procedure law during the Survey year were varied and interesting. The changes reflect no general trend, however, and are organized in this article according to the sequence followed in a single lawsuit. Issues on forum selection are discussed first, for example, then pleadings, and on through appeals and post-judgment motions. The final two sections concern developments in multiparty litigation, and a brief discussion of survey year cases involving the statutes of limitation.

I. FORUM SELECTION

A. *Subject Matter Jurisdiction*

The Supreme Court of New Mexico has jealously guarded from legislative encroachment what it perceives to be its inherent power over matters affecting the internal workings of the courts.[1] In *In re Arnall,*[2] the supreme court confirmed its commitment to this principle by narrowly construing a statute[3] which purports to require that only one division within a district court can exercise jurisdiction over certain actions affecting the parent-child relationship.

In *Arnall,* the maternal grandparents of an infant filed a petition in the District Court of Bernalillo County seeking guardianship of the minor. The mother of the child initially consented to the action. When the court awarded guardianship to the father and not the grandparents, the mother appealed. She claimed that the district court lacked subject matter jurisdiction of the action because the legislature had assigned exclusive original jurisdiction of such actions to the children's court division of the district court.[4] The mother

*Professor of Law, University of New Mexico School of Law.

1. *See, e.g.,* Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976). The seminal decision is State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

2. 94 N.M. 306, 610 P.2d 193 (1980).

3. N.M. Stat. Ann. §32-1-9(B) (Repl. Pamp. 1981) of the New Mexico Children's Code provides: "The [children's court division of the district court] has exclusive original jurisdiction of the following proceedings . . . (5) to determine the custody of or to appoint a custodian or a guardian for a minor. . . ."

4. 94 N.M. at 307, 610 P.2d at 194. The statute the mother relied upon was N.M. Stat. Ann. §32-1-9(B) (Repl. Pamp. 1981).

argued that because the district court was not authorized to hear the case, the court was without subject matter jurisdiction.[5]

The New Mexico Supreme Court disagreed. The court stated that the subject matter jurisdiction of the district courts flows directly from the state constitution and is not subject to limitation by the legislature.[6] Therefore, the legislature did not have the power to confine to a single division of the district court jurisdiction which the constitution gives to all district courts without limitation. The supreme court rejected the argument that the legislative action was permissible because the legislature had not completely removed jurisdiction from the district court, but had merely allocated a portion of the jurisdiction to a particular division. According to the supreme court, it would be unconstitutional to allow the legislature to allocate judicial power in this way: "Though the district court as a whole still retains 'original jurisdiction' over these matters, particular divisions of the court would be left with a more limited jurisdiction. Such an interference in the original jurisdiction of a court of general jurisdiction is constitutionally impermissable."[7]

The statute at issue is designed to assign a certain class of cases to a single court, which would develop the expertise necessary to handle them.[8] The supreme court obliquely acknowledged the wisdom of this goal,[9] but would not acquiesce in such an intrusion upon the internal workings of the court as the legislation entailed.

There is a solution to this dilemma. The district court should

5. Because the mother challenged the subject matter jurisdiction of the district court, she was permitted to raise the issue on appeal even though she did not raise the issue in the trial court. *See* Chavez v. County of Valencia, 86 N.M. 205, 521 P.2d 1154 (1974); Barnett v. Cal M, Inc., 79 N.M. 553, 445 P.2d 974 (1968); *see also* State *ex rel.* Evans v. Field, 27 N.M. 384, 201 P.2d 1059 (1921); N.M. R. Civ. P. 12(h)(3).

6. The New Mexico Constitution provides that the judicial power of the state shall be vested in certain courts, including the district courts. N.M. Const. art. 6, §1. Another provision grants broad subject matter jurisdiction to the district courts: "The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law." N.M. Const. art. 6, §13.

7. 94 N.M. 306, 308, 610 P.2d 193, 195 (1980). The court did not actually hold the statute unconstitutional. Instead, it construed the statutory language to mean that the children's court division was not given exclusive original jurisdiction. 94 N.M. at 308, 610 P.2d at 195. It is doubtful that frictions which flow from such separation of powers battles are diminished by this holding. The court, however, is committed to the notion that interpreting a statute to mean what it does not say is preferable to declaring the statute unconstitutional. *See, e.g.*, State *ex rel.* Norvell v. Credit Bureau of Albuquerque, Inc., 85 N.M. 521, 529, 514 P.2d 40, 48 (1973). The preference for liberal construction instead of a declaration of unconstitutionality has a long history in New Mexico. *See, e.g.*, Codlin v. Kohlhousen, 9 N.M. 565, 58 P. 499 (1899), *appeal dismissed*, 181 U.S. 151 (1899).

8. *See* N.M. Stat. Ann. §§32-1-1 to 32-6-3 (Repl. Pamp. 1981).

9. 94 N.M. at 308, 610 P.2d at 195; *see generally* N.M. Stat. Ann. §32-1-2 (Repl. Pamp. 1981).

adopt a court rule[10] providing that matters within the scope of the Children's Code will be transferred automatically to the children's division of the district court when such actions are filed initially in the district court. In this way, the court can accomplish the legislative goal, demonstrate the judiciary's willingness to cooperate with the legislature, and illustrate the appropriate means for avoiding separation of powers battles of the type presented in *Arnall.*[11]

In *Spray v. City of Albuquerque,*[12] the city argued before the supreme court that its sovereign immunity protected it from liability for the contract claims asserted by the plaintiff in the trial court. The city had not raised the defense at trial. Nonetheless, the supreme court permitted the argument to be presented because "the issue of governmental immunity is jurisdictional in nature and . . . may be raised at any time during the proceedings."[13]

Governmental immunity has been considered a jurisdictional question in contract actions, and has been permitted to be raised at any time.[14] This may no longer be wise, however, given the great number of claims now asserted under the State Tort Claims Act.[15] If governmental immunity may be raised at any time, the sovereign immunity defense is exempt from the general requirement that alleged errors must be presented to the trial court if they are to be preserved for appellate review.[16] Such an exemption seems open to abuse. Many of the substantive issues presented in a typical state tort claims action can be framed in terms of whether the state has waived immunity under the circumstances presented.[17] To permit parties to raise

10. District courts are authorized to promulgate local rules of court. N.M. R. Civ. P. 83.

11. The need for cooperation between the legislature and the court is clear to the legislature. One section of the Children's Code calls upon the supreme court to promulgate rules of procedure to implement the Code. N.M. Stat. Ann. §32-1-4(C) (Repl. Pamp. 1981). Unfortunately, the tone and language of the provision is not conciliatory. It declares that the supreme court "shall" adopt implementing procedures, but only those "not in conflict" with the Code. *Id.*

12. 94 N.M. 199, 608 P.2d 511 (1980).

13. *Id.* at 201, 608 P.2d at 513; *see* note 5 *supra.*

14. *E.g.,* State *ex rel.* Evans v. Field, 27 N.M. 384, 201 P. 1059 (1921).

15. The State Tort Claims Act is codified in N.M. Stat. Ann. §§41-4-1 to -29 (Supp. 1981).

16. N.M. R. Civ. App. 11. The rule incorporates an exception for jurisdictional issues and contains additional exceptions as well. *Id.*

17. The Tort Claims Act reaffirms the common law principle of sovereign immunity, N.M. Stat. Ann. §41-4-4 (Cum. Supp. 1981), and then provides a series of exceptions to that immunity. Most litigation arising under the Tort Claims Act concerns the question whether the conduct the government engaged in comes within the statutory exceptions. *E.g.,* Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980); City of Albuquerque v. Redding, 93 N.M. 757, 605 P.2d 1156 (1980); Moore v. State, 95 N.M. 300, 621 P.2d 517 (Ct. App. 1980). In such cases, the issue is one of sovereign immunity and, under the ruling in *Spray,* can be raised for the first time on appeal.

such questions for the first time before the court of appeals[18] would encourage dilatory tactics, reward poor preparation, and prevent the appellate court from benefitting from the district court judge's views on the immunity question. These evils can be avoided by treating the immunity question as one of substance rather than of jurisdiction, at least for the purpose of determining whether the defense can be presented for the first time on appeal.[19]

B. *Personal Jurisdiction*

As first-year law students quickly realize, the permissible scope of a state's exercise of in personam jurisdiction is not clearly defined. The "minimum contacts/fairness" test established by the United States Supreme Court in 1945[20] provides little practical guidance. Periodically, the Supreme Court attempts to refine the constitutional test,[21] but with little success. Fact patterns continue to arise with small but significant differences. Therefore, the outcome of an in personam jurisdiction question cannot be easily predicted by reference to the constitutional standard.

Decisions by both the United States Supreme Court and the New Mexico Court of Appeals illustrate the indefiniteness of the due process limitation on the states' long-arm jurisdiction statutes. In *World-Wide Volkswagen Corp. v. Woodson,*[22] the United States Supreme Court held that an Oklahoma long-arm statute could not be interpreted to permit an Oklahoma court to assert jurisdiction over a distributor and the retail dealer of an automobile sold on the East Coast, even though defects in the automobile caused an accident and injuries in Oklahoma. The Supreme Court emphasized that the "minimum contacts/fairness" test serves not only to protect defendants from the burdens of litigating in an inconvenient forum,

18. The State Tort Claims Act provides that "[a]ppeals may be taken as provided by law." N.M. Stat. Ann. §41-4-18(A) (Cum. Supp. 1981). Because all claims arising under the Act are tort claims, *see* N.M. Stat. Ann. §41-4-4(A) (Cum. Supp. 1981), the court of appeals and not the supreme court has jurisdiction to hear the appeal. N.M. Stat. Ann. §34-5-8(A) (Repl. Pamp. 1981).

19. The New Mexico Supreme Court removed any theoretical objections to this change in Hicks v. State. 88 N.M. 588, 544 P.2d 1153 (1975). In *Hicks,* the court abolished the common law doctrine of sovereign immunity, which was grounded on a theory that courts did not have jurisdiction to hear cases in which the government was sued. Even though the legislature later re-enacted sovereign immunity, *see* note 15 *supra,* it did not, at least explicitly, re-enact that common law ground for the doctrine. Therefore, the jurisdictional analysis may be considered to have been implicitly abolished in *Hicks.* As the policy of judicial economy argues against this jurisdictional analysis, it should be expressly abolished as well.

20. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

21. *See, e.g.,* Kulko v. Cal. Superior Court, 436 U.S. 84 (1978); Hanson v. Denckla, 357 U.S. 235 (1958).

22. 444 U.S. 286 (1980).

but also "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system."[23] Thus, long-arm jurisdiction must henceforth be considered in light of one state's right to be free from encroachment of its interests by the courts of a sister state. The Court offered no guidance, however, as to the application of this state sovereignty aspect of the due process test. Instead, the Court focused upon the relationship between the defendants and the Oklahoma forum. The Court found no evidence that defendants made or solicited sales in Oklahoma, performed services there, or in any way sought "to serve the Oklahoma market."[24] The Court concluded that the sale of the automobile in New York to a New York resident who was later injured in Oklahoma was not sufficient to permit Oklahoma to assert in personam jurisdiction over defendants. The state argued that jurisdiction should exist because it was foreseeable that defendants' conduct in New York could have consequences in Oklahoma. The Court responded that mere foreseeability of extra-territorial consequences was not germane to the constitutional analysis. The Court attempted to define the type of foreseeability which would be relevant: "This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[25]

The *Woodson* decision places constraints upon the expansion of a state's long-arm jurisdiction. The influence of the decision has already been felt in New Mexico. *Tarango v. Pastrana,*[26] for example, seems to limit the scope of the New Mexico long-arm statute. In *Tarango,* a New Mexico woman went to El Paso where a Texas physician performed a tubal ligation upon her. The operation was unsuccessful, and the woman became pregnant after her return to New Mexico. The woman filed a malpractice action against the treating physician in New Mexico district court. The district court concluded that in personam jurisdiction was lacking, and the woman appealed.

The court of appeals cited *Woodson,* although it chose a different reasoning process to reach the conclusion that an exercise of jurisdic-

23. *Id.* at 292.

24. *Id.* at 295.

25. *Id.* at 297. It is difficult to see how this kind of foreseeability is distinguishable from the type of foreseeability that the state urged. If a defendant could reasonably foresee the possibility of a car accident in Oklahoma, surely he could foresee the possibility of being hailed into court there, at least prior to the decision in *Woodson. See, e.g.,* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

26. 94 N.M. 727, 616 P.2d 440 (Ct. App. 1980).

tion over the Texas physician would be impermissible. The court applied a two-part analysis: (1) the long-arm statute must authorize the assertion of jurisdiction in light of the facts presented, and (2) if the terms of the statute have been met, jurisdiction exists only if it would not violate the constitutional constraints imposed by the due process clause to assert jurisdiction in light of the facts presented.[27]

The court held that the first requirement of the test was met. The New Mexico long-arm statute authorizes the assertion of jurisdiction if a defendant has engaged in either the "transaction of any business" or the "commission of a tortious act" in New Mexico.[28] The mailing of bills to the New Mexico resident, the court concluded, did not constitute the "transaction of any business" in New Mexico.[29] The court concluded, however, that the physician's conduct constituted the commission of a tortious act in New Mexico even though the act of malpractice was performed in Texas. The court noted that it was only when the negligent act resulted in the "injury" of pregnancy that the act became tortious.[30] The pregnancy occurred in New Mexico. Therefore, the tortious act was committed in New Mexico.

The constitutional test still had to be applied, however. The court of appeals did not analyze the constitutional question in light of *Woodson,* but relied upon earlier precedent.[31] The court accepted as controlling two pre-*Woodson* cases from other jurisdictions which had concluded that physicians were not subject to in personam jurisdiction when their negligent acts committed elsewhere cause harm to the patients in the forum state.[32] The court held that the defendant's

27. *Id.* at 728, 616 P.2d at 441.

28. N.M. Stat. Ann. §38-1-16(A) (1978).

29. 94 N.M. at 728, 616 P.2d at 441. This conclusion is consistent with determinations made in analogous situations by the United States Supreme Court, *e.g.,* Hanson v. Denckla, 357 U.S. 235 (1958) (correspondence with domiciliary of forum not sufficient contact), and by New Mexico's courts. *E.g.,* Telephonic, Inc. v. Rosenblum, 88 N.M. 532, 543 P.2d 825 (1975) (mailing signed contract into New Mexico is not a transaction of business); Diamond A Cattle Co. v. Broadbent, 84 N.M. 469, 505 P.2d 64 (1973) (mailing payments on a contract into New Mexico is not a transaction of business).

30. 94 N.M. at 728, 616 P.2d at 441. The position that the tortious act occurs where the harm occurs and not where the act of negligence is performed was adopted in the leading Illinois case of Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). Because New Mexico's long-arm statute is based upon that of Illinois, New Mexico courts give special deference to the interpretation of the Illinois statute provided by the Illinois courts. Melfi v. Goodman, 69 N.M. 488, 368 P.2d 582 (1962); *see* Smith v. Meadows, 56 N.M. 242, 242 P.2d 106 (1952).

31. The court of appeals quoted from Hanson v. Denckla, 357 U.S. 235 (1958), decided twenty-two years before *Woodson,* and merely referred to *Woodson* in passing. 94 N.M. at 729, 616 P.2d at 442.

32. Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972); Gelineau v. New York University Hospital, 375 F. Supp. 661 (D.N.J. 1974).

contacts with New Mexico were insufficient to satisfy due process. Therefore the New Mexico long-arm statute could not be applied and personal jurisdiction over the Texas doctor was lacking.[33]

The court's conclusion in *Tarango* cannot be faulted. Nor is it improper that the New Mexico Court of Appeals sought guidance from other courts on the question of a physician's amenability to jurisdiction in the courts of states other than the one in which he practices. The *Tarango* court, however, passed up an opportunity to clarify a confused area of the law. By declining to engage in a careful analysis of the standards set forth in *Woodson,* the court of appeals diminished the value of the *Tarango* case as useful precedent.[34]

C. *Venue*

The venue statutes allocate judicial business among the counties within the state.[35] Though the venue provisions are relatively clear, cases decided this year demonstrate that questions of interpretation can still arise. Further, two cases show how attorneys can shape litigation in such a way as to obtain a venue favorable to their lawsuits.

A New Mexico statute provides that "when lands or any interest in lands are the object of any suit" the action shall be brought in the county where the land is located.[36] In *Rito Cebolla Investments, Ltd. v. Golden West Land Corp.,*[37] one corporation sued another for damages arising out of alleged misrepresentations in the course of the sale of land. Suit was instituted in district court in Mora County, where the land was located. Mora County lacked any other affiliat-

33. 94 N.M. at 730, 616 P.2d at 443.

34. Under *Tarango,* New Mexico citizens who receive medical treatment in Texas can expect that they will be obligated to initiate malpractice actions in Texas courts, with the resulting inconvenience. New Mexicans who go to Mexico for medical and dental treatment may face even more inconvenience. They are condemned by the *Tarango* decision not only to litigate in a foreign forum, but in a forum with fundamentally different substantive and procedural law. To the extent that Mexican health care providers solicit business in New Mexico, however, *Tarango* may be distinguishable. *See* Gelineau v. New York University Hospital, 375 F. Supp. 661 (D.N.J. 1974) (jurisdiction may exist when patient was solicited to travel elsewhere to receive professional services).

35. New Mexico's district courts are divided into judicial districts. N.M. Stat. Ann. §34-6-1 (Repl. Pamp. 1981). Some districts encompass only a single county. *E.g.,* Bernalillo County alone constitutes Second Judicial District, N.M. Stat. Ann. §34-6-1(B) (Repl. Pamp. 1981). Other districts may include several counties. *E.g.,* the counties of Socorro, Torrance, Sierra and Catron are within the Seventh Judicial District, N.M. Stat. Ann. §34-6-1(G) (Repl. Pamp. 1981).

The general venue statutes do not follow judicial district boundaries. Judicial business is allocated by county, not by judicial district. N.M. Stat. Ann. §§38-3-1 to -11 (Supp. 1981). If a change of venue is sought, however, special rules apply if the proposed alternative site is in a different judicial district. N.M. Stat. Ann. §38-3-3(B) (1978).

36. N.M. Stat. Ann. §38-3-1(D)(1) (Supp. 1981).

37. 94 N.M. 121, 607 P.2d 659 (Ct. App. 1980).

ing circumstances to the transaction.[38] The court of appeals affirmed the trial court's decision dismissing the case for improper venue. The court concluded that the fact that land was the subject of the contract did not alone trigger the statute laying venue at the situs of the realty. Because the action was for damages and did "not affect the title to, or ownership of, the property,"[39] the real property-venue statute was inapplicable and the general venue statute controlled.[40]

This holding allows a plaintiff power over venue. To the extent that a plaintiff in a breach of contract action involving land has a choice of remedies, including specific performance and damages, it is within his power to create or destroy venue at the situs of the land. If plaintiff asks for specific performance or recission, only the county in which the land is located is a proper venue for the action.

In *Jacobs v. Stratton,*[41] a professor at Eastern New Mexico University in Portales filed an action in state district court in Santa Fe alleging that the Board of Regents of the University, the individual members of the Board, and other officials had violated his civil rights. The supreme court rejected the argument that the applicable venue statute required that "state officers" be sued only in the county where their offices are located.[42] Instead, the court interpreted the statute to permit such actions to be brought at the state capitol in Santa Fe County, even when the officials have no office in Santa Fe.[43] *Jacobs* indicates that persons who file civil rights claims in state court can create venue in Santa Fe no matter where the illegal conduct occurred. Plaintiff need only include among the defendants supervisory personnel[44] who qualify as state officers for purposes of

38. Both corporations were incorporated in New Mexico and had their principal places of business in Bernalillo County. The contract of sale was entered into in Bernalillo County and was to have been performed there. 94 N.M. at 123, 607 P.2d at 661.

39. *Id.*

40. The general venue statute for transitory action is contained in N.M. Stat. Ann. §38-3-1(A) (Supp. 1981).

41. 94 N.M. 665, 615 P.2d 982 (1980).

42. At the time the issue was litigated, the applicable venue statue provided that "suits against any state officers as such shall be brought in the court of the county wherein their offices are located, at the capital and not elsewhere." N.M. Stat. Ann. §38-3-1(G) (1978).

43. 94 N.M. at 667, 615 P.2d at 984. The venue statute appears to provide an alternative venue where the offices of the state official are located in a county other than Santa Fe, but the issue has never been presented to the court for determination. *Cf.* Jones v. New Mexico State Highway Dep't, 92 N.M. 671, 593 P.2d 1074 (1979) (where only office of official is in Santa Fe, only Santa Fe County is proper venue); State *ex rel.* Bureau of Revenue v. MacPherson, 79 N.M. 272, 442 P.2d 584 (1968) (situs of branch office of agency with main office in Santa Fe not proper venue); State *ex rel.* State Highway Comm'n v. Quesenberry, 74 N.M. 30, 390 P.2d 273 (1964) (legislature intended that actions against state officers be brought in Santa Fe and not elsewhere).

44. Supervisory personnel can be held liable for civil rights violations committed by persons under their authority. The doctrine of respondeat superior is not a sufficient basis for imposing

the venue statute.[45] Shortly after *Jacobs* was decided, the legislature amended the venue statute to require that "suits against the officers or employees of a state educational institution" shall be brought only in the county where the plaintiff resides or the county "in which the principal office of the state educational institution is located."[46]

In *Santa Fe National Bank v. Galt,*[47] the court rejected an assertion that a claimant on an insurance policy had improperly appointed a conservator in order to obtain a favorable venue for trial. In *Galt,* an Eddy County infant was harmed by the alleged malpractice of a physician from Eddy County. A bank located in Santa Fe was chosen as conservator of the minor.[48] The conservator then filed suit in district court in Santa Fe County. In the district court, defendant successfully challenged the Santa Fe venue.[49] The court of appeals reversed, holding that if a conservator is validly appointed, the general venue statutes apply. The court indicated that the burden was on the defendant to prove that the conservatorship proceeding was improper, or that it was a "sham" in that it "was obtained solely to establish a Santa Fe County venue."[50] Absent such proof, the court found that venue of the transitory action was proper in the county in which the conservator resided.[51]

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liability. *See* Monell v. New York Dep't of Social Servs., 436 U.S. 658 (1978); Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976). However, allegations that supervisory personnel either failed to adequately train subordinates or, knowing of past misconduct, failed to act to prevent subordinates from continuing to act impermissibly, is sufficient to state a cause of action. *See,* McLelland v. Facteau, 610 F.2d 693 (10th Cir. 1979).

45. For cases defining "state officers" for purposes of the venue statute, *see* State *ex rel.* Bureau of Revenue v. MacPherson, 79 N.M. 272, 442 P.2d 584 (1968); Tudesque v. New Mexico St. Bd. of Barber Examiners, 65 N.M. 42, 331 P.2d 1104 (1958).

46. N.M. Stat. Ann. §38-3-1(G) (Supp. 1981).

47. 94 N.M. 111, 607 P.2d 649 (Ct. App. 1979), *cert. denied,* 94 N.M. 628, 614 P.2d 545 (1979).

48. Conservator proceedings are controlled by N.M. Stat. Ann. §§45-5-401 to -432 (1978).

49. The district court rested its decision on an interpretation of the scope of a venue provision contained in the statutes dealing with conservators. The statute provides that venue "for proceedings under" the conservatorship statute is to be laid in the district "where the person to be protected resides." N.M. Stat. Ann. §45-5-403 (1978). The district court concluded that the statute determined not only the situs of the original conservatorship proceeding, but also the venue of all actions brought by the conservator. Santa Fe Nat'l Bank v. Galt, 94 N.M. 111, 113, 607 P.2d 649, 651 (Ct. App. 1979), *cert. denied,* 94 N.M. 628, 614 P.2d 545 (1979).

The court of appeals rejected this reasoning. It held that the venue statute relied on by the district court was limited to proceedings dealing with the appointment of the conservator. 94 N.M. at 115, 607 P.2d at 653. Once the conservator is appointed, the conservator is authorized by statute to prosecute or defend actions anywhere. N.M. Stat. Ann. §45-5-432(C)(24) (1978). The general venue provisions control the determination of the proper situs of such suits. 94 N.M. at 115, 607 P.2d at 653.

50. 94 N.M. at 113, 607 P.2d at 651.

51. The court of appeals also suggested that proof that there was "noncompliance with statutory provisions" governing the conservatorship proceedings might also preclude the use of

The court of appeals conceded that permitting the residence of the conservator to determine venue would open the door for forum-shopping by the selection of a conservator residing where venue was desired.[52] By narrowly construing the scope of permissible collateral attack on the validity of the appointment proceedings, the court may have encouraged the use of conservatorship appointments as a means for manipulating the forum-selection process. The court stated that the elimination of such undesirable ramifications is the function of the legislature rather than the court.[53]

D. *Forum Non Conveniens*

The doctrine of forum non conveniens is used to solve the problem which arises when jurisdiction and venue requirements are technically met in the chosen court but there exists a more appropriate forum in a foreign jurisdiction.[54] Application of the doctrine of forum non conveniens results in the dismissal without prejudice of the case in the initially chosen forum, with the expectation that the

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the conservator's residence as a basis for venue in subsequent litigation. *Id.* The court of appeals declined to decide whether collateral attacks upon the validity of the conservatorship proceeding could be raised in the context of a venue challenge to a suit subsequently brought by the conservator: "We do not reach the 'standing' question; that is, we do not consider whether defendants could make a collateral attack, but consider the sufficiency of the attack made." 94 N.M. at 114, 607 P.2d at 652.

The court of appeals went on to state that if a collateral attack on the conservatorship proceeding is permitted in the subsequent suit, the deficiency in the conservatorship proceeding must appear on the face of the record of the earlier proceeding. *Id. See* McDonald v. Padilla, 53 N.M. 116, 202 P.2d 970 (1948).

52. The county of residence of the plaintiff or the defendant is a proper venue for the trial of transitory actions. N.M. Stat. Ann. §38-3-1(A) (Supp. 1981). The decision in *Galt* assumes that the conservator, and not the protected minor, is the party to the suit for purposes of applying the venue statute.

53. The courts have never challenged the preeminence of the legislature in determining venue. Why this arguably procedural issue is not within the exclusive domain of the judiciary is not apparent. *See* Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976); State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

54. A change of venue can be obtained when the movant establishes that he cannot obtain a fair trial in the county in which the case is pending for "any . . . cause. . . ." N.M. Stat. Ann. §38-3-3(A)(2)(d) (1978). Presumably, if the litigant demonstrates that the chosen forum is inconvenient because of its distance from sources of evidence or is too far for attorneys and witnesses to travel, a change of venue could be granted. *See* Fitzgerald v. Texaco, Inc., 521 F.2d 448 (2d Cir. 1975).

Once the motion is made and accompanied by an affidavit of the objecting party as required, N.M. Stat. Ann. §38-3-3(A)(2) (1978), the court must grant the motion unless the judge chooses to require the presentation of evidence in support of the motion. State v. Fernandez, 56 N.M. 689, 248 P.2d 679 (1952); *See* N.M. Stat. Ann. §38-3-5 (1978) (Judge authorized to hold evidentiary hearing). If a hearing is held, the court need not grant the motion unless the movant establishes the truth of the allegation made in the affidavit. State v. Turner, 90 N.M. 79, 559 P.2d 1206 (Ct. App. 1976), *cert. denied,* 90 N.M. 9, 558 P.2d 621 (1979). Change of venue motions cannot be used where the more appropriate forum is in a foreign jurisdiction.

action will be refiled in the more appropriate forum. This year, in *Buckner v. Buckner,*[55] the New Mexico Supreme Court unequivocally adopted the doctrine of forum non conveniens and discussed its content and application.[56] In *Buckner,* the supreme court reversed a district court decision dismissing an action for divorce on the ground of forum non conveniens. Although the court held that the doctrine was applicable in New Mexico, the court found that the requisites for its application had not been established in the record in *Buckner.*[57]

The essential prerequisite to the application of the doctrine is the existence of an alternative forum which is able to hear and determine the matter.[58] If this requirement is met,[59] the court has the power to

55. 95 N.M. 337, 622 P.2d 242 (1981). For a discussion of the effect of the *Buckner* case on domestic relations law, *see* Kelsey & Montoya, *Domestic Relations,* 12 N.M. L. Rev. 325 (1982).

56. Dictum in Torres v. Gamble, 75 N.M. 741, 410 P.2d 959 (1966), acknowledged the existence of the doctrine. *Id.* at 744, 410 P.2d at 961. *Torres,* however, was decided on other grounds. McLam v. McLam, 85 N.M. 196, 510 P.2d 914 (1973), upheld a dismissal by the trial court of counterclaims filed by a defendant. The trial court applied the doctrine of forum non conveniens. The *McLam* opinion rests in part on the possibility that the court lacked subject matter jurisdiction over the counterclaim because it would have involved issues of title to land located in another state. *Id.* at 198, 510 P.2d at 916.

57. The supreme court concluded that "the balance seems to be equally struck" between the forum and the alternative suggested by defendant. The court concluded that in such circumstances, plaintiff's choice of forum should not be disturbed. 95 N.M. at 340, 622 P.2d at 245.

58. *Id.* at 339, 622 P.2d at 244; Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) ("[I]t presupposes at least two forums in which the defendant is amenable to process."); Restatement (Second) Conflict of Laws §84, Comment c (1971) ("[T]he suit will be entertained no matter how inappropriate the forum may be if defendant cannot be subjected to jurisdiction in other states.").

Because most actions are transitory and can be brought in any jurisdiction, the problem of finding an alternative forum is usually an issue of personal jurisdiction rather than subject matter jurisdiction. Even if defendant is amenable to personal jurisdiction in only one forum, however, he might "create" an alternative forum by stipulating to waive the claim of lack of personal jurisdiction if sued in the alternative forum. *But see* Hoffman v. Blaski, 363 U.S. 335 (1960) (stipulation of defendant insufficient basis for transfer pursuant to 28 U.S.C. §1404 (1976).

The alternative forum may also be unavailable because the statute of limitations for filing an action there has run by the time the court in the forum where the action is commenced is asked to dismiss on forum non conveniens grounds. Here too, the defendant may be able to "create" the alternative forum by stipulating that he will not raise the defense of the statute of limitations, at least where the limitation statute does not destroy the cause of action, but merely provides an affirmative defense. *See* Bournias v. Atlantic Maritime Co., 220 F.2d 152 (2nd Cir. 1955) (distinguishing limitation as either part of cause of action or affirmative defense). Moreover, if the alternative forum has a statute such as New Mexico's which authorizes a party to file a second lawsuit anytime within six months of the dismissal of an action without prejudice even if the statute of limitations would have otherwise run, N.M. Stat. Ann. §37-1-14 (1978), the statute of limitations problem would not be a bar to finding that the alternative forum was available.

59. In *Buckner,* the supreme court suggested, although it did not rely on the analysis, that the alternative forum proposed by the defendant might lack subject matter jurisdiction to grant

apply the doctrine. Thereafter "the use of the doctrine rests largely in the discretion of the court."[60] Quoting liberally from the leading United States Supreme Court opinion on forum non conveniens,[61] the court emphasized that convincing evidence of the superiority of the alternative forum must be established before the doctrine is applied and the case is dismissed: "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[62] Factors to be considered in determining whether the request should be granted include relative ease of access to sources of proof,[63] the enforceability of a judgment if one is obtained,[64] comparison of the expense involved in litigation in each forum,[65] and "all other problems that make trial of a case easy, expeditious and inexpensive."[66]

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a divorce on the ground of incompatibility, which was the ground asserted by the plaintiff in his complaint. 95 N.M. at 339, 622 P.2d at 244. The argument is not persuasive. The alternative forum clearly had jurisdiction to grant a divorce to the Buckners. Whether a substantive ground for divorce existed in the alternative forum is not a question of jurisdiction, but of substance.

60. 95 N.M. at 338, 622 P.2d at 243.

61. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). Federal courts seldom apply the common law doctrine of forum non conveniens any more. After *Gilbert* was decided, a federal statute was adopted which authorizes a federal court to *transfer* a case to any other federal district court where it could have been brought when it is in the interest of justice to do so. 28 U.S.C. § 1404(a) (1976).

Because transfer of the case is less drastic a remedy than dismissal, the statute is generally accorded a more liberal interpretation than the common law doctrine of forum non conveniens. *See, e.g.,* American Standard, Inc. v. Bendix Corp., 487 F. Supp. 254 (D.C. Mo. 1980); Hess v. Gray, 85 F.R.D. 15 (D.C. Ill. 1979).

62. 95 N.M. at 939, 622 P.2d at 244. The language is from Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947), but is quoted with approval by the New Mexico Supreme Court in *Buckner.* The Restatement position is the same: "[S]ince it is for the plaintiff to choose the place of the suit, his choice of a forum should not be disturbed except for weighty reasons. . . ." Restatement (Second) of Conflict of Laws § 84, Comment c (1971).

63. 95 N.M. at 939, 622 P.2d at 244. For all of these factors, the court quoted with approval from the opinion in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947), which included among the factors relevant to this issue, "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action. . . ." *Id.*

In addition to the factors quoted by the court in *Buckner,* the opinion in *Gilbert* recognizes the significance of public interest consideration including administrative difficulties, comparative congestion of dockets, the burden of jury duty imposed on communities with little relationship to the litigation and the interest of deciding local controversies when public interest is greatest. 330 U.S. at 507-08.

64. 95 N.M. at 939, 622 P.2d at 244. This factor was important in the New Mexico case of McLam v. McLam, 85 N.M. 196, 510 P.2d 914 (1973). Fear that a New Mexico judgment purporting to affect title to realty might not receive full faith and credit at the situs of the land weighed heavily on the court's determination to dismiss the New Mexico action.

65. 95 N.M. at 940, 622 P.2d at 245.

66. 95 N.M. at 939, 622 P.2d at 244. In *Buckner,* the court also cited with approval Hemmelgarn v. Boeing Co., 106 Cal. App. 3d 576, 165 Cal. Rptr. 190 (1980), which the supreme court of New Mexico noted contains "a rather exhaustive list of considerations that might influence the decision on the issue of change of forum." 95 N.M. at 939, 622 P.2d at 244.

Forum non conveniens is now firmly entrenched in New Mexico as a tool available to prevent a litigant from forcing trial in a technically acceptable, but inconvenient, forum. The doctrine should have little application when the alternative forum is another New Mexico court in a different county because the less drastic remedy of a change of venue is usually adequate to correct the problem.[67] If the preferred alternative forum is a fedeal court or the court of another state, the doctrine will apply and should prove useful to control egregious examples of forum-shopping.[68]

E. *Notice*

The Survey year saw a change in the federal rules with respect to service of process. Until last year, service of process in federal actions could only be made by a United States marshal or by someone specially appointed by the court for the purpose of serving process.[69] Federal Rule 4(c) has been amended to permit federal process to be served by any person authorized by state law without the necessity of first obtaining a special appointment.[70] This means that the New

67. N.M. Stat. Ann. §38-3-3 (1978). *See* note 54 *supra*. Where two New Mexico courts have concurrent jurisdiction, the applicability of the doctrine of forum non conveniens, as opposed to change of venue, may be appropriate. *See, e.g.*, N.M. Stat. Ann. §45-1-302.1 (1978). The doctrine should apply where the two courts are in the same county, but the court chosen by the plaintiff is much less convenient than the alternative forum having concurrent jurisdiction. The change of venue statute is inapplicable because it applies only to transfers between counties and not to transfers between different courts in the same county. N.M. Stat. Ann. §38-3-3 (1978). Forum non conveniens is the only remedy available in such cases.

Other jurisdictions have statutory mechanisms for transferring the case from one court level to another. *E.g.*, N.Y. Dom. Rel. Law §251 (McKinney 1977). New Mexico lacks such a transfer mechanism.

68. Perhaps the most common form of forum shopping—child snatching by a noncustodial parent in order to obtain a sympathetic forum in which to seek a change of custody—has been at least hampered by the enactment of recent federal (28 U.S.C. §1938A (Supp. III 1979)) and state legislation (N.M. Stat. Ann. §§40-10-1 to -24 (Cum. Supp. 1981)) (Child Custody Jurisdiction Act).

69. Fed. R. Civ. P. 4(c) (pre-1980 amendment). Ambiguities existed which made it unclear whether persons other than the federal marshal could serve federal process. Fed. R. Civ. P. 4(d)(7) provides that in certain cases, "it is also sufficient if the summons and complaint are served . . . in the manner prescribed by the law of the state" where the federal court is located. *Id.* In addition, Rule 4(e) authorizes service "under the circumstances and in the manner prescribed" by state law when service is made outside the state where the federal court is situated. *Id.* Whether the mdnate in Rule 4(c) that a marshal or specially appointed person must serve federal process was modified by the references to state law was thus unclear.

In Veeck v. Commodity Enterprises, Inc., 487 F.2d 423 (9th Cir. 1973), the court ruled that the mandate of Rule 4(c) superseded the provision of Rule 4(e), and set aside a default judgment because the process server was neither a federal marshal nor specifically apointed by the court. *Id.* at 425. *See also* United States v. St. Paul Mercury Ins. Co., 361 F.2d 838 (5th Cir. 1966) (writ of garnishment must be served by marshal or person specially appointed).

70. Fed. R. Civ. P. 4. The rule provides that service is proper if it is authorized by *either* the law of the state in which the federal action is filed *or* the state where service is actually made. Fed. R. Civ. P. 4(c).

Mexico practice which, with some exceptions, permits any person over the age of eighteen who is not a party to the action to serve process, will now be applicable in the federal courts as well.[71] The change may not make a practical difference, however. The federal marshal has not been displaced: "The marshal continues to be the obvious, always effective officer for service of process."[72]

In *Hubbard v. Howell,*[73] the New Mexico Supreme Court considered the validity of process which had been properly served but which contained a misnomer in its designation of the defendant. In *Hubbard,* the misnamed defendant neither filed an answer nor otherwise defended and a default judgment was entered against him. In a subsequent action seeking to enforce the judgment, the defendant sought to attack collaterally the initial judgment, on the ground that the summons and complaint in the first action misnamed him. The supreme court did not allow this attack.

Normally, a defendant who is misnamed in the complaint would, before trial, file a motion alleging insufficiency of service of process.[74] A court is then likely to permit the plaintiff to amend the complaint and to overlook the erroneous designation on the summons,[75] at least where the error can be fairly said to be a mere misnomer rather than a failure to sue the correct defendant.[76] The supreme court declined to afford Howell any greater right to attack

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71. N.M. R. Civ. P. 4(d). Writs of attachment, replevin, and habeas corpus may be served only by persons specially designated by the court or by the sheriff of the county where the court is located. *Id.*

72. Notes of Advisory Committee on Rules, 1980 Amendment, reprinted 28 U.S.C.A. Fed. R. Civ. P. 4 (Supp. 1981 p. 98).

73. 94 N.M. 36, 607 P.2d 123 (1980).

74. N.M. R. Civ. P. 12(b)(4). In the alternative, the defense may be contained in the answer. If the defendant neither raises the issue by motion or answer, the defense is waived. N.M. R. Civ. P. 12(h)(1).

75. The federal rules expressly provide that "process or proof of service may be amended, unless it clearly appears that material prejudice would result." Fed. R. Civ. P. 4(h). Many federal cases have permitted amendment where a misnomer occurs. *See, e.g.,* Grandy v. Pacific Indem. Co., 217 F.2d 27 (5th Cir. 1954); United States v. A.H. Fisher Lumber Co., 162 F.2d 872 (4th Cir. 1947).

Rule 4 of the New Mexico Rules of Civil Procedure contains no equivalent provision. It seems likely, however, that New Mexico courts would either permit an amendment to the pleadings, N.M. R. Civ. P. 15, and ignore the erroneous designation on the summons, or would merely require summons to be corrected when the motion to amend the pleading had been granted. If defendant could demonstrate that he was prejudiced by the misnomer, the result might be different. *See* Fed. R. Civ. P. 4(h); N.M. R. Civ. P. 15(c).

76. The test should be whether, on the basis of an objective standard, it is reasonable to conclude that the plaintiff had in mind a particular entity or person, merely made a mistake as to the name, and actually served the entity or person intended; or whether plaintiff actually meant to serve and sue a different person.

2 J. Moore, Federal Practice ¶4.44, at 4-558 (2d ed. 1981). *But see* Sweeney v. Greenwood Index Journal Co., 37 F. Supp. 484 (W.D.S.C. 1941).

the judgment collaterally than he would have had to dismiss the original action had he raised the issue there. In the absence of proof "that he was not served with process or that he was misled by the discrepancy in his name as it appeared in the summons . . . such an irregularity does not provide the basis for a collateral attack based on lack of personal jurisdiction."[77]

The supreme court in *Estate of Baca*[78] demonstrated a greater concern for persons who attack a prior default judgment on the ground that they were not served with process at all. In a 1950 quiet title action brought by Baca, Otero and Romero were named parties. The record of that proceeding indicates that neither of them was served with summons and complaint; nor were they listed within the notice which was published.[79] Nonetheless, the court quieted title in Baca. Years later, successors to the interests of Otero and Romero collaterally attacked the 1950 judgment and sought to impose a constructive trust upon Baca's successors to the property.[80] The supreme court held that the judgment was void as to Otero and Romero for lack of adequate notice and could be collaterally attacked.[81] The court imposed a heavy burden of proof and a severe constraint upon the sources of proof, however, upon the party seeking to upset the prior judgment: "[E]very presumption consistent with the record is indulged in favor of the jurisdiction . . . [and] judgments cannot be questioned when attacked collaterally, unless lack of jurisdiction appears affirmatively on the face of the judgment or in the judgment roll or record, or is made to appear in some other permissable manner."[82] The majority held that Otero and Romero met this burden.

The *Baca* decision seeks to balance competing policies. Failure to seek to notify a defendant of the institution of litigation constitutes a violation of due process.[83] Too liberal a rule, which would allow frequent collateral attacks, would seriously undermine the goals of finality and certainty. The decision to permit collateral attacks for failure of notice, but to limit the source of admissible evidence, is

77. 94 N.M. at 38-39, 607 P.2d at 125-26.

78. 95 N.M. 294, 621 P.2d 511 (1980).

79. *Id.* at 297, 621 P.2d at 514.

80. After title was quieted in Baca, it passed through several hands until it reached Baca de Romero, who upon her death in 1977 willed the property to Burton. Successors of Otero and Romero sought to exclude the property from the estate of Baca de Romero and impose a constructive trust on their behalf. *Id.* at 295-96, 621 P.2d at 512-13.

81. The trial court had concluded that because of the failure to serve Otero and Romero, the entire judgment in the quiet title action was void. The supreme court disagreed, stating that "it is void only as to those persons not served and their successors." 95 N.M. at 296, 621 P.2d at 513. *See* Woodland v. Woodland, 147 N.W.2d 590 (N.D. 1966).

82. 95 N.M. at 296, 621 P.2d at 513.

83. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

consistent with precedent[84] and was a decision agreed upon by the entire court in *Baca*. Justice Easley dissented only because he concluded that the record in the prior proceeding did not affirmatively demonstrate that the court there lacked jurisdiction.[85]

II. SELECTION OF TRIAL JUDGE

The selection of the judge who will preside at a trial may be as important as the selection of jurors.[86] In many jurisdictions, a judge is assigned by lot and presides over a case unless he is successfully challenged for cause or unless he voluntarily recuses himself. New Mexico affords litigants an additional instrument with which to disrupt the laws of chance. A New Mexico statute provides that a party to a lawsuit may disqualify a judge by the simple process of filing an affidavit asserting that the party believes the judge who has been chosen to preside cannot be impartial.[87] New Mexico attorneys make full use of this statute.[88] During the Survey year, New Mexico courts

84. *See* Hambaugh v. Peoples, 75 N.M. 144, 401 P.2d 777 (1965); Kutz Canon Oil & Gas Co. v. Harr, 56 N.M. 358, 244 P.2d 522 (1952); Bounds v. Carner, 53 N.M. 234, 205 P.2d 216 (1949).

85. Both the majority and the dissent argued that the absence of jurisdiction must appear on the face of the judgment or within the record and that every presumption consistent with the record "is indulged in favor of the jurisdiction of courts of general jurisdiction . . . when attacked collaterally." 95 N.M. at 296, 621 P.2d at 513; 95 N.M. at 298, 621 P.2d at 515 (dissenting opinion). The majority thought it sufficient that the record did not show that either Otero or Romero "ever filed an answer, disclaimer, or appearance in the court." *Id.* at 297, 621 P.2d at 514. Justice Easley insisted in his dissent that a lack of jurisdiction did not appear in the record because "[t]his record does not affirmatively rule out that the two parties appeared personally and sat through the trial in this case." *Id.* at 798, 621 P.2d at 515. The record did show that service was never made on them.

86. *See, e.g.*, Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U. Chi. L. Rev. 109 (1975); *Empirical Approaches to Judicial Behavior*, 42 U. Cin. L. Rev. 589 (1973).

87. N.M. Stat. Ann. §38-3-9 (1978). A properly executed affidavit, if timely filed by the party cannot be challenged and operates to divest the judge of power to proceed with the case. Rivera v. Hutchings, 59 N.M. 337, 284 P.2d 222 (1955). *But see* State v. James, 76 N.M. 376, 415 P.2d 350 (1966) (judge may perform merely formal acts after disqualification).

88. Data taken from the most recent official compilation of statistics, 1979-80 Annual Report of the New Mexico Judicial Department, demonstrates this frequent use.

DISQUALIFICATIONS
July 1, 1979 - June 30, 1980

Judicial District	*Judge*	*Disqualification by Affidavit*	*Recusal*	*Total*
1	Donnelly	18	16	34
	Byrd	23	16	39
	Garcia	10	26	36
	Kaufman	41	7	48
	Franke	9	5	14
2	Stowers	122	27	149
	Baca	58	11	69

addressed a minor question concerning the workings of the automatic disqualification statute, and considered the circumstances under which it is required that a trial judge recuse himself.

Failure to file the affidavit of disqualification within the time limit imposed by statute[89] makes it void.[90] Until 1977, this could mean that the statute required the filing of the affidavit of disqualification before the parties learned which judge would be assigned to the

Judicial District	*Judge*	*Disqualification by Affidavit*	*Recusal*	*Total*
	Love	37	14	51
	Riordan	90	27	117
	Fowlie	19	13	52
	Franchini	23	10	33
	Maloney	61	4	65
	Cole	20	21	41
	Madrid	92	21	113
	Sanchez	67	18	85
	Traub	29	34	63
	Baiamonte	17	15	32
	Brown	24	2	26
	Brennan	12	20	32
3	Galvan	13	3	18
	Burks	70	22	92
4	Angel	13	0	13
	Martinez	267	4	271
5	Fort	19	16	35
	Snead	7	5	12
	Neal	74	2	76
	Reese	4	3	7
	Walker	22	6	28
6	Hodges	10	5	15
	Hughes	132	2	134
7	Kase	9	12	21
	Marshall	13	13	26
8	Wright	32	11	43
	Caldwell	7	31	38
9	Nieves	6	3	9
	Hensley	14	9	23
10	Frost	3	9	12
11	Musgrove	14	4	18
	DePauli	18	5	23
	Brown	81	22	103
12	Zimmerman	37	2	39
	Doughty	33	21	54
13	Sedillo	208	3	211
	Perez	20	3	23
	Chavez	34	5	39
	TOTALS	1,932	550	2,482

89. N.M. Stat. Ann. §38-3-10 (1978).
90. *See* State *ex rel.* Romero v. Armijo, 41 N.M. 38, 63 P.2d 1037 (1936).

case.[91] This, combined with ambiguities in the phrasing of the statute,[92] led to the practice of filing "provisional" affidavits of disqualification. Parties were permitted to file affidavits of disqualification challenging any judge who was eligible to be selected as trial judge. The affidavit took effect if the challenged judge were later assigned to the case.[93]

In 1977, the legislature obviated the need for filing provisional affidavits of disqualification by providing that an affidavit would be timely if it were filed "within ten days after the judge sought to be disqualified is assigned to the case."[94] In *Martinez v. Carmona,*[95] the court of appeals also tried to cure this problem by approving the continued use of the provisional affidavit because "[i]t avoids postponements, delays and eleventh hour filing of affidavits of disquali-

91. From 1933 until 1971, the statute required that the affidavit be filed "not less than ten (10) days before the beginning of the term of court, if said case is at issue." 1933 N.M. Laws ch. 184, §2. In 1971, the statute was modified to permit the affidavit to be filed "within ten days after the time for filing a demand jury trial has expired." 1971 N.M. Laws ch. 123, §1 (current version at N.M. Stat. Ann. §38-3-10 (1978)). A 1977 amendment further modified the statute. *See* note 94 *infra.*

92. For example, the statute seemed to require that the ten-day period begin from when the case is "at issue." Because a criminal case is deemed "at issue" when the defendant is arraigned, Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974), and the trial judge may not then be assigned to the case, the defendant would not necessarily know who the trial judge would be at the time he was required to file the affidavit. In civil cases, where the judge is disqualified or recuses himself after the case is at issue, *cf.* Martinez v. Carmona, 95 N.M. 545, 624 P.2d 541 (Ct. App. 1980), *writ quashed,* 95 N.M. 593, 624 P.2d 535 (1981), or there is a reversal on appeal and a new trial before a different judge, *e.g.,* Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978), the ten-day time limit would have run before the parties were aware of the identity of the trial judge. Where a pending case is reassigned upon the resignation or death of a sitting judge, or the appointment of a new judge, the problem also arises. *See* Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974).

New Mexico courts have tried to clarify when a case is "at issue" in civil cases, Atol v. Schifani, 83 N.M. 316, 491 P.2d 533 (Ct. App. 1971), *cert. denied,* Dec. 2, 1971 (when an answer is filed which requires no further pleading), and in criminal cases, Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974) (when a defendant answers by appearing at his arraignment). Questions continue to arise, however, about the meaning of the term. *See, e.g.,* Linton v. Farmington Municipal Schools, 86 N.M. 748, 527 P.2d 789 (1974) (de novo appeal from agency decision).

93. Notargiacomo v. Hickman, 55 N.M. 465, 235 P.2d 531 (1951). The court even suggested the appropriate language to be used in provisional disqualification affidavits: "that if the judge before whom the case is to be tried or heard should be Judge _____, then according to affiant's belief such judge cannot preside over the same with impartiality. . . ." *Id.* at 469, 235 P.2d at 534.

94. 1977 N.M. Laws ch. 228, §2, N.M. Stat. Ann. §38-3-10 (1978).

> The affidavit of disqualification shall be filed within ten days after the cause is at issue *or* ten days after the time for filing a demand for jury trial has expired, *or* within ten days after the judge sought to be disqualified is assigned to the case, *whichever is the later.*

N.M. Stat. Ann. §38-3-10 (1978) (emphasis added).

95. 95 N.M. 545, 624 P.2d 54 (Ct. App. 1980).

fication. . . .'"[96] Thus, though provisional affidavits are no longer required, they will continue to be honored if a party chooses to file them prior to the time when the trial court judge is selected.[97]

One reason for New Mexico's disqualification by affidavit statute may be that disqualification of a judge for cause can be an unseemly process. The challenged judge himself normally determines whether the challenger has met his burden of proof.[98] The trial court judge's decision to remain on the case generally is not reviewable until the completion of the underlying litigation. An unsuccessful challenge thus leaves the challenging party to the mercy of the judge whose ability to be fair the challenger has publicly called into question. Moreover, appellate courts are unlikely to reverse a final judgment on the ground that the judge erred in failing to step down. The court will be more inclined to insist upon proof that the alleged bias or interest manifested itself in specific incorrect rulings.[99]

United Nuclear Corp. v. General Atomic Co.[100] illustrates this point. Almost two years after the lawsuit was filed, the General Atomic Company several times moved to disqualify the district court judge who had been assigned to hear the case.[101] Defendant asserted that language used by the judge in both written orders and

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96. 95 N.M. at 549, 624 P.2d at 58.

97. The court also confirmed that the disqualification statute is applicable not only to the initial judge assigned to the case, but also to the substituted judge who by rule of court takes on the case if the first judge recused himself. *Id. See also* Doe v. State, 91 N.M. 51, 53, 570 P.2d 589, 591 (1977).

In a decision rendered too late to be included in this Survey article, Vigil v. Reese, 20 N.M. St. B. Bull. 1226 (Oct. 22, 1981), the Supreme Court of New Mexico held that where the subsequent judge is assigned by the Chief Justice of the Supreme Court, *see* N.M. Stat. Ann. §38-3-9 (1978), the parties may not use the disqualification by affidavit statute to remove him.

98. *See* United States v. Bell, 351 F.2d 868, 878 (6th Cir. 1965), *cert. denied,* 383 U.S. 947 (1966); Eisler v. United States, 83 U.S. App. D.C. 315, 319-20, 170 F.2d 272, 278, *cert. granted,* 335 U.S. 857 (1948); *cert. dismissed,* 338 U.S. 883 (1949); Berger v. United States, 255 U.S. 22, 32-35 (1921).

On occasion, the issue is submitted for decision to a different judge. *See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563, 582-83 n.13 (1966); Tenants & Owners in Opposition to Redevelopment v. United States Dep't of Housing & Urban Dev., 338 F. Supp. 29, 31 (N.D. Cal. 1972). In United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1971), the court of appeals found it to be "well settled that the involved judge has the prerogative, if indeed not the duty, of passing on the legal sufficiency of a . . . challenge." *Id.* at 131.

99. Allegations of general bias may be considered too vague to overcome the policies of judicial economy which argue against disturbing a completed trial.

100. 629 P.2d 231 (N.M. 1980), *cert. denied,* 49 U.S.L.W. 3787 (Apr. 20, 1981).

101. The disqualification by affidavit statute was not available to plaintiff for several reasons. Not only had the time for filing an affidavit expired, N.M. Stat. Ann. §38-3-10 (1978), but the defendant disqualified a judge by affidavit early on. Only one disqualification by affidavit is permitted per party. Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969).

in-court remarks[102] demonstrated "a bias, prejudice and 'interest' against it."[103] The defendant grounded its motions on a provision of the New Mexico Constitution dealing with the disqualification of judges,[104] on the New Mexico Code of Judicial Conduct,[105] and on the requirements of due process.[106] The district court judge, against whom the complaints were brought, denied each motion. No appeal was taken until a final judgment was entered. The Supreme Court of New Mexico affirmed the decision of the trial judge that grounds for disqualification had not been established.

When a challenge is mounted on the ground that the judge has an "interest" in the case, that interest "must be a present pecuniary interest in the result, or actual bias or prejudice."[107] In *United Nuclear,* the supreme court decided that "[t]he alleged bias, and preju-

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102. GAC's charge of bias and prejudice is based on the following allegations:

(1) The "vituperative tone" of several of the judge's orders and statements, especially in the sanctions order and default judgment, manifested a personal hostility towards GAC.

(2) The judge's actions during the trial were one-sided in favor of United, as evidenced by his interruption and termination of GAC's cross-examination of United's witnesses, his curtailment of GAC's right to impeach those witnesses, and his questioning of witnesses.

(3) Various orders and rulings on questions of evidence, procedure and discovery were favorable to United, prejudicial to GAC, and explainable only as expressions of hostility to GAC.

(4) In his conduct of pre-trial discovery and in his entry of sanctions, the judge acted with unreasonable haste and without exercising independent judgment, thereby prejudicing GAC and favoring United.

629 P.2d at 323.

103. *Id.* at 322.

104. The New Mexico Constitution provides:

No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which either of the parties are related to him by affinity or consanguinity within the degree of first cousin, or in which he was counsel, or in the trial of which he presided in any inferior court, or in which he has an interest.

N.M. Const. art. 6, § 18 (amended Nov. 8, 1966).

105. The relevant section provides:

C. *Disqualification.* (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he presided in any inferior court.

N.M. Code of Judicial Conduct, Canon 3(c)(1).

106. U.S. Const. art. XIV; N.M. Const. art. 2, § 18 (amended Nov. 7, 1972).

107. State v. Scarborough, 75 N.M. 702, 705, 410 P.2d 732, 734 (1966).

dice, to be disqualifying, must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."[108] General Atomic could not show that the trial judge's attitudes flowed from anything other than his evaluation of the facts and proceedings in the case. The supreme court therefore concluded that there was insufficient relevant evidence to establish bias or prejudice. With this decision, New Mexico joined with the federal courts[109] in requiring that bias or prejudice, to be disabling, must flow from an extrajudicial source; it cannot be predicated on the judge's evaluation of the evidence presented and the conduct of parties and counsel which unfolded at the trial.[110]

The argument that the trial judge violated the Code of Judicial Conduct by failing to recuse himself also was rejected. Canon 3(c)(1) states that a judge "should" disqualify himself when his impartiality might *reasonably* be questioned, including instances where "he has a personal bias or prejudice" concerning a party.[111] The supreme court decided that the Canon was mandatory, not discretionary,[112] and that the provision was broader than that contained in the state Constitution.[113] It rejected the argument that reasonable doubts as

108. United Nuclear Corp. v. General Atomic Co., 629 P.2d 231, 323 (N.M. 1980), quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

109. *See, e.g., In re* International Business Machines Corp., 618 F.2d 923 (2d Cir. 1980); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1971).

110. The court at one point seemed to suggest that the only evidence which would be relevant to such a challenge would be evidence of bias shown by "extrajudicial conduct." United Nuclear Corp. v. General Atomic Co., 629 P.2d at 324. A subsequent footnote indicated, however, that a judge's in-court conduct would be admissible evidence if it were used to prove "bias or predjudice which arose outside his official duties." *Id.* at 324 n. 159.

The court cited United States v. Hatahley, 257 F.2d 920 (10th Cir.), *cert. denied,* 358 U.S. 899 (1958), as an example of a case in which the judge's in-court comments demonstrated a bias or prejudice arising from a non-judicial source. In that case, involving a Native American plaintiff, the court of appeals cited the judge's in-court statements as evidence "that the District Judge was incensed and embittered, perhaps understandably so, by the general treatment over a period of years of the plaintiffs and other Indians in southwestern Utah by the government agents and white ranchers in their attempt to force the Indian onto established reservations." *Id.* at 925. These comments found in the record were held to be sufficient proof of an extrajudicial bias or prejudice. *Id.*

111. Canon 3(C)(1), *supra,* note 105.

112. Canon 3(C) presently contains two sections. Section One, which contains the provision concerning bias and prejudice states that "a judge should disqualify himself . . . where: . . . ." Canon 3(C)(1), *supra,* note 105. In contrast, Canon 3(C)(2) provides that when the circumstances there described are present, "[a] judge shall disqualify himself." *Id.*

113. The constitutional provision mandates that a judge not sit in cases in which he has an interest, *i.e.,* is biased or prejudiced. N.M. Const. art. 6, §18. In contrast, Canon 3(C)(1) precludes a judge from sitting not only when he is biased or prejudiced in fact, but also when his freedom from bias or prejudice "might reasonably be questioned." Canon 3(C)(1). Because the reasonable apprehension of bias or prejudice is sufficient to satisfy Canon 3(C)(1), the court concluded that "this provision sets up an objective standard geared to the appearance of justice, and then expands the instances in which a judge should disqualify himself beyond those set out in article 6 § 18." United Nuclear Corp. v. General Atomic Co., 629 P.2d at 326.

to the judge's fairness had been raised. Only where there is a reasonable factual basis for doubting the judge's impartiality which is founded on evidence suggesting extrajudicial bias is the trial judge obligated to recuse himself.[114] The supreme court concluded that the evidence adduced failed to create even a reasonable possibility of the existence of extrajudicial bias.

By engrafting the "extrajudicial source" requirement upon Canon 3, the court diminished the usefulness of Canon 3 as a method for challenging a judge who is not disqualified by the terms of the New Mexico Constitution. The standards of the canon are broader than those of the constitution, however. The canon only requires a reasonable belief that bias exists, rather than proof of bias itself. Thus, challenges to judges based on bias should continue to be framed separately under both the state Constitution and the Code of Judicial Conduct.

During the Survey period, the Tenth Circuit Court of Appeals confronted the issue of the appropriateness of a judge's decision to recuse himself when no party sought his removal. In *In re New Mexico Natural Gas Antitrust Litigation,*[115] Judge Bratton recused himself[116] from consolidated class action cases seeking monetary and injunctive relief for alleged antitrust violations which had the effect of raising the price of natural gas to many New Mexico consumers. Judge Bratton noted that he was a natural gas consumer who would benefit from a victory by the plaintiffs.[117] By opting out of the class, he could preclude himself from receiving any portion of a damage award which might be rendered, but he would still benefit in the future from the rollback in prices which might follow if injunctive relief were granted. Judge Bratton interpreted a federal statute calling for recusal when the judge has either "a financial interest . . .

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114. *Id.* The court relied upon the interpretation given to an identical provision in a federal statute, 28 U.S.C. §455(a) (1976). *In re* International Business Machines Corp.,618 F.2d 923 (2d Cir. 1980); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976); Lazofsky v. Sommerset Bus Co., 389 F. Supp. 1041 (E.D.N.Y. 1975).

115. 620 F.2d 794 (10th Cir. 1980).

116. Judge Bratton raised the issue of whether he should recuse himself *sua sponte. Id.* at 795. The parties to the action agreed that the judge should preside. *Id.* at 795 n. 1. The parties, however, cannot waive an objection based upon the judge's financial or other interest in the outcome of the suit. 28 U.S.C. §455(e) (1976). In reversing Judge Bratton's decision, the court took care to "commend the trial judge for recognizing the problem and acting sua sponte to raise the issue." *Id.* at 797.

117. Had Judge Bratton recused himself without stating his reasons, it is unlikely that there would have been an appeal or a reversal of his decision. In New Mexico state courts, the judge need not state the reason why he recused himself, and a reviewing court will "presume, in the absence of any evidence to the contrary, that he is doing so in full conformity with his duty." Gerety v. Demers, 92 N.M. 396, 400-01, 589 P.2d 180, 184-85 (1978); *see* Laird v. Tatum, 409 U.S. 824 (1972).

or such other interest that would be substantially affected by the outcome of the proceeding"[118] as mandating that he recuse himself.

The court of appeals disagreed. Narrowly interpreting the recusal statute,[119] the court concluded that the mere possibility that the judge may benefit, along with the public generally, from the outcome of a case, is not sufficient to require recusal. Public confidence in the judiciary would not be fostered by recusal in such circumstances,[120] and the administration of justice would be severely hampered if judges were obligated to recuse themselves on each occasion in which they might benefit with the public generally in the outcome of litigation.[121]

Both the *United Nuclear* and *Natural Gas* courts narrowly construed their respective recusal provisions. These cautious interpretations may indicate a desire to streamline the judicial process and prevent time-consuming and unnecessary disqualifications. The appellate courts seem to be adopting the approach that "a . . . judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where disqualified."[122] The New Mexico auto-

118. 28 U.S.C. §455(b)(4) (1976) provides a judge shall disqualify himself when

> [h]e knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

New Mexico's Code of Judicial Conduct, Canon 3(C)(1)(c) is identical.

119. First, the court of appeals determined that before a judge will be found to have "financial interest in the subject matter" of a case, he must have "direct ownership, legal or equitable." 620 F.2d at 796.

Absent ownership, the fact that the trial court may gain some benefit, financial or otherwise, from the outcome of the litigation constitutes an "other interest" the presence of which does not require disqualification unless that "other interest . . . could be substantially affected by the outcome of the proceeding." 28 U.S.C. §455(b)(4) (1976). Estimates of the maximum financial benefit that would flow to the judge if injunctive relief were granted ranged from $12 to $31 per year, which the court of appeals concluded was not a substantial amount. 620 F.2d at 796.

120. The court stated: "It is not simply a question of de minimis effect; a personal benefit or detriment shared in common with the community at large is perceived to have a different psychological effect on a judge than would a benefit or detriment not so shared." 620 F.2d at 796-97.

121. *Id.* at 797. In addition to noting the great amount of public interest legislation in which a judge might share the benefits, the court of appeals also noted that each judge in the New Mexico federal district would benefit from the outcome of the litigation. This would require transfer of the case to a distant forum if Judge Bratton's decision were upheld. *Id.* Of course, where all federal judges would benefit from the outcome, a change of venue would not solve the problem. In such cases, the Supreme Court has applied the "rule of necessity" to permit a federal judge with an obvious financial interest in the outcome of the case to sit nonetheless. United States v. Will, 449 U.S. 200 (1980).

122. Laird v. Tatum, 409 U.S. 824, 837 (1972). The Supreme Court of New Mexico approved of this language in Gerety v. Demers, 92 N.M. 396, 400, 589 P.2d 180, 184 (1978): "We hold with the well-established principle that a judge has a duty to perform the judicial role mandated by the statutes, and he has no right to disqualify himself unless there is a compelling constitutional, statutory or ethical cause for doing so."

matic disqualification statute is not consistent with this approach. It remains to be seen whether the supreme court will construe the statute more narrowly[123] or will reconsider its constitutionality.[124] The statute creates significant problems of judicial administration and permits frequent and perhaps unwarranted disqualification of judges.

III. PLEADINGS

Most pleading issues have been eliminated in New Mexico by the adoption of "notice pleading."[125] When a pleading issue does arise, it often involves the question of whether the Rule of Civil Procedure which authorizes amendments permits a deficient pleading to be corrected. Several cases decided during the Survey year demonstrate the courts' liberal interpretation of the rule controlling amendments. The cases also illustrate the opposing principle, however: the necessity for imposing some constraints on the amendment process if the pleadings are to serve any function at all.

In *Mauck, Stastny & Rassam, P.A. v. Bicknell,*[126] the court of appeals affirmed the view that amendments to the pleadings should be liberally granted. In that libel case, the defendant sought to amend his answer, four months prior to trial, by adding three defenses. The trial court permitted one of the defenses[127] to be added to the answer, but refused to permit the defenses of privilege and fair com-

123. The federal courts have interpreted a similar statute, 28 U.S.C. § 144 (1976) as authorizing the court to insist upon specific allegations of bias or prejudice in the affidavit: "[T]he affidavit must meet exacting standards. It must be strictly construed; it must be definite as to time, place, persons and circumstances. Assertions merely of a conclusionary nature are not enough, nor are opinions or rumors. And the affidavit 'must give fair support to the charge. . . .' " United States v. Haldeman, 599 F.2d 31, 134 (D.C. Cir. 1976) (footnotes omitted).

124. *See generally,* Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976); State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

125. "The function of pleadings under these rules is to give fair notice of the claim asserted so as to enable the adverse party to answer and prepare for trial. [citation omitted] . . . [F]air notice of the nature of the action will withstand a motion to dismiss. . . ." Las Luminarias of the N.M. Council of the Blind v. Isengard, 92 N.M. 297, 304, 587 P.2d 444, 451 (Ct. App. 1978) (Sutin, J., specially concurring). *See* Malone v. Swift Fresh Meats Co., 91 N.M. 359, 362, 574 P.2d 283, 286 (1978).

126. 95 N.M. 702, 625 P.2d 1219 (Ct. App. 1980). *See* Note, *Libel—The Defenses of Fair Comment and Qualified Privilege,* 11 N.M. L. Rev. 243 (1981).

127. The court allowed the defendant to add the affirmative defense of truth. *Id.* at 704, 625 P.2d at 1221. In New Mexico, truth is a defense to a defamation action. Eslinger v. Henderson, 80 N.M. 479, 457 P.2d 998 (1969). *See* N.M. Stat. Ann. § 38-2-9 (1978); Ammerman v. Hubbard Broadcasting, Inc., 91 N.M. 250, 572 P.2d 1258 (Ct. App. 1972), *cert. denied,* 91 N.M. 249, 572 P.2d 1257 (1977), *cert. denied,* 436 U.S. 906 (1978); N.M. U.J.I. Civ. 10.18. Other jurisdictions place the burden of pleading and proof on the plaintiff to establish falsity as an element of the cause of action. *See, e.g.,* E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 84.08 (1977), N.M. U.J.I. Civ. 10.18 (Committee Comment).

ment to be inserted. After a trial and verdict for plaintiffs, the court of appeals reversed and remanded the case for a new trial.

Judge Andrews first determined that the proposed affirmative defenses of privilege[128] and fair comment[129] were substantively proper. She then concluded that there was no acceptable justification for denying the defendant's motion to amend the answer to include the defense of fair comment. The court emphasized that the procedural rules and the provision authorizing amendments are designed "to allow cases to be disposed of on the merits and not on technicalities."[130] Because there was no proof that the plaintiff would be prejudiced by the grant of permission to amend,[131] the court concluded that it was an abuse of discretion to refuse the requested amendment.[132] The court's willingness to undo the results of a completed trial because the trial court refused to permit a pre-trial amendment to the pleadings suggests that trial courts should permit amendments in most circumstances. *Mauck* indicates that the trial court should grant amendments, absent compelling proof that prejudice would result or that an unfair advantage would be obtained if the amendment were permitted.

In two cases, New Mexico appellate courts found ways to encourage liberal amendment of pleadings without reversing otherwise error-free judgments. In *Hot Springs National Bank v. Stoops,*[133] the trial court refused to permit an amendment to the pleadings twenty-one months after the original pleading had been filed. The request to amend was made on the date that a summary judgment mo-

128. The relevant defense asserts a privilege "consisting of a good faith publication in the discharge of a public or private duty when the same is legally or morally motivated." Mahona-Jojanto, Inc. v. Bank of New Mexico, 75 N.M. 293, 295-96, 442 P.2d 783, 785 (1968); *see* Ward v. Ares, 29 N.M. 418, 223 P. 766 (1924). The trial court concluded that defendant had acted in willful disregard of plaintiffs' rights. The court of appeals held that this finding negated the privilege. 95 N.M. at 704, 625 P.2d at 1221. Presumably, therefore, the error in failing to permit the defense of privilege to be raised was harmless error and not by itself sufficient reason to require reversal of the trial court's decision.

129. "[T]he common law privilege [of fair comment] is available to one who comments and communicates regarding a matter of public interest where the subject of that commentary has voluntarily sought and acquired a government contract." 95 N.M. at 705, 625 P.2d at 1222.

130. 95 N.M. at 706, 625 P.2d at 1223.

131. "[L]iberality in amendments is encouraged and favored where no prejudice is suffered by the opposing party. . . ." Fitzhugh v. Plant, 57 N.M. 153, 157, 255 P.2d 683, 686 (1953).

132. 95 N.M. at 706, 625 P.2d at 1223. The court of appeals noted that the trial court probably refused to permit the defense of fair comment because it erroneously concluded that the defense was not available in New Mexico. *Id.* When an error in interpreting the substantive law is the reason for declining to permit an amendment, the appellate court is particularly willing to find an abuse of discretion. Kirby Cattle Co. v. Shriners Hospitals for Crippled Children, 88 N.M. 605, 544 P.2d 1170 (Ct. App. 1975), *rev'd on other grounds,* 89 N.M. 169, 548 P.2d 449 (1976); Vernon Co. v. Reed, 78 N.M. 554, 434 P.2d 376 (1967).

133. 94 N.M. 568, 613 P.2d 710 (1980).

tion was to be heard. The trial court granted summary judgment for the plaintiff. Defendant successfully argued that the grant of summary judgment was error. Because the supreme court had already decided to reverse and remand, it was not necessary to decide whether the refusal to permit the amendment was itself reversible error. Instead, the court noted that given the new time frame for litigation caused by the appeal and remand, there was no longer a compelling reason to deny defendant's motion to amend. The trial court was ordered to allow an amendment prior to the new hearing.[134]

The court of appeals, in *Hernandez v. Brooks,*[135] arrived at a similar conclusion: that amendment of pleadings should be permitted before a retrial following a successful appeal. In *Hernandez,* plaintiffs sued for negligence and were prohibited by the trial judge from amending their complaint to include a count charging gross negligence. After a verdict for defendants, plaintiffs appealed. Plaintiffs alleged as error both the refusal to permit the amendment and the giving of erroneous instructions to the jury. The court of appeals reversed and ordered a new trial on the latter ground. The court also instructed the trial court to permit plaintiffs to amend their complaint within a reasonable time prior to the retrial.[136]

These decisions are correct. Though the trial court is granted discretion in deciding whether to permit amendments, Rule 15(a) articulates a strong perference favoring amendment.[137] Absent proof of prejudice, trial courts should normally permit amendments at any time prior to trial. Appellate courts should carefully review denials of leave to amend. When an appellate court remands a case for retrial, amendments to the pleadings normally should be permitted prior to the second trial.

If a party seeks to amend the pleadings after the statute of limitations has run, additional policy considerations come into play and often require that the proposed amendment be refused. One such policy is to permit the potential defendant to proceed with his affairs without endless fear of litigation.[138] Possible evidence is discarded, records are destroyed, and financial decisions are made, based upon the assurance that after a given period of time no lawsuit will be filed. If amendments to pleadings after the statute of limitations has run were freely permitted, these goals of the statute of limitations

134. *Id.* at 572, 613 P.2d at 714.

135. 95 N.M. 670, 625 P.2d 1187, *cert. denied,* 94 N.M. 675, 615 P.2d 991 (1980).

136. 95 N.M. at 672, 625 P.2d at 1189.

137. The rule states that leave to amend prior to trial "shall be freely given when justice so requires." N.M. R. Civ. P. 15(a).

138. *See generally* Gaston v. Hartzell, 89 N.M. 217, 549 P.2d 632 (Ct. App. 1976).

could be frustrated. For this reason, amendments proposed after the statute of limitations has run, are only permitted when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading."[139]

The New Mexico Court of Appeals has chosen to interpret this "relation-back" provision conservatively. In *Raven v. Marsh,*[140] plaintiff charged his former business associate with a breach of fiduciary duty. Alleging that a joint venture between plaintiff and defendant had been agreed upon, the plaintiff asserted that the associate wrongfully ousted plaintiff from the venture and alone entered into a contract with the city of Albuquerque. After the statute of limitations had run on an action in libel, the plaintiff sought to amend his breach of contract action to include a count for libel. The trial court dismissed the libel claim from plaintiff's second amended complaint.

The court of appeals found that none of the allegations of the original complaint suggested that defendant's misconduct was accompanied by libelous conduct. The court also noted that the alledgedly libelous conduct occurred after the breaches of contract and fiduciary duty outlined in the complaint. The court of appeals therefore concluded that the trial court correctly ruled that the statute of limitations was a bar to the assertion of the libel count in the amended complaint.

The court foresaw the opening of a "Pandora's box" if the plaintiff's request for a liberal construction of Rule 15(c) were accepted: "Every unpleaded wrong known to legal imagination would be added piecemeal and interminably to every plaintiff's complaint as pre-trial discovery and investigation developed additional real or fancied misconduct on defendant's part."[141] This language will often be quoted by those seeking to prevent a broad reading of the relation-back provision of Rule 15. The court's application of this analysis to the facts of *Raven* was insufficient, however, to provide

139. N.M. R. Civ. P. 15(c). "[Federal] Rule 15(c) is based on the concept that a party who is notified of litigation concerning a given transaction or occurrence has been given all the notice that statutes of limitation are intended to afford." 3 J. Moore, Federal Practice ¶15.15[3], at 15-194 (1980).

Many courts have been reluctant to interpret the "same transaction" requirement of the relation back provision liberally for fear that to do so would frustrate the policy of repose which is fostered by limitations statutes. *E.g.,* Barnes v. Callaghan & Co., 559 F.2d 1102 (7th Cir. 1977); Textile Museum v. F. Eberstadt & Co., 453 F. Supp. 72 (S.D.N.Y. 1978).

140. 94 N.M. 116, 607 P.2d 654 (Ct. App. 1980).

141. *Id.* at 117-18, 607 P.2d at 655-56.

guidelines for the resolution of this difficult question in future cases.[142]

In *Houston v. Young,*[143] the supreme court terminated a legal malpractice claim because the plaintiff's attorneys failed to state a claim for relief. The court placed limitations upon the right to amend pleadings. In *Houston,* plaintiff asserted that she had retained the defendants to protect her interests in the probate of her husband's estate and that they failed to do so. Instead of pleading generally as is permitted under the Rules,[144] plaintiff alleged that defendants' malpractice consisted in the failure to pursue a remedy granted by a specific statute.[145] Defendants filed a motion to dismiss the complaint for failure to state a claim.[146] The trial court agreed with defendants that neither the specific statute cited in the complaint nor another relied upon by the plaintiff in argument[147] was relevant. The court sustained the motion and dismissed the complaint. Instead of granting leave to plaintiff to amend the complaint,[148] the court

142. Perhaps it inheres in the nature of the "same transaction or occurrence" test that particular cases be resolved in an *ad hoc* fashion. The court in *Raven* merely noted that, though the complaint alleged a scheme to oust the plaintiff from a joint venture in order to obtain all the benefits of a contract for the defendant, "[n]one of the facts recited in the first two complaints intimated that any of the defendant's allegedly wrongful acts were accompanied by or accomplished through libelous conduct of the defendant, nor was an injury in libel claimed." 94 N.M. at 117, 607 P.2d at 655. This observation is tautological. If the complaint had contained the missing information, there would have been no need to seek an amendment. Prior decisions have offered little more guidance. *See, e.g.,* Scott v. Newsome, 74 N.M. 399, 394 P.2d 253 (1964). "Fundamentally, the general wrong suffered and the general conduct causing the wrong are the controlling considerations." *Id.* at 405, 394 P.2d at 254.

143. 94 N.M. 308, 610 P.2d 195 (1980).

144. Rule 8 requires only that "a short and plain statement of the claim showing that the pleader is entitled to relief" be asserted in the complaint. N.M. R. Civ. P. 8(a)(2). In Clark v. Ruidoso-Hondo Valley Hospital, 72 N.M. 9, 380 P.2d 168 (1963), the supreme court explained the pleading requirement in negligence actions: "[U]nder former rules of pleading, it would seem to have been required that specific acts of negligence be alleged, [but] this is not true under our present rules of practice. . . ." *Id.* at 14, 380 P.2d at 170.

145. Plaintiff asserted that the defendant failed to pursue the rights granted her by N.M. Stat. Ann. §29-1-9 (1953), which provided that community property belongs to the spouse of the decedent subject to his power of testamentary disposition over one-half of the community property.

146. 94 N.M. at 309, 610 P.2d at 196. Rule 12 permits a defendant to file a motion alleging a failure to state a claim prior to the filing of an answer. N.M. R. Civ. P. 12(b)(6). Filing the motion defers the time for filing an answer. N.M. R. Civ. P. 12(a).

147. During the arguments on the motion to dismiss, plaintiff's attorneys abandoned the argument that N.M. Stat. Ann. §29-1-9 (1953) applied, and argued that N.M. Stat. Ann. §31-8-3 (1953), requiring creditors' claims to be filed within four months of death, was the statutory mandate which defendants negligently failed to fulfill. The supreme court found that this statute was also inapplicable to the plaintiff's claim and could not support the claim of negligence. 94 N.M. at 310, 610 P.2d at 197.

148. Rule 15 permits plaintiff to amend as a matter of right "at any time before a responsive pleading is served." N.M. R. Civ. P. 15(a). A motion to dismiss is not a responsive pleading. N.M. R. Civ. P. 7(a). Therefore, plaintiff is permitted to amend her complaint as a matter of course even after the court has ruled that it is insufficient. Malone v. Swift Fresh Meats Co., 91 N.M. 359, 361, 574 P.2d 283, 285 (1978); *see* Platco Corp. v. Shaw, 78 N.M. 36, 428 P.2d 10 (1967).

dismissed with prejudice. The plaintiff appealed, alleging as error the decision that the complaint was inadequate. The court of appeals concluded that, though reliance on the specific statutes to show a breach of duty was incorrect, there were sufficient general allegations of negligence in the complaint to overcome a motion to dismiss. In addition, the court of appeals noted that it was error to dismiss the complaint without leave to amend.[149]

The supreme court reversed the court of appeals and reinstated the final judgment in favor of the defendants. The court did not discuss the question of the sufficiency of the general allegations of negligence, but merely concluded that the complaint was deficient because the plaintiff selected the wrong specific statutes upon which to base her malpractice claim. The court also rejected the alternative rationale of the court of appeals that the trial court erred in not permitting plaintiff to amend the complaint. The burden is upon the plaintiff to move to amend the complaint, said the supreme court, and not upon the trial court to invite plaintiff to amend a deficient complaint.[150]

The supreme court's decision in *Houston* is inconsistent with the fundamental principle that decisions should be rendered upon the merits whenever possible.[151] To dismiss a case because of failure to comply with technical pleading requirements does not foster the purposes of notice pleading. If the court of appeals was correct in asserting that the complaint contained sufficient general allegations of negligence,[152] it is difficult to understand why plaintiff should be penalized for having attempted to add to the general allegations an erroneous specific assertion of the acts constituting negligence. By penalizing specificity, the supreme court may encourage attorneys to plead in the most general terms to avoid dismissal for having been too specific at the earliest stage of the proceeding. No good can come from encouraging vague complaint writing.

Houston also indicates that, though plaintiffs have a right to amend their complaints after a successful attack on its sufficiency by pre-answer motion, they must affirmatively request the right to amend or lose that right. This clarifies a minor point of procedure. It seems inappropriate, however, to make the point at the expense of a

149. Young v. Houston, No. 4080 (Ct. App., filed Dec. 11, 1979), *rev'd,* Houston v. Young, 94 N.M. 308, 610 P.2d 195 (1980).

150. 94 N.M. at 310, 610 P.2d at 197. In addition, the supreme court held that the court of appeals had no authority itself to authorize an amendment of the pleadings. Appellate courts may only review the issue of the propriety of a trial judge's refusal to permit an amendment. *Id.* Because plaintiff in *Houston* had not requested permission to amend from the trial court, the court of appeals lacked power to authorize an amendment. *Id.*

151. *See* Carroll v. Bunt, 50 N.M. 127, 172 P.2d 116 (1946).

152. Young v. Houston, unreported opinion of the court of appeals *rev'd,* Houston v. Young, 94 N.M. 308, 610 P.2d 195 (1980).

litigant who seeks to hold attorneys to account for their alleged incompetence.[153]

IV. DISCOVERY

That big cases produce big decisions is one lesson to be learned from the case of *United Nuclear Corp. v. General Atomic Co.*[154] Billed as "by far the single largest litigation in the history of New Mexico,"[155] the action spawned a ninety-eight-page opinion by the New Mexico Supreme Court affirming the trial court's determination that defendant should suffer a default judgment[156] as a penalty for exercising bad faith while undergoing discovery.

Resolution of the case required careful analysis of a very large record, and much of the court's opinion can only be understood in reference to the specific facts and proceedings presented.[157] Nonetheless, the court's discussion of four discovery-related issues[158] is of general interest: (1) the test for determining whether sought-after in-

153. One can only consider with dismay the possibility that the plaintiff in *Houston* might hire a third set of attorneys to charge the second set of attorneys with malpractice in failing to state a claim in the malpractice action against plaintiff's first attorneys.

154. 629 P.2d 231 (N.M. 1980), *cert. denied,* 49 U.S.L.W. 3787 (Apr. 20, 1981). After the trial of this case, the New Mexico Rules of Procedure were substantially amended. The New Mexico Supreme Court applied the rules in effect at the time of the trial. 629 P.2d at 328 n.4. The discussion which follows in the text focuses upon the portions of the *United Nuclear* opinion which are equally applicable after the 1979 amendments. Aspects of the decision which are not generally relevant in light of the 1979 amendments are omitted. References in the following footnotes are to the current rules unless otherwise noted. References to the former rules are made only where the rule in question underwent more than formal change as a result of the 1979 amendments.

155. 629 P.2d at 237. The opinion noted:

> This case is by far the single largest litigation in the history of New Mexico, both in terms of the dollar value of the judgment, which approaches one billion dollars, and the sheer volume of the record, which contains more than 28,000 pages in the record proper, 13,000 pages of transcripts, thousands of documents, and over 100 depositions containing approximately 16,000 pages of testimony and 2,700 exhibits.

Id.

156. The court referred to the sanction imposed as a default judgment. 629 P.2d 231, 329 (1980). The rules state that "[a] judgment by default" is authorized as one sanction available to the court for failure of a party to comply with discovery orders. N.M. R. Civ. P. 37(B)(2)(c). The *United Nuclear* trial court first entered twelve findings of fact contrary to General Atomic's allegations, which the court is authorized to do in accordance with N.M. R. Civ. P. 37(B)(2)(a), and then entered a judgment of default pursuant to N.M. R. Civ. P. 37(B)(2)(c). 629 P.2d at238.

157. "The facts are largely disputed and are extremely complex." 629 P.2d at 237.

158. In addition to the discovery questions, the court addressed the propriety of the trial judge's refusal to recuse himself, the propriety of the judge's ruling that plaintiff's attorney should not be disqualified, the scope of the New Mexico antitrust statute, and the role of the act of state doctrine as a limitation on a state trial court's power to deal with matters affecting the foreign relations of the United States.

formation is "relevant to the subject matter" as required by the rules of discovery; (2) whether discovery devices available only against a party may be used to obtain information possessed by partners who are not parties to a lawsuit brought only against the partnership; (3) the rules governing the use of interrogatories in the discovery process; and (4) the conditions under which a court may impose the ultimate sanctions of dismissal with prejudice or default judgment, for failure to undergo discovery. The court's holdings on these issues will greatly affect New Mexico law, and deserve lengthy discussion.

A. *Relevancy*

General Atomic Company argued that sanctions should not have been imposed upon it for failure to comply with discovery orders because the information sought was not relevant to the subject matter of the litigation and thus was not a proper subject of discovery.[159] The information sought dealt with the defendant's alleged participation in an international uranium cartel. The issue presented was whether such information was relevant to an action charging defendant with violations of state antitrust law, breach of fiduciary duty, and fraud.

New Mexico has accepted the view that broad discovery is an integral part of modern procedure[160] and that objections asserting that requested discovery is irrelevant should be tested under "a broad interpretation . . . and . . . should not be delimited by technical or confining definitions."[161] The *United Nuclear* opinion affirms this approach[162] and suggests that the requirement of relevancy to the subject matter is met unless a court is led to the conclusion that the sought-after information "palpably can have no possible bearing upon the subject matter of [the] action."[163] The court also rejected

159. General Atomic argued this point in an attack on the propriety of the discovery order. The propriety of discovery orders can be examined on appeal. "If sanctions are imposed under Rule 37(b), . . . on appeal from the order imposing sanctions the appellate court will consider the propriety of the prior order for discovery." C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2289, at 791 (1970) (footnote omitted). "It is generally recognized that a Rule 37(b) sanction makes the prior discovery order final and therefore subject to review on appeal." Familias Unidas v. Briscoe, 544 F.2d 182, 191 (5th cir. 1976).

160. *E.g.*, Fort v. Neal, 79 N.M. 479, 444 P.2d 990 (1968) (dictum). The New Mexico view was expressed by the court of appeals in Griego v. Griego, 90 N.M. 174, 561 P.2d 36 (Ct. App.), *cert. denied,* 90 N.M. 254, 561 P.2d 1347 (1977): "Our deposition rules intend a liberal pretrial discovery to enable the parties to obtain the fullest possible knowledge of the facts before trial." *Id.* at 181, 561 P.2d at 43.

161. Fort v. Neal, 79 N.M. 479, 481, 444 P.2d 990, 992 (1968).

162. The court also noted that: "not only is the term 'relevant' subject to a broad interpretation as it is generally used in the discovery context, but also it is given a particularly liberal interpretation for purposes of discovery in antitrust cases." 629 P.2d at 250.

163. 629 P.2d at 257.

the argument that discovery should be prohibited if the party seeking information is unable to demonstrate that the sought-after data are clearly connected to the subject matter of the pending litigation: "Such an interpretation of the rule . . . might compel a party to know what was in the documents before he had seen them."[164]

The court's decision continues, and perhaps broadens, the liberal interpretation New Mexico has applied to the relevancy requirement. It will now be difficult to succeed on a claim of irrelevancy in seeking to bar discovery. Little, if any, information likely to be sought will be "palpably" outside the scope of discovery. The *United Nuclear* opinion also makes it clear that the attorney for the party opposing discovery may not decide unilaterally that the relevance threshold has not been met. The responsibility lies with the attorney for the deposed party "to work out the matter with opposing counsel, or failing that [to present] its objection to the trial court."[165]

B. *Scope of Discovery of Non-parties*

Of all the discovery devices, only the deposition is generally available for use in obtaining information from a nonparty to the action.[166] United Nuclear chose to sue the General Atomic Company, a partnership, without joining as co-defendants the corporations which had joined to form the partnership. This tactical decision[167] set the stage for a battle concerning the relationship of the nonparty partners to the defendant partnership and the scope of the interrogatories and requests for admission addressed to the partnership.

In carefully drafted interrogatories, United Nuclear sought information from "the partnership or the partners."[168] The partnership only responded with information in the possession of the partnership. Requests for documents, though addressed only to the partnership, sought documents in the possession of the partners. Language in both Rules 33 and 34 provides room to argue that information and documents in the possession of the nonparty partners are within

164. The *United Nuclear* court relied on Beler v. Savarona Ship Corp., 26 F. Supp. 599 (E.D.N.Y. 1939), for this proposition.

165. 629 P.2d at 287.

166. Documents may also be obtained by the issuance of a subpoena duces tecum issued in conjunction with a subpoena commanding the presence of a non-party witness at a deposition. N.M. R. Civ. P. 45(d)(1).

167. United Nuclear initially named the constituent partners as co-defendants with the partnership in an action commenced in state court. When the partners removed the case to federal court because there was diversity of citizenship between the plaintiff and the partners, the plaintiff took a voluntary nonsuit, Fed. R. Civ. P. 41(a)(1), and refiled the action in state court. This time, the partners were not named as defendants. 629 P.2d at 237 n.2. Therefore, removal to federal court by the nondiverse partnership was not possible.

168. 629 P.2d at 281 n.80.

the scope of discovery. Rule 33 requires a partnership to answer interrogatories through an agent who shall furnish "such information as is available to the party,"[169] while Rule 34 requires a party to furnish documents "in the possession, custody, or control of the party upon whom the request is served."[170] The supreme court considered these requirements to be identical and created a common test for the determination of the extent to which information or documents in the possession of a nonparty partner must be supplied by the partnership which is a party. The first question is whether the party seeking to obtain the data is capable of procuring it through other means.[171] If not, the court held, "the critical inquiry [is] whether the party from whom the materials are sought has the practical ability to obtain those materials."[172] The court did not define the phrase "practical ability."[173] Instead it reasoned that because the partnership ultimately did produce the documents, it was clear "that, as a practical matter, those documents were 'available.' "[174]

The reach of the decision extends beyond the confines of the partnership setting presented in this case. Under *United Nuclear,* where only one of several interlocking corporations is sued,[175] or where documents are in the possession not of a party but of an independent, though related, entity,[176] the party must produce the information if it has the practical ability to do so. Sanctions may be imposed for failure to make the effort.[177] To avoid sanctions, a party who is arguably in such a posture should make reasonable attempts to pro-

169. N.M. R. Civ. P. 33(a).

170. N.M. R. Civ. P. 34(a).

171. The court stated: "[I]n general a party should not be required to obtain, collect or turn over materials which the opposing party is equally capable of obtaining on its own." United Nuclear Corp. v. General Atomic Co., 629 P.2d at 246. General Atomic did not attempt to assert that United Nuclear had alternative means to obtain the desired information. *Id. But see* N.M. R. Civ. P. 45(d)(1).

172. 629 P.2d at 246.

173. The court reasoned that "[b]ecause the inquiry is a pragmatic one, the phrases . . . should not be subjected to formalistic strictures which ignore the policy of liberal discovery and the practical realities of the particular situation at issue." 629 P.2d at 246.

The court listed some factors which would be improper to consider in making the determination of "practical ability." Immaterial is the fact "that the party subject to the discovery orders does not own the documents, or that it did not prepare or direct the production of the documents, or that it does not have actual physical possession of them." 629 P.2d at 246-47.

174. *Id.*

175. *E.g.,* Hubbard v. Rubbermaid, Inc., 78 F.R.D. 631 (D. Md. 1978); Service, Inc. v. Hartford Accident & Indem. Co., 60 F.R.D. 632 (N.D. Ill. 1973).

176. *See, e.g.,* Norman v. Young, 422 F.2d 470 (10th Cir. 1970) (documents in possession of accountant); Simper v. Trimble, 9 F.R.D. 598 (W.D. Mo. 1949) (photographs taken by party's insurer and in possession of attorney). Of course, if the matter is privileged under Rule 26, then it is not discoverable even though the party has the practical ability to obtain it. *See, e.g.,* Hickman v. Taylor, 329 U.S. 495 (1947).

177. *E.g.,* Hart v. Wolff, 489 P.2d 114 (Alaska 1971).

cure the information before responding to the interrogatory or request for production.[178]

C. *Procedures for Responding to Interrogatories*

The supreme court concluded that General Atomic Company's conduct during discovery was "marked by an extraordinary lack of diligence that cannot be characterized as accidental, unintentional or involuntary."[179] General Atomic's failure to respond fully to two sets of interrogatories was the primary deficiency identified by the court. Though the exact scope of the court's ruling can only be understood in the context of the complex record, some guidelines for the use of interrogatories emerge from the case.

A set of interrogatories may be prefaced by definitions of the terms used in the questions.[180] The definitions proposed by the interrogating party control unless timely objection is made to the definition.[181] Where the definitions do not establish a particular meaning for the phrases used, "the answering party is obligated to answer the interrogatories in 'the ordinary, everyday usage and meaning' of the language in which the questions are asked."[182]

The duty of the party who receives interrogatories is "to fully answer the questions according to their terms"[183] within the time provided or to serve a timely objection. Under the current version of Rule 33, an objection will be accepted in lieu of an answer if the reasons for the objection are stated sufficiently.[184] Failure to object as provided by the rules constitutes a waiver of all claims of impropriety and precludes subsequent review, either in a hearing to con-

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178. The broad definition of relevance that *United Nuclear* establishes, together with the requirement that a party produce everything that he has the practical ability to produce, permit discovery so extensive that it might amount to harassment. A party can prevent this by requesting a protective order under N.M. R. Civ. P. 26(C).

179. 629 P.2d at 329.

180. *See id.* at 281 n.80.

181. *See id.* at 281-82. The 1979 amendments enacted after *United Nuclear* permit the party responding to the interrogatory to object to the interrogatories as formulated and refuse to answer them. N.M. R. Civ. P. 38(a). The burden is on the proponent of the interrogatory to obtain an order requiring the interrogatories to be answered with the proposed definitions. *Id.* Prior to 1978, the party opposed to the formulation of the questions was required to object *and* to seek a court order excusing it from answering the questions as propounded (superseded by the current rules). N.M. R. Civ. P. 33.

182. 629 P.2d at 288; Roesberg v. Johns-Manville Corp., 85 F.2d 292, 298 (E.D. Pa. 1980).

183. 629 P.2d at 290.

184. *See* note 154 *supra*. "[T]he well established rule [is] that '[o]bjections to interrogatories must be specific and be supported by a detailed explanation as to why interrogatories or a class of interrogatories is objectionable.' . . . The party resisting discovery has the burden to clarify and explain its objections and to provide support therefor." 629 P.2d at 298 (footnotes omitted).

sider sanctions or on an appeal from the imposition of a sanction order by the trial court.[185] The party answering interrogatories is obligated to provide not only information in its possession, but all information which is "available" to the party.[186] To fulfill this responsibility a party is "under a duty to make every effort to obtain the requested information and, if, after adequate effort it [is] unsuccessful, its answers should [recite] in detail the attempts which it made to acquire the information."[187] If the information is not available to the party because of its conscious and deliberate policy of placing the information out of the reach of discovery, sanctions can be imposed for making the information unavailable.[188]

Answers to interrogatories should not consist merely of references to other documents or depositions, particularly where the referenced matter is "equally unresponsive."[189] Also forbidden is the practice of summarizing data which "purports to" demonstrate an answer to the question propounded. A party should take a definite position or state that it does not know the answer to the question asked.[190]

When the answers to interrogatories are deemed unsatisfactory, the party receiving them should file a motion to compel more complete answers.[191] In some circumstances a failure to object to insufficient answers can constitute a waiver of any objections to the sufficiency of the response.[192] However, if the discovering party has no reason to know that the answers are insufficient because it lacks access to the data upon which the answer is based, no waiver occurs.[193]

D. *Selection of Appropriate Sanction*

The supreme court affirmed the trial court's determination that General Atomic Company "acted in flagrant bad faith and callous disregard of its [discovery] responsibilities."[194] Based on this finding, it agreed that the default judgment imposed as a sanction was a

185. The court stated: "The law is well established that the failure to timely file objections to interrogatories operates as a waiver of any objections the party might have. . . . When a party fails to file timely objections, the only defense that it has remaining to it is that it gave a sufficient answer to the interrogatories." 629 P.2d at 286; *see also id.* at 245, n.8.

186. N.M. R. Civ. P. 33(a).

187. 629 P.2d at 301.

188. *Id.* at 309.

189. *Id.* at 299.

190. *Id.* at 301-02.

191. Rule 37(A) permits a party to file a motion to compel discovery if a party fails to respond to an interrogatory. N.M. R. Civ. P. 37(A)(2). Evasive or incomplete answers are treated as failures to answer for purposes of this rule. *Id.* 37(A)(3).

192. 629 P.2d at 289 n.95; *see, e.g.*, Butler v. Pettigrew, 409 F.2d 1205 (7th Cir. 1969).

193. 629 P.2d at 289, 292.

194. 629 P.2d at 315.

proper exercise of the court's remedial power.[195] This severe sanction should be imposed "only in extreme circumstances."[196] The court found those circumstances to be present in this case, and focused on the evils of bad faith in the discovery process. When a cavalier attitude toward discovery is demonstrated, the right to a meaningful hearing of the party seeking discovery is impaired.[197] When to this is added the policy of preserving the integrity of the judicial process, "it is not only proper, but imperative, that severe sanctions be imposed" on the noncomplying party.[198]

The supreme court agreed that the default judgment sanction cannot be imposed as "mere punishment," but "only in extreme cases and only upon a clear showing of wilfulness or bad faith."[199] The court stated that the discovery sanction of default judgment need not be limited to those aspects of the case to which the missing data related. The sanction serves two purposes: first, it prevents prejudice to the party who is unable to obtain discovery, and thus might be ignorant of relevant facts. Second, it punishes the uncooperative party. To accomplish this second purpose, default judgment may be ordered as to an entire case: "A party cannot approach its obligation to make good faith discovery . . . as to certain matters, and at the same time expect to have the case proceed in a normal fashion as to other issues."[200] The default judgment sanction thus serves to ensure the integrity of the judicial process and to deter parties to a lawsuit from ignoring their responsibilities.

Finally, the supreme court held that sanctions could sometimes be imposed without a full evidentiary hearing. This may be done when the sanctioned party had adequate notice that its conduct would expose it to sanctions, and the conduct upon which the sanctions are based is within the knowledge of the trial court. In such situations, the opportunity to brief the legal issues and to present additional facts by affidavit is sufficient to satisfy the requirements of the rules and the mandate of due process.[201]

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195. *Id.*

196. *Id.*

197. "We are . . . concerned . . . with the . . . fundamental constitutional right of the party who seeks discovery to a hearing which is meaningful." 629 P.2d at 317.

198. *Id.*

199. *Id.* Lesser sanctions need not first be tried and found wanting, however, before a default judgment may be entered.

200. *Id.*

201. 629 P.2d at 311-14. Rule 43(c) provides that "[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties." N.M. R. Civ. P. 43(c) (Repl. 1980). The supreme court had considered the question of when an evidentiary hearing must be held in a previous opinion in the *United Nuclear* case. 93 N.M. 105, 597 P.2d 290 (1979).

The *United Nuclear* opinion has been said to read like a novel.[202] Like that of an intricate Russian novel, the plot of *United Nuclear* may be difficult to follow at times, but much is to be learned from a careful reading. Such complex litigation is unusual in New Mexico, but, just as great novels reveal universal truths, *United Nuclear* established principles which apply to the average lawsuit:

> The rules of discovery are as equally applicable to cases involving large sums as they are to small, and the obligation to comply with those rules in good faith and to obey the orders of the court is no less incumbent on the largest company than it is on the poorest citizen.[203]

The discovery rules have been much criticized for their capacity to be used for delay and confusion instead of enlightenment.[204] The *United Nuclear* opinion blunts this criticism by establishing high standards of conduct for attorneys and parties who use the discovery rules. The opinion signals the court's willingness to enforce the rules in order "to insure that discovery will further, not frustrate, the goal of a determination on the merits after a full, good faith disclosure of all relevant facts."[205]

During the Survey year, other decisions and rule changes had an impact on discovery procedures in New Mexico. Local court rules[206] for Bernalillo County now provide that parties must obtain leave of the court to file more than twenty-six interrogatories.[207] A local rule of the New Mexico federal district court[208] provides that if a motion for protective order is filed within three days of the date scheduled for a deposition, a party will not be sanctioned for failure to appear at the time and place designated for the deposition.[209] The New Mex-

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202. In a separate action in federal court in Illinois, Gulf Oil was charged with bad faith for failure to turn over cartel documents to its opponent, the Westinghouse Electric Corporation. During the arguments concerning the appropriate sanction in that case, the attorney for Westinghouse "encouraged Judge Marshall to examine the New Mexico high court decision because in his words, it reads like a 'good novel.' " Wall Street Journal, Sep. 3, 1980, at 8.

203. 629 P.2d at 318.

204. *E.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975) (Rehnquist, J.); Dissent from adoption of 1980 amendments to discovery rules, 85 F.R.D. 521 (1980) (Powell, J.); Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation, ABA.

205. 629 P.2d at 317.

206. N.M. R. Civ. P. 83 authorizes district courts to promulgate local rules of practice not inconsistent with the Rules of Civil Procedure. *See generally* James v. Brumlop, 94 N.M. 291, 609 P.2d 1247 (Ct. App. 1980).

207. Second Judicial Dist. Ct. R. 42(d) (Rev. 1980); *see also* D.N.M. R. 10 (Rev. 1981) (interrogatories limited to 50).

208. Federal Rule 83 authorizes federal district courts to promulgate local rules of practice not inconsistent with the Federal Rules of Civil Procedure. Fed. R. Civ. P. 83.

209. D.N.M. R. 8. If the district court concludes that the motion for protective order is frivolous or made for dilatory purposes, sanctions may be imposed. *Id.*

ico Rules of Civil Procedure do not contain a similar provision. The New Mexico Supreme Court has stated that the mere filing of a motion for a protective order does not excuse the deponent from attending the deposition.[210] In state court practice, if a motion for a protective order cannot be heard prior to the scheduled date of the deposition, a court order postponing the deposition until the motion can be heard should be obtained.[211]

It is not uncommon for the attorneys present at a deposition to waive certain formal requirements and procedures which would otherwise be required in the conduct of depositions.[212] In *Garcia v. Co-Con, Inc.*,[213] the court of appeals held that the introductory statement in the record by the deposing attorney that "this deposition is being taken according to the usual stipulationse and [the witness] waives signature" did not constitute a stipulation that the signature of the person deposed would be waived.[214] The court acknowledged that pre-deposition stipulations by counsel were valid, and that a binding stipulation is entered into when one lawyer announces for the record that "it is stipulated and agreed . . ." if the opposing lawyer is present and remains silent.[215] However, the court held that because the attorney did not precede the phrase "the [witness] waives signature" with the incantation that "the attorneys stipulate," no stipulation was entered into even though opposing counsel was present and offered no objection.[216] The court held that, absent a valid stipulation, the lack of signature by the witness precluded admission of the deposition into evidence, unless there had been a waiver of the defect by the party opposing the introduction of the deposition. Failure to move to suppress the deposition after the defect is or should have been ascertained constitutes a waiver.[217] The court remanded for a determination of whether a waiver occurred.

210. United Nuclear Corp. v. General Atomic Co., 629 P.2d 231, 282, *cert. denied,* 49 U.S.L.W. 3787 (Apr. 20, 1981); *see* Wienke v. Chalmers, 73 N.M. 8, 385 P.2d 65 (1963).

211. In *United Nuclear,* the supreme court quoted with approval from Pioche Mines Consolidated, Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964), *cert. denied,* 380 U.S. 956 (1965), which suggested that the party seeking a protective order must obtain from the court an order postponing the time to comply with the discovery request until the motion for protective order could be heard. 629 P.2d at 282.

212. Rule 29 provides: "Unless the court orders otherwise, or previous orders of the court conflict, the parties may by written stipulation (a) provide that depositions may be taken . . . in any manner . . . and (b) modify the procedures provided by these rules for other methods of discovery." N.M. R. Civ. P. 29.

213. 20 N.M. St. B. Bull. 798 (May 26, 1980).

214. *Id.* at 803. Rule 30 expressly provides that the parties may "by stipulation waive the signing." N.M. R. Civ. P. 30(E).

215. *Id.*

216. *Id.*

217. This aspect of the opinion makes little sense. Rule 30(E) provides that if a witness does not sign a deposition within thirty days of its submission to him, the officer before whom the deposition was taken should sign it. N.M. R. Civ. P. 30(E). Once signed by the court officer

V. SUMMARY JUDGMENT

Appellate review of summary judgment determinations is perhaps the most frequently considered procedural issue decided by the appellate courts each year.[218] One reason for this is that review focuses upon the sufficiency of the record to raise issues of fact. The result is that the decisions rendered have only limited precedential value. Perhaps to compensate for this, the courts have set forth in detail the appropriate procedural process for the determination of summary judgment motions. The framework for deciding summary judgments is carefully monitored by the appellate courts,[219] even though the substantive merits are determined in an ad hoc fashion.[220]

This Survey year the courts reaffirmed the well-recognized formulation of the test for the grant of a summary judgment,[221] the

"the deposition may then be used as fully as though signed, unless, on a motion to suppress . . . the court holds that the reason given for the refusal to sign requires rejection of the deposition in whole or in part." *Id.* Thus, the failure of the witness to sign a deposition is not relevant to the issue of its admissibility in the usual case and no lawyer would have reason to move to suppress the deposition for failure of the witness to sign except to test the sufficiency of the reason given for refusal to sign.

218. This Survey year is no exception: *See, e.g.,* Sweenhart v. Co-Con, Inc., 95 N.M. 773, 626 P.2d 310 (Ct. App. 1981); Baldwin v. Worley Mills, Inc., 95 N.M. 398, 622 P.2d 706 (Ct. App. 1980); Chavez v. Ronquillo, 94 N.M. 442, 612 P.2d 234 (Ct. App. 1980); Diaz v. Lockheed Electronics, 95 N.M. 28, 618 P.2d 372 (Ct. App. 1980); Henning v. Parsons, 95 N.M. 454, 623 P.2d 574 (Ct. App. 1980); James v. Brumlop, 94 N.M. 291, 609 P.2d 1247 (Ct. App. 1980), *cert. denied,* 94 N.M. 674, 615 P.2d 991 (1980); Richards v. Upjohn Co., 95 N.M. 675, 625 P.2d 1192 (Ct. App. 1980); Rickerson v. State, 94 N.M. 473, 612 P.2d 703 (Ct. App.), *cert. denied,* 94 N.M. 675, 615 P.2d 992 (1980); Silva v. City of Albuquerque, 94 N.M. 332, 610 P.2d 219 (Ct. App. 1980); State Farm Mut. Auto. Ins. Co. v. Sutherland, 94 N.M. 653, 615 P.2d 268 (1980); Tinley v. Davis, 94 N.M. 296, 609 P.2d 1252 (Ct. App. 1980).

219. Judge Sutin has emphasized that the correct application of the procedural structure of summary judgment practice by the district courts is of great importance to the appellate court which reviews the district court decision: "Before summary judgment is granted, the district court has a duty to follow the rules. . . . If these rules were followed and spelled out in the summary judgment . . . our duties would be lessened." Rickerson v. State, 94 N.M. 473, 477, 612 P.2d 703, 707 (Sutin, J., specially concurring).

220. *E.g.,* Zengerle v. Commonwealth Ins. Co., 60 N.M. 379, 291 P.2d 1099 (1955); C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M 150, 597 P.2d 1190 (Ct. App. 1979).

221. Three opinions of the supreme court serve as the source of black letter law on this point. Goodman v. Brock, 83 N.M. 789, 498 P.2d 676 (1972), is the oldest and most often cited. Also frequently cited are Goffe v. Pharmaseal Laboratories, Inc., 90 N.M. 753, 568 P.2d 589 (1977), and Fischer v. Mascarenas, 93 N.M. 199, 598 P.2d 1159 (1979). Unfortunately, *Fischer* suggested in dictum that summary judgment should not be granted "where there is the slightest doubt as to the existence of a material fact," *id.* at 201, 598 P.2d at 1161, while *Goodman v. Brock* claimed that summary judgment should not be denied merely because of a "slight doubt," but only when a "reasonable doubt" as to the existence of a factual dispute is present. 83 N.M. at 792, 498 P.2d at 679. Whether *Fischer* modified *Goodman* has been the subject of debate. *See* Gallegos v. Los Lunas Consol. Schools, 95 N.M. 160, 619 P.2d 836 (Ct. App. 1980). Judge Sutin has concluded that the language in *Goodman* accurately states the current rule: "*Fischer* did not expressly overrule *Goodman v. Brock.* Neither was it overruled sub-silentio. It is apparent that the cited language in *Fischer* was inadvertent." Henning v. Parsons, 95 N.M. 454, 461, 623 P.2d 574, 581 (Ct. App. 1980) (Sutin, J., dissenting). The majority in *Henning* seemed to agree, for it applied the standard that in deciding whether summary judgment is proper, one is to give to the party opposing the motion "the benefit of all reasonable doubts in determining whether a genuine issue exists." *Id.* at 455, 623 P.2d at 575.

shifting burdens of responsibility of the parties in presenting evidence,[222] and the unavailability of summary judgments where different inferences can be drawn from undisputed facts.[223] The courts focused upon the timing of the motion and the need for and content of supporting affidavits. Decisions concerning these matters offer guidance to the practitioner about the correct procedural framework for the presentation of summary judgment motions.

Rule 56 requires that motions for summary judgment "shall be served at least 10 days before the time fixed for the hearing."[224] In *State Farm Mutual Automobile Insurance Co. v. Sutherland,*[225] the supreme court held that this time requirement was mandatory. Failure of the moving party to comply with the rule precludes the trial court from granting a summary judgment.[226] The appellant in *Sutherland* did not raise the timeliness issue on appeal. The opinion does not demonstrate that the issue was raised in the trial court either. The supreme court nonetheless approved the court of appeals' *sua sponte* decision to raise the issue. This decision may change the theoretical status of the rule. By not requiring that the issue be preserved for appeal[227] and not considering the applicability of the harmless error rule,[228] the supreme court treated the ten-day notice rule as if it were a jurisdictional requirement, which may be raised

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222. When the defendant seeks a summary judgment,

> *First,* the burden is on defendants to show an absence of a genuine issue of material fact. . . . This burden means that the defendant must make a prima facie showing by such evidence as is sufficient in law to raise a presumption of fact or establish the fact unless rebutted.
>
> *Second,* once this prima facie showing is made by defendants, the burden shifts to plaintiff to come forward and demonstrate that a genuine issue of fact exists. . . .

Tinley v. Davis, 94 N.M. 296, 297, 609 P.2d 1252, 1253 (Ct. App. 1980). The seminal case in New Mexico is Goodman v. Brock, 83 N.M. 789, 498 P.2d 676 (1972).

223. *See* Tinley v. Davis, 94 N.M. 296, 298, 609 P.2d 1252, 1254 (Ct. App. 1980). *Tinley* merely repeats the rule established by the supreme court in Fischer v. Mascarenas, 93 N.M. 199, 598 P.2d 1159 (1979): "Even where the basic facts are undisputed, if equally logical but conflicting inferences can be drawn from the facts, summary judgment should be denied." 94 N.M. at 298, 598 P.2d at 1161.

224. N.M. R. Civ. P. 56(c).

225. 94 N.M. 653, 615 P.2d 268 (1980).

226. *Id.* at 655, 615 P.2d at 270. *See* Barnett v. Cal M, Inc., 79 N.M. 553, 445 P.2d 974 (1968).

227. Appellate rules require that, generally, "[t]o preserve a question for review it must appear that a ruling or decision by the trial court was fairly invoked." N.M. R. Civ. P. 11.

228. The harmless error rule is contained in N.M. R. Civ. P. 61. It provides that no judgment or decision be set aside "unless refusal to take such action appears to the court inconsistent with substantial justice." The supreme court in *Sutherland* did not address the issue of whether appellant was harmed by the failure to receive a full ten days' notice as required by the rule.

for the first time on appeal.[229] Nothing in the rule itself suggests that the requirement is jurisdictional. No significant policies are furthered by an interpretation of the notice requirement which could compel the reversal of an otherwise valid summary judgment without a showing of harm. The decision in *Sutherland* is unfortunate. The issue should be reconsidered by the court before the force of the decision is extended beyond the summary judgment motion to all motions.[230]

A party may move "with or without supporting affidavits" for a summary judgment.[231] Whether the court can consider affidavits which did not accompany the motion for a summary judgment but which were submitted at or prior to the hearing was the subject of two opinions this year. In *Richards v. Upjohn Co.*,[232] the court of appeals stated that a trial court has the power to consider affidavits presented as late as the day of the summary judgment hearing. Rule 6(d) requires that when a motion is supported by affidavit, "the affidavit *shall* be served with the motion."[233] Nevertheless, the court decided that the trial judge has the power to allow the filing of late affidavits.[234] The court also suggested that late filing of affidavits

229. Jurisdictional issues may be raised for the first time on appeal. N.M. R. Civ. App. 11; *see, e.g.*, Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967). No other exception to the rule that issues cannot be raised for the first time on appeal is applicable. *See* N.M. R. Civ. App. 11 (issues of public interest or matters affecting fundamental rights may be raised for first time on appeal).

230. The supreme court interpreted the time requirement expressly applicable only to summary judgment motions. N.M. R. Civ. P. 56(c). However, a different rule, applicable to almost all motions, requires that "[a] written motion . . . shall be served not later than five days before the time specified for the hearing, unless a different period is fixed . . . by these rules or by order of the court." N.M. R. Civ. P. 6(d). Unless the supreme court can find a principled reason for differentiating between the treatment of the time requirement in Rule 56 and that in Rule 6(d), it would appear that *Sutherland* would apply to all motions. *But see* Cordova v. City of Albuquerque, 86 N.M. 697, 704-05, 526 P.2d 1290, 1297-98 (Ct. App. 1974) ("it may be questioned whether [Rule] 6(d) applies to summary judgment procedure"). The result would be that all decisions rendered in motion proceedings would be voidable on appeal whenever the time requirements for motions were not met.

One distinguishing factor is that Rule 6(d) authorizes the trial court to shorten the time requirement for notice upon an order of court, while Rule 56(c) contains no equivalent provision. However, if neither party objects and the court hears a motion when the time requirements have not been met, without entering an order authorizing the shortened time period, the situation presented is indistinguishable from that presented in *Sutherland*.

231. N.M. R. Civ. P. 56(a).

232. 95 N.M. 675, 625 P.2d 1192 (Ct. App. 1980). In *Richards*, the court did not actually rule on this issue. The court concluded that summary judgment was improper, and discussed the issue as a guide for the lower courts. *Id.* at 681, 625 P.2d at 1198.

233. N.M. R. Civ. P. 6(d) (emphasis added).

234. 95 N.M. at 681, 625 P.2d at 1198; *see* Cordova v. City of Albuquerque, 86 N.M. 697, 526 P.2d 1290 (Ct. App. 1974).

should ordinarily be permitted, and that the proper remedy to cure allegations of unfair surprise is to postpone the hearing rather than to refuse to accept the affidavit.[235] Only when "the other party needs time to rebut the information contained in the affidavit, and there is some reason that the hearing cannot be postponed," should the court reject the late affidavit.[236]

A similar result was reached in *James v. Brumlop.*[237] There, the trial court accepted an affidavit presented after the motion for summary judgment had been filed. A local rule of procedure[238] required that the affidavit accompany the motion. In *James,* the court affirmed the decision of the trial court to accept and consider affidavits filed weeks after the motion was filed.[239]

Richards and *James* establish that affidavits in support of a motion for summary judgment should, but need not always, accompany the motion. The trial judge may permit subsequent service of affidavits, but only after ensuring that the party opposing the motion suffers no procedural prejudice by acceptance of the late affidavits.[240]

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235. 95 N.M. at 681, 625 P.2d at 1198; *cf.* N.M. R. Civ. P. 56(f), which authorizes the court to grant a continuance where one side is unable to obtain sufficient affidavits in time for presentation at the originally scheduled date.

236. 95 N.M. at 681, 625 P.2d at 1198.

237. 94 N.M. 291, 609 P.2d 1247 (Ct. App. 1980), *cert. denied,* 94 N.M. 674, 615 P.2d 991 (1980).

238. Local Rule 13 required that all motions in which allegations of fact are relied on must be supported by affidavits, which are to be attached to the motion. *See* 94 N.M. at 293, 609 P.2d at 1249. The local rule was promulgated pursuant to authority granted in N.M. R. Civ. P. 83. However, Rule 83 requires that local rules be filed with the supreme court and the rules in question had not been filed. The court of appeals correctly determined that it was unnecessary to decide whether local rules were applicable if they had not been filed as required. 94 N.M. at 294 n.2, 609 P.2d at 1250 n.2. The portion of Rule 13 at issue in *James* was the same as N.M. R. Civ. P. 6(d). Thus, the issue would be the same even if Local Rule 13 were invalid.

239. 94 N.M. at 294, 609 P.2d at 1250. Local Rule 13 required that parties opposing motions file counteraffidavits "within ten days after service of movant's motion and supporting papers." *See id.* The court concluded that when, as in *James,* the movant files tardy affidavits, the time for filing affidavits in opposition does not begin to run until the court so orders. *Id.* at 294–95, 609 P.2d at 1250–51. In the absence of a local rule, the problem does not arise. Rule 56(c) authorizes the party opposing the motion to serve counteraffidavits at any time prior to the day of the hearing. N.M. R. Civ. P. 56(c). Because Local Rule 13 imposes a stricter time limit than does Rule 56, the former may be void. *See* N.M. R. Civ. P. 83 (local rules valid if "not inconsistent with" Rules of Civil Procedure).

240. Where the party confronted with last-minute affidavits needs additional time to prepare a response, a motion to continue the hearing should be made. *See* N.M. R. Civ. P. 56(f). If the hearing cannot be postponed, then the tardy affidavit must be rejected once the opponent shows that prejudice would result. Richards v. Upjohn Co., 95 N.M. at 681, 625 P.2d at 1178. The prejudice that must be shown should, of course, be other than that which flows from the greater likelihood of victory which may follow from the introduction of an effective supporting affidavit. What must be shown is unfair surprise and an inability readily to obtain rebutting affidavits which would be forthcoming if time permitted.

Rule 56 requires that affidavits filed in support of summary judgment "shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence."[241] In an important opinion, the court of appeals held in *Chavez v. Ronquillo*[242] that if the opposing party does not move to strike affidavits which fail to comply with the admissibility requirement, the court may assume the truth of the statements contained in the affidavit for purposes of resolving the motion. Treating the affidavit requirement as analogous to a rule of evidence,[243] the court held that "the testimony is admissible if no objection is made nor any motion is made to strike the testimony."[244] It is the duty of the attorney resisting the motion for summary judgment to challenge the sufficiency of the affidavit by a motion to strike those portions of the affidavit which do not comply with the rule.[245] The court of appeals reserved to the trial judge the right to "call the incompetency of the testimony to the attention of the opposing lawyer."[246] If no objection is made by a party, however, "[t]he trial court does not sit as an advocate, object to its admission and deny its admission."[247] In *Chavez,* the court of appeals took a restricted view of its own role. Because the plaintiff had failed to move to strike the affidavit in the trial court, the court of appeals accepted as true the inadmissible assertions in the affidavit in upholding the grant of a summary judgment to defendant.[248]

In *Henning v. Parsons,*[249] the court of appeals concluded that a summary judgment was appropriate despite the fact that isolated portions of a critical deposition, if read alone, might have been sufficient to raise an issue of fact. The general rule that the party opposing the grant of summary judgment is afforded the benefit of all

241. N.M. R. Civ. P. 56(e).

242. 94 N.M. 442, 612 P.2d 234 (Ct. App. 1980).

243. "This language . . . is likened unto the presentation of testimony at trial." 94 N.M. at 445, 612 P.2d at 237. *But compare* N.M. R. Evid. 103(a)(1) (error may not be based on the erroneous admission of evidence unless timely objection is made) *with* N.M. R. Evid. 103(d) (nothing in Rule 103 precludes a court from noticing plain error).

244. 94 N.M. at 445, 612 P.2d at 237; *see* Carter v. Burn Constr. Co., 85 N.M. 27, 508 P.2d 1324 (Ct. App. 1973).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* If the analogy to the Rules of Evidence is accepted, the appellate court has the power to reject the deficient affidavit even though the issue was not raised in the trial court. Where the flaws in the affidavit constitute "plain errors affecting substantial rights," N.M. R. Evid. 103(d), the appellate court would not be forced to accept the content of the affidavit as true. *See, e.g.,* State v. Quintana, 87 N.M. 414, 534 P.2d 1126 (Ct. App.), *cert. denied,* 88 N.M. 29, 534 P.2d 1084, *cert. denied,* 423 U.S. 832 (1975).

249. 95 N.M. 454, 623 P.2d 574 (Ct. App. 1980).

reasonable doubts[250] is not enough reason to read portions of a deposition out of context, said the court: "Appellant urges us to hold that certain . . . testimony . . . created a genuine issue of fact. . . . We do not have the liberty to so read that testimony because it would require us . . . to select some . . . testimony apart from the whole of those questions and answers. . . ."[251]

VI. DIRECTED VERDICT

In a case tried to a jury, the defendant may test the sufficiency of the plaintiff's evidence at several different stages of the proceeding. Defendant may move for a directed verdict at the close of plaintiff's case,[252] and at the close of all the evidence.[253] Defendant may move for a judgment n.o.v. after a judgment has been entered for the plaintiff.[254] Finally, defendant may assert on appeal that the trial court erred in denying the three motions. The test applied to determine whether to grant any of the motions is the same as for any other,[255] so that one might conclude that it is fruitless to pursue the issue if the first motion is denied.

Two opinions rendered this year demonstrate that it may be worthwhile to make all three motions, even if the first is denied. In *P.V. v. L.W.*,[256] the defendant moved for a directed verdict at the close of the plaintiff's case, but failed to renew the motion at the close of the entire case. Citing earlier New Mexico decisions as precedent,[257] the court of appeals held that the failure of the defendant to renew the directed verdict motion at the close of the entire case precluded him from arguing on appeal that the court erred in denying the motion.

In *Barnes v. Sadler Associates, Inc.*,[258] defendant requested a di-

250. *See, e.g.*, Pharmaseal Laboratories, Inc. v. Goffe, 90 N.M. 753, 756, 568 P.2d 589, 592 (1977).

251. 95 N.M. at 459, 623 P.2d at 579.

252. N.M. R. Civ. P. 50(a).

253. *Id.*

254. N.M. R. Civ. P. 50(b).

255. *See, e.g.*, Montoya v. General Motors Corp., 88 N.M. 583, 544 P.2d 723 (Ct. App. 1975), *cert. denied*, 89 N.M. 5, 546 P.2d 70 (1976) (standard for n.o.v. is same as that for grant of a directed verdict); Scott v. J.C. Penney Co., 67 N.M. 219, 354 P.2d 147 (1960) (appeal court reviews correctness of trial court decision in granting or denying judgment n.o.v.); *compare* Merchant v. Worley, 79 N.M. 771, 449 P.2d 787 (Ct. App. 1969) (standard for directed verdict at close of evidence described), *with* Smith v. Loos, 78 N.M. 339, 431 P.2d 72 (Ct. App.), *cert. denied*, 78 N.M. 337, 431 P.2d 70 (1967) (standard for directed verdict at close of plaintiff's case described).

256. 19 N.M. St. B. Bull. 303 (Ct. App. Apr. 10, 1980).

257. Nally v. Texas-Arizona Motor Freight, Inc., 69 N.M. 491, 368 P.2d 806 (1962); Bondanza v. Matteucci, 59 N.M. 354, 284 P.2d 1024 (1955).

258. 95 N.M. 334, 622 P.2d 239 (1981).

rected verdict at the close of plaintiff's case and at the close of all the evidence. Both requests were denied. A motion for judgment n.o.v. was also denied. On appeal, the defendant finally succeeded. The Supreme Court of New Mexico acknowledged that it would not reverse the trial court unless the jury verdict is "unsupported by substantial evidence,"[259] but concluded that the trial court erred each of the three times that it determined that sufficient evidence was presented. A defendant in a jury trial does not waive his right to offer evidence if his motion for a directed verdict at the close of the plaintiff's case is denied.[260] Therefore, there is no risk involved in making the motion. Nor can defendant be prejudiced by a request for a directed verdict at the close of all the evidence. After *P. V.* and *Barnes,* the motions should be made as a matter of course.

The equivalent procedure in a nonjury trial poses a dilemma for the defendant. The rule applicable in nonjury trials,[261] permits the defendant to move for what amounts to a directed verdict at the close of plaintiff's case.[262] As with jury trials, the rule provides that if the motion is denied, the defendant may present his defense.[263] In *Den-Gar Enterprises v. Romero,*[264] the court held, in contrast to the rule in jury trials, that if the defendant chooses to put on a defense after the motion to dismiss is denied, no appellate review of the trial judge's decision to deny the motion is available. The defendant must choose between two options: "He may stand on his motion and appeal directly from the order of denial . . . or proceed to offer evidence."[265] If he chooses the latter course he waives the right to appeal.[266] The decision is consistent with federal courts' interpretation

259. *Id.* at 335, 622 P.2d at 240.

260. N.M. R. Civ. P. 50(a). The common law rule was to the contrary. *See* Galloway v. United States, 319 U.S. 372 (1943) (Black, J., dissenting).

261. N.M. R. Civ. P. 41(b).

262. In a jury trial, one purpose of the directed verdict is to keep the case from a jury which might be swayed by passion or prejudice from truly determining the facts. Rutherford v. Central Illinois R.R., 278 F.2d 310, 312 (5th Cir.), *cert. denied,* 364 U.S. 922 (1960). In a nonjury case, there is no need to use the directed verdict to serve this purpose. Reflecting this difference, Rule 41(b) does not use the term "directed verdict." Instead, it authorizes the court to grant a judgment for the defendant at the close of the plaintiff's case "on the ground that upon the facts and the law the plaintiff has shown no right to relief." N.M. R. Civ. P. 41(b). This motion serves another purpose. As in jury cases, the grant of the motion at the close of plaintiff's case saves the time and expense incurred if the defendant were obligated to present its complete defense prior to receiving a judgment in its favor. No purpose would be served by the grant of a directed verdict at the close of all the evidence in a nonjury trial, and the rule provides for no such motion in nonjury cases. *Compare* N.M. R. Civ. P. 50(a) (motion for directed verdict) *with* N.M. R. Civ. P. 41(b) (involuntary dismissals).

263. N.M. R. Civ. P. 41(b).

264. 94 N.M. 425, 611 P.2d 1119 (Ct. App. 1980), *cert. denied,* 94 N.M. 628, 614 P.2d 545 (1980).

265. *Id.* at 428, 611 P.2d at 1122.

266. *Id.*

of the same provision of the federal rules,[267] but the rationale for treating the nonjury trial Rule 41(b) motion differently from the jury trial motion for a directed verdict is not readily apparent.

VII. INSTRUCTIONS, FINDINGS OF FACT AND CONCLUSIONS OF LAW

One reason New Mexico adopted uniform jury instructions was to decrease the number of cases reversed on appeal due to improperly worded instructions.[268] There were no important developments on this issue during the Survey year. The infrequency of appellate opinions focusing upon instructions in civil actions demonstrates the success of Uniform Jury Instructions.[269]

It is unfortunate that no one has yet been able to develop uniform findings of fact and conclusions of law in nonjury cases. Issues concerning the proper procedures for formulating findings and conclusions and the sufficiency of the end product continue to arise with great frequency in New Mexico's appellate courts. Though none of the year's decisions breaks new ground, each emphasizes or clarifies important aspects of the procedure for developing findings of fact and conclusions of law.

In a nonjury case, the trial court is obligated to state in writing the facts and legal conclusions which led to the court's decision.[270] The rule anticipates that the parties will participate in the process,[271] but

267. *See* Wealdon Corp. v. Safeway, 482 F.2d 550 (5th Cir. 1973); United States v. Doyle, 468 F.2d 633 (10th Cir. 1972); Smith Petroleum Serv., Inc. v. Monsanto Chemical Co., 420 F.2d 1103 (5th Cir. 1970).

268. N.M. U.J.I. Civ., A New Concept of Jury Instructions, at 7-8 (Repl. Pamp. 1980).

269. Only two cases decided during the Survey year dealt with the adequacy of instructions. In Cervantes v. Skelton, 94 N.M. 402, 611 P.2d 225 (Ct. App. 1980), defendant asserted that the trial court erred in giving an instruction on excessive speed because no evidence had been introduced on the issue at the trial. The court of appeals disagreed, concluding that there was evidence in the record sufficient to permit the instruction to be given. *Id.* at 404, 611 P.2d at 227. In Perea v. Stout, 94 N.M. 595, 613 P.2d 1034 (Ct. App.), *cert. denied,* 94 N.M. 674, 615 P.2d 991 (1980), the plaintiff requested an instruction concerning the duty of jurors to consult with one another. N.M. U.J.I. Civ. 17.9 (now found at N.M. U.J.I. Civ. 19.3). The trial court declined to give the instruction. On appeal, the court pointed out that the "Directions for Use" clearly stated that the instruction need only be given when the court thought it appropriate to do so. The court of appeals would reverse only if the trial court abused its discretion. The court of appeals found no abuse and affirmed the trial court. 94 N.M. at 599, 613 P.2d at 1038.

270. N.M. R. Civ. P. 52(B). Decisions on motions are exempt from the requirement except when a motion to dismiss at the close of plaintiff's case is granted. N.M. R. Civ. P. 52(B)(1). In addition, a party who neither makes a written request for findings and conclusions nor tenders proposed findings and conclusions waives his right to insist that the court render findings and conclusions. N.M. R. Civ. P. 52(B)(1)(f). In the federal courts, requests for findings are not necessary. The court must issue them. *E.g.,* Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 215 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964).

271. N.M. R. Civ. P. 52(B)(1)(h) provides: "The court shall allow counsel in the cause reasonable opportunity to submit requested findings of fact and conclusions of law. . . ."

the findings are the responsibility of the court. These findings should be written and should reflect the reasoning which led to the judge's decision. When the judge orally announces his holding and invites the prevailing party to construct proposed findings and conclusions to support the decision, a perversion of the process is likely to occur.[272] The judge has not demonstrated his own reasoning, but has merely asked the winner to construct a reasoning process consistent with the court's conclusion. The findings and conclusions may reflect the prevailing party's views rather than those of the judge.[273]

When the court adopts verbatim the proposed findings and conclusions of the prevailing party, it is obvious that the rule is not operating as it should.[274] In 1969, the supreme court proclaimed that it would "insist on the exercise of an independent judgment on the part of the trial judge in making his own findings of fact rather than adopting those of one of the parties."[275] A decade later, the supreme court acknowledged that verbatim adoption of proposals is a "practice . . . not to be commended," but concluded that it did not constitute reversible error "so long as the findings adopted are supported by the record."[276] Having legitimatized the practice, the supreme court this year tightened up the review process when a party's proposals have been uncritically accepted.

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272. It is possible, though unlikely, that the court's careful analysis of the proposal submitted by the prevailing party, and the changes made thereto by the judge, demonstrates that the final result reflects the judge's rationale rather than a fictional construction of the court's reasoning. The preferable practice is to reserve decision and to invite both parties to submit proposed findings and conclusions to the court. In this way, the judge is able to use the proposals to inform his judgment in the matter, instead of merely using the findings of the prevailing party to justify a conclusion already reached. C. Wright & A. Miller, Federal Practice and Procedure §2578 (1971); *see, e.g.,* Roberts v. Ross, 344 F.2d 747, 782-83 (3d Cir. 1965); Eli Lilly & Co. v. Generic Drug Sales, Inc., 460 F.2d 1096, 1099 (5th Cir. 1972).

273. In Mora v. Martinez, 80 N.M. 88, 451 P.2d 992 (1969), the supreme court stated that the findings and conclusions must be the result of "the exercise of an independent judgment on the part of the trial judge." *Id.* at 90, 451 P.2d at 994. Such independent judgment serves "as an aid to the appellate court by placing before it the basis of the decision of the trial court; to require care on the part of the trial judge in his consideration and adjudication of the facts; and for the purposes of res judicata and estoppel by judgment." *Id.* at 89-90, 451 P.2d at 995.

274. Judge Frank explained one reason why a judge should go through the process of formulating findings and conclusions independently of the parties and prior to deciding the case:

> For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.

United States v. Forness, 125 F.2d 928, 942 (2d Cir.), *cert. denied,* 316 U.S. 694 (1942).

275. Mora v. Martinez, 80 N.M. 88, 90, 451 P.2d 992, 994 (1969).

276. United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 122, 597 P.2d 290, 307 (1979). Most federal courts agree. United States v. El Paso Gas Co., 376 U.S. 651 (1964); United States v. Crescent Amusement Co., 323 U.S. 173 (1944); Bradley v. Maryland Cas. Co., 382 F.2d 415 (8th Cir. 1967). *But see* Kelson v. United States, 503 F.2d 1291 (10th Cir. 1974).

In *United Nuclear Corp. v. General Atomic Co.*,[277] the General Atomic Company complained that the trial judge adopted almost verbatim the proposed findings of the prevailing party which were to serve as the basis for the judgment rendered as a sanction for bad faith resistance to discovery.[278] The court declined to take the position that verbatim adoption constitutes reversible error. The court, however, did conclude that "[t]he verbatim adoption of proposed findings requires the appellate court to 'view the challenged findings and the record as a whole with a more critical eye to insure that the trial court has adequately performed its judicial function' "[279] Even under this critical scrutiny, the trial court's complete adoption of proposed findings was upheld.

In *Sisneros v. Garcia*,[280] the supreme court suggested that if the findings are supported by the evidence, an appellate court need not reverse merely on the basis of verbatim adoption of proposed findings unless there is some additional "indication of the abdication of judicial responsibility."[281] The court did not elaborate on the nature of the required additional evidence.[282]

Perhaps the press of congested calendars and understaffed courts

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277. 629 P.2d 231 (1980).

278. N.M. R. Civ. P. 37(B)(2) (1978) was the rule applied in formulating and applying the sanction. Both that rule and its current version, N.M. R. Civ. P. 37(B)(2) (Repl. Pamp. 1980), appear to be outside the scope of the requirement that findings of fact and conclusions of law must be made. Rule 52 exempts decisions on any motions from the requirement with one exception, which is not applicable to Rule 37. N.M. R. Civ. P. 52(B)(1).

279. 629 P.2d 231, 280 (1980), quoting with approval from Ramey Constr. Co. v. Apache Tribe, 616 F.2d 464, 467 (10th Cir. 1980). Other courts agree that appellate courts review findings of the court which consist of verbatim adoption of the prevailing party's proposals more carefully. *E.g.*, *In re* Las Cocinas, Inc., 426 F.2d 1005 (1st Cir. 1970); Roberts v. Ross, 344 F.2d 747 (3d Cir. 1965).

The reason for this difference in treatment was well stated by the Fifth Circuit:

> When the findings have been drafted by the trial judge himself, they carry a certain badge of personal analysis and determination that may dissuade an appellate court from reversing in a doubtful case. When that badge is missing, the appellate court can feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered. . . .

Louis Dreyfus & Cie. v. Panama Canal Co., 298 F.2d 733, 736 (5th Cir. 1962).

280. 94 N.M. 552, 613 P.2d 422 (1980).

281. *Id.* at 554, 613 P.2d at 424.

282. The supreme court made an attempt to distinguish two New Mexico cases which reversed the trial court for failure to determine the facts and conclusions independently. *Id.* Little is to be learned from the distinctions drawn:

> In [Mora v. Martinez, 80 N.M. 88, 451 P.2d 992 (1969)], the lower court attempted to adopt by reference a rambling set of findings submitted by the plaintiffs which were so obscure that this Court found the case difficult to review.
>
> In [Pattison Trust v. Bostian, 90 N.M. 54, 559 P.2d 842 (1976), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977)], the trial judge sent a letter to the prevailing party requesting a set of findings for him to sign.

Id.

has compelled the court to take a tolerant view of the practice of verbatim adoption of proposed findings of a party. Unless the exhortation to use a "critical eye" in reviewing such findings is vigorously pursued, verbatim adoptions will continue and the goals furthered by requiring care on the part of the trial judge in the resolution of nonjury decisions will be sacrificed for the sake of expediency.[283]

To preserve the right to appeal from the judge's findings of fact, it is necessary to challenge the proposed finding in the trial court either by submitting proposed findings and conclusions or by objecting in timely fashion to the findings and conclusions proposed by the trial judge.[284] In *Shed Industries, Inc. v. King,*[285] the supreme court held that if this procedure is not followed, the district court's findings and conclusions are binding on the appellate court and not subject to review.[286]

A further problem arises when judges incorporate by reference findings proposed by the party into their decisions. Normally, a judge must separately list and number each finding of fact in his decisions.[287] In *Lieb v. Milne,*[288] the court of appeals overlooked this rule, and approved the trial court's practice of adopting and incorporating by reference into the decision findings contained in the proposals submitted by the parties.[289] Judge Sutin dissented. He asserted that the practice might result in omission of the complete findings from the record on appeal when they were scattered in several documents and not fully set forth in the court's decision.[290]

Another issue concerning the proper procedure for complying with Rule 52 surfaced in *Lieb.* Plaintiffs submitted 117 proposed

283. Rule 52(B)(1)(g) provides a way in which the appellate courts could insist upon independent fact finding by trial courts without the necessity of reversing and remanding for a new trial. The rule authorizes the appellate court to remand the case to the district court "for the making and filing of proper findings of fact and conclusions of law." N.M. R. Civ. P. 52(B)(1)(8). Application of this rule would prevent the necessity of retrials, but it would compel the trial court to engage in independent fact finding, at least when a case is appealed. Where no appeal is filed, the verbatim adoption of findings and conclusions would remain. The lack of appeal would suggest that no harm had occurred.

284. N.M. R. Civ. P. 52(B)(1)(f); *see* State v. Hardy, 78 N.M. 374, 431 P.2d 752 (1967) (effect of rule is to limit scope of attack on appeal). *But see* N.M. R. Civ. App. 11 (authorizing court to review some matters even though not raised below).

285. 94 N.M. 62, 618 P.2d 1226 (1980).

286. *Id. See also* Winrock Enterprises v. House of Fabrics, 91 N.M. 661, 579 P.2d 787 (1978); Wagner Land & Investment Co. v. Halderman, 83 N.M. 628, 495 P.2d 1075 (1972); J. Walden, Civil Procedure in New Mexico § 9-B-2, at 222 (1973).

287. N.M. R. Civ. P. 52(B)(1)(b), (c).

288. 95 N.M. 716, 625 P.2d 1233 (Ct. App. 1980).

289. *Id.* at 720, 625 P.2d at 1237.

290. *Id.* at 721, 625 P.2d at 1240 (Sutin, J., dissenting).

findings of fact.[291] The court rejected all but one of them. Instead, the court made four findings and incorporated some proposed by the defendant. Plaintiffs insisted on appeal that the trial judge had a duty not only to reject plaintiff's proposals, but to make and enter contrary findings in the decision. Judge Andrews, writing for the court of appeals, disagreed. She held that whenever the court rejects a proposed finding of a party who has the burden of proof, the effect of the rejection is deemed to be equivalent to a contrary finding.[292]

Two months later, in *Trigg v. Allemand,*[293] a different panel[294] reached the opposite conclusion. The court concluded that it was improper for the trial judge merely to deny the plaintiff's proposed findings of fact: "The denial of a requested finding cannot amount to a contrary finding where the court fails to find one way or another upon a material fact issue."[295] The latter rule is preferable, for it requires greater consideration of the factual allegations by the trial judge. However, the desire for streamlined decision-making which led the supreme court to tolerate verbatim adoption of proposed findings in *United Nuclear*[296] may justify the practice approved in *Lieb,* particularly where the requested findings are "nothing short of epic" in number and scope.

In New Mexico courts, unlike in the federal courts,[297] the judge's findings of fact are not subject to reversal on appeal if they are supported by substantial evidence.[298] The definition of substantial evidence is well established,[299] and the supreme court this year reaf-

291. Judge Andrews stated that "[t]he requested findings of fact submitted by the plaintiffs were nothing short of epic." *Id.* at 720, 625 P.2d at 1237.

292. *Id.* Support for Judge Andrews' conclusion may be found in DeVilliers v. Balcomb, 79 N.M. 572, 574, 446 P.2d 220, 222 (1963). However, the contrary position also finds support in New Mexico supreme court opinions. *E.g.,* Aguayo v. Village of Chama, 79 N.M. 729, 732, 449 P.2d 331, 334 (1969); Thompson v. H.B. Zachry Co., 75 N.M. 715, 410 P.2d 740 (1966).

293. 95 N.M. 128, 619 P.2d 573 (Ct. App. 1980).

294. In *Trigg,* Judge Sutin wrote the opinion of the court. Judges Walters and Lopez concurred. In *Lieb,* Judge Andrews wrote the opinion of the court. Judge Walters specially concurred and Judge Sutin dissented. For a discussion of difficulties which arise when different panels of the New Mexico Court of Appeals address the same issue, see text accompanying notes 351-372 *infra.*

295. 95 N.M. at 136, 619 P.2d at 581.

296. United Nuclear Corp. v. General Atomic Co., 629 P.2d 231 (1980) (appellate court reviewed findings of fact although they were supported by substantial evidence); *see* text accompanying notes 277-279 *supra.*

297. The difference between the New Mexico and federal tests of the permissible scope of appellate review in nonjury cases is described in J. Walden, Civil Procedure in New Mexico 216-22 (1973).

298. *See, e.g.,* Fox v. Doak, 78 N.M. 743, 438 P.2d 153 (1968).

299. "Substantial evidence" was defined in Tapia v. Panhandle Steel Erectors Co., 78 N.M. 86, 428 P.2d 625 (1967): "Substantial evidence means such evidence as a reasonable mind might accept as adequate to support a conclusion, [citations omitted] and has been defined as

firmed the existing rule.[300] In contrast, when conclusions of law are the subject of an appeal, "the proper mode of review is not whether substantial evidence as to the question was presented—but, whether the trial court correctly applied the law to the facts."[301]

The trial court's conclusion that a determination is factual or legal is not binding on the appellate court. In *Ross v. Ringsby,*[302] the trial court characterized a determination that certain conduct altered the terms of a contract as a finding of fact. The court of appeals disagreed. It labeled the finding a conclusion of law and subjected it to the broader review available when legal conclusions of the trial judge are considered. Lawyers should be aware of this functional distinction between findings of fact and conclusions of law, both when drafting proposed findings for consideration by the trial court and when framing arguments on appeal. Successfully labeling a determination as a finding of fact instead of a conclusion of law decreases the likelihood that the appellate court will reverse the trial judge's decision.

VIII. APPEALS

New Mexico follows the usual rule[303] that the thirty-day requirement for filing a notice of appeal is jurisdictional and that failure to comply within the time prescribed is fatal to the appeal.[304] A rule of appellate procedure permitting the grant of a thirty-day extension of the thirty-day requirement for filing the notice of appeal provides some flexibility to the general rule.[305] The district court may grant an extension if excusable neglect or circumstances beyond the control of the appellant justify relief.[306] Though the rule delegates the decision to the district court, the opinion in *Guess v. Gulf Insurance Co.*[307] demonstrates that appellate courts will ultimately have to decide whether an extension should be granted. In *Guess,* plaintiff's com-

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evidence of substance which establishes facts from which reasonable inferences may be drawn." *Id.* at 89, 428 P.2d at 628.

300. *In re* Hooker, 94 N.M. 798, 617 P.2d 1313 (1980).

301. Ross v. Ringsby, 94 N.M. 614, 616, 614 P.2d 26, 28 (Ct. App. 1980).

302. *Id.*

303. *See, e.g.,* P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System at 1593 (2d ed. 1973).

304. *E.g.,* Miller v. Doe, 70 N.M. 432, 374 P.2d 305 (1962); Chavez v. Village of Cimarron, 65 N.M. 141, 333 P.2d 882 (1958).

305. N.M. R. Civ. App. 3(a) states the general rule that appeals must be taken within thirty days after entry of judgment or a decision appealed. N.M. R. Civ. App. 4(a) requires that the notice of appeal be filed within the time limit. N.M. R. Civ. App. 3(f) authorizes a thirty-day extension.

306. N.M. R. Civ. App. 3(f).

307. 94 N.M. 139, 607 P.2d 1157 (1980).

plaint was dismissed by order entered on August 31. Because of a series of misadventures,[308] newly substituted counsel for plaintiff did not receive notice of entry of the order until mid-October, when the time for filing an appeal had expired. Counsel for plaintiff immediately filed a motion with the district court seeking an extension of time. On October 30, while the motion for an extension was pending before the trial court, counsel for plaintiff filed a notice of appeal.[309] The trial court denied the motion for an extension. Plaintiff's attorney appealed the decision.

The supreme court reversed the decision of the trial court. The court insisted that the extension provision "should be strictly construed so as to prevent the progressive erosion of the rule to the point that attorneys will assume that they have sixty days within which to file notices of appeal."[310] Nonetheless, it found that unique circumstances beyond "[m]ere failure to receive notice alone, work overload of attorneys, [or] palpable error of counsel" mandated that the extension be granted.[311] The court acknowledged that the "seriousness of the case" is a legitimate element for consideration and may tilt the balance against a strict interpretation of the rule.[312]

The supreme court in *Guess* signaled its desire that the grant of power to extend the time for appeal be strictly construed. By authorizing consideration of the plight of the party seeking to appeal, however, the court may have opened the door for a very liberal interpretation. In every case in which an extension is granted[313] or denied by the trial court, the appellate court will now have to consider the issue of whether the district court should have granted an extension.

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308. *Id.* at 140-41, 607 P.2d at 1158-59.

309. Plaintiff's attorney wisely filed a notice of appeal prior to receiving permission to do so. Rule 3(f) limits the power of the district court to grant an extension to an additional 30 days from the date by which the notice of appeal must be filed. If the district court did not rule on the motion until more than sixty days after the judgment was rendered, it would lack authority to permit a subsequent filing of a notice of appeal. To overcome this problem, counsel should follow the practice adopted here: file the motion for extension together with a "protective" notice of appeal within 60 days after entry of the judgment. If the court grants the motion, the pre-filed notice of appeal becomes valid and is deemed to have been timely filed.

310. 94 N.M. at 142-43, 607 P.2d at 1160-61.

311. *Id.* at 143, 607 P.2d at 1161.

312. The court stated:

> [W]e cannot under the circumstances ignore the position of [plaintiff], the real party in interest, in this scenario. His complaint involves the death of his wife and two children. The seriousness of the case is one of the many elements for consideration in determining whether the conduct of an attorney might be considered excusable.

Id.

313. *E.g.*, White v. Singleton, 88 N.M. 262, 539 P.2d 1024 (Ct. App. 1975) (appellate court reviewed propriety of grant of extension by district court judge).

Because the appeal courts will ultimately decide the issue, perhaps it would be appropriate to amend the rule to require the motion to be addressed to the appellate court in the first instance.[314]

The supreme court exhibited a similar liberality in construing the jurisdictional requirements for taking an appeal in *Butcher v. City of Albuquerque*.[315] Butcher sought review of a decision of a local zoning authority. The controlling statute authorizes appeal by writ of certiorari and provides that "[t]he petition shall be presented to the court within thirty days"[316] after the decision. Butcher filed the petition for certiorari within the required time, but failed to present the petition to the district court judge for over nine months. The supreme court held that jurisdiction vested in the district court when the petition was filed, and that the delay in presenting it to the court did not affect the court's jurisdiction.[317]

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314. If the appellate court is likely to be asked to review each decision of the trial judge, it may be more efficient to bypass the district court judge altogether and let the appellate court make the initial decision. One way to discourage automatic appeals of the denial of an extension is to limit the scope of appellate review of the district judge's decision. Though the supreme court did not articulate a narrow or limited standard in *Guess* and seemed to be making a de novo decision, there is support in case precedent for the application of a standard of limited review. White v. Singleton, 88 N.M. 262, 264, 539 P.2d 1024, 1026 (Ct. App. 1975) ("bound to presume the correctness of the proceedings in the trial court in the absence of any indication [of irregularity]").

315. 95 N.M. 242, 620 P.2d 1267 (1980). For a discussion of this case in the Administrative Law context, *see* Browde, *Administrative Law*, 12 N.M. L Rev. 1 (1982).

316. N.M. Stat. Ann. §3-21-9(A) (1978).

317. 95 N.M. at 244, 620 P.2d at 1269. The court determined that the statutory language foreclosed any other result. The decision also evinced concern that if presentation to a judge within the time limit was required, the petitioner's right to review would be "dependent upon the availability of a judge on the final day of the statutory period." *Id.*

The decision is consistent with New Mexico precedent that had focused on the act of filing as the jurisdictional requirement, though not in the context of a delayed presentment of the writ to the judge. *See* Bolin v. City of Portales, 89 N.M. 192, 548 P.2d 1210 (1976); Serna v. Board of County Comm'rs, 88 N.M. 282, 540 P.2d 212 (1975). *See contra* Ballman v. Duffecy, 230 Ind. 220, 102 N.E.2d 646 (1952).

Unreasonable delay in presenting the petition may give rise to the defense of laches, however. 95 N.M. at 245, 620 P.2d at 1270; *see* Johnson v. Standard Mining Co., 248 U.S. 360 (1893). The district court concluded that the petition was barred by laches. The supreme court reversed, concluding that because the respondents had actual knowledge that the petition had been filed and were unable to demonstrate that any prejudice resulted from the delay, the defense of laches had not been established. The court reaffirmed the elements required to establish laches which it had first set out in Morris v. Ross, 58 N.M. 379, 381, 271 P.2d 823, 824 (1954), and has consistently applied. *E.g.*, Baker v. Benedict, 92 N.M. 283, 587 P.2d 430 (1978); Cave v. Cave, 81 N.M. 797, 474 P.2d 480 (1970).

> The necessary elements of laches are: (1) the defendant's invasion of plaintiff's rights; (2) a delay in asserting plaintiff's rights, after having had notice and an opportunity to institute a suit; (3) lack of knowledge in the defendant that the plaintiff would assert his rights, and (4) injury or prejudice to the defendant in event relief is accorded to the plaintiff or suit is not held to be barred. [Citations omitted.]

Butcher v. City of Albuquerque, 95 N.M. at 244, 620 P.2d at 1270.

The supreme court in *Butcher,* as in *Guess,* acted to minimize the likelihood that appeals will be dismissed because of non-waivable jurisdictional requirements. Unfortunately, the court exhibited the opposite tendency in *Town of Hurley v. New Mexico Municipal Boundary Commission.*[318] A statute authorizes district court review of decisions of municipal boundary commissions if review is sought within thirty days of the filing of certified copies of the order in the office of the clerk.[319] In *Town of Hurley,* appeal was sought within thirty days of the recordation of the order, but more than thirty days after the order had been received in the clerk's office, placed in a folder and stored in a file cabinet.[320] The supreme court determined that the time for appeal began when the order was received and filed, not when it was recorded; therefore, the notice of appeal was untimely and the district court correctly dismissed the appeal.[321]

The court suggested that if a party has actual notice of the execution of the order, errors in the manner in which the order is filed or recorded are irrelevant. Under these circumstances, the time for appeal runs from the date of actual notice of the execution of the appealable order.[322] Introduction of the actual notice rule into this

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318. 94 N.M. 606, 614 P.2d 18 (1980). For an analysis of this case as it affects administrative power, *see* Browde, *Administrative Law,* 12 N.M. L. Rev. 1 (1982).

319. N.M. Stat. Ann. §3-7-15(E) (Repl. Pamp. 1981). In *Town of Hurley,* the document recorded was "a machine copy of a certified copy of the order." 94 N.M. at 607, 614 P.2d at 19. Appellant claimed that this was not a certified copy and therefore failed to fulfill the statutory requirement. The court held that the duplicated copy of the certified document would suffice. *Id.*

320. The clerk received the copy of the order in the mail on December 21. It was placed in a file folder and filed. Not until January 2 was the copy of the order recorded in the record books of the county. 94 N.M. at 607, 614 P.2d at 19.

321. The supreme court emphasized that the legislature chose the word "filed" rather than "recorded" when it drafted the statute. 94 N.M. at 608, 614 P.2d at 20. The court had stated in an early decision that "[t]he most accurate definition of filing a paper is that it is its delivery to the proper officer, to be kept on file." Gallagher v. Linwood, 30 N.M. 211, 217-18, 231 P. 627, 629 (1924). In a demonstration of great deference to legislative will, the court concluded that "to read a recordation requirement into the law governing the case at bar indulges in an impermissible inference, never intended by the Legislature." 94 N.M. at 608, 619 P.2d at 20.

322. 94 N.M. at 609, 619 P.2d at 21. The town of Hurley was both the keeper of the records and the appellant in this case. It may be that the court intended only to hold that where the governmental unit receives notice by delivery of a document to its clerk, notice is imputed to the municipality itself. *See* 94 N.M. at 609, 614 P.2d at 21. The supreme court went further, however, and purported to resolve the question "never squarely decided in New Mexico" in favor of the conclusion that "generally where there is actual notice, constructive notice is unnecessary." *Id.*

The decision could be far-reaching. Rule 3 of the Rules of Appellate Procedure provides that notice of appeal must be filed within thirty days "after entry of" a judgment. N.M. R. Civ. App. 3(a). If *Town of Hurley* is not confined to its unique factual setting and the specific statute at issue there, the time for appeal under Rule 3 may begin to run when a party knows that the judgment has been signed even if it has not yet been "entered."

jurisdictional arena is unwise. It undermines the goal of establishing a fixed and easily ascertainable event from which the time for appeal runs. More important, such a rule invites litigation and would require extensive fact finding hearings, which would increase the burdens on the appellate courts[323] without advancing the resolution of any issues on the merits.

Broadly read, *Town of Hurley* would increase litigation about collateral issues and result in the expenditure of time and money to prevent, rather than foster, decisions rendered on the merits. *Guess* and *Butcher* invite additional litigation too, but for a better cause—to increase the court's power to determine appeals on the merits, while preserving the discretion to prevent abuse of the power to grant extensions of time in which to appeal.

The jurisdictional trap claimed another victim in *Seaboard Fire & Marine Insurance Co. v. Kurth.*[324] Higgins and his subrogated insurance carrier filed suit against Kurth for damages arising out of an automobile accident. Higgins' claims against the defendant were dismissed pursuant to an order entered on September 7, 1978. Higgins did not then file a notice of appeal, but waited until after a final judgment was rendered against the insurance carrier in March of 1979. The court of appeals ruled that it lacked jurisdiction to hear the merits of Higgins' appeal. Rule 54(b)(2) provides that in multiple-party cases, if all issues relating to one party are resolved prior to the termination of the litigation, the court may issue a judgment as to the party whose controversy has been resolved and "[s]uch judgment shall be a final one unless the court, in its discretion, expressly provides otherwise . . . in the judgment."[325] Because the order[326] dismissing Higgins' claims failed to state that it was not to be deemed final, the time for appeal ran from its entry and not from the time of the disposition of the entire case.

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323. If actual notice of execution of the judgment or order starts the time for appeal, then appellees may often assert that the notice of appeal was not timely filed and the appellate court lacked jurisdiction. A fact-finding hearing or at least a battle of affidavits would be required to resolve the issue in the appellate court.

324. 19 N.M. St. B. Bull. 848 (Ct. App. Sep. 11, 1980), *cert. quashed,* 95 N.M. 426, 622 P.2d 1046 (1981).

325. N.M. R. Civ. P. 54(b)(2). The federal rule is different. It provides that a judgment resolving all issues as to one party is final "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b).

326. Throughout the *Kurth* opinion, the court of appeals refers only to the *order* of dismissal, and never the *judgment.* Rule 54(a) includes within the definition of a judgment "any order from which an appeal lies." N.M. R. Civ. P. 54(a). Thus, once the order of dismissal of Kurth's claims was filed in the clerk's office, *see* N.M. R. Civ. P. 58, the time for Kurth to appeal began to run, in accordance with the terms of Rule 54(b)(2).

A procedural device which might assist a party who has failed to comply with the jurisdictional requirement for an appeal is the motion to reopen a judgment pursuant to Rule 60(b). *James v. Brumlop*[327] illustrates the manner in which a sympathetic court can permit the use of the Rule 60 motion to avoid the jurisdictional requirements for appeal. James suffered a summary judgment because she failed to respond to Brumlop's motion for summary judgment within the required time limit. For unexplained reasons, James did not learn of the entry of judgment until several months after the time for filing a notice of appeal had lapsed. James filed a motion to reopen the judgment pursuant to Rule 60(b).[328] When the trial court denied the motion, James appealed. Treating the appeal as one from the denial of the Rule 60(b) request,[329] the court of appeals determined that it had jurisdiction only to decide if the trial judge abused his discretion in declining to reopen the judgment.[330] In fact, however, review of the denial of a Rule 60(b) motion often involves the question of the correctness of the original judgment.[331] This case was no exception. The court of appeals accepted the invitation to review the entry of the original judgment through the prism of the trial court's denial of the motion to reopen and reversed the trial court. The court was fully cognizant of the actual scope of its review. It did not even purport to reverse the Rule 60 decision and remand for further consideration, but directly ordered the district court judge to withdraw the summary judgment and to proceed to reconsider the summary judgment motion. Judge Sutin dissented and argued that the effect of the decision was to permit the use of rule 60(b) impermissibly to extend the time for taking of an appeal.[332] Judge Sutin is

327. 94 N.M. 291, 609 P.2d 1247 (Ct. App. 1980), *cert. denied,* 94 N.M. 674, 615 P.2d 991 (1980).

328. Rule 60 separately lists six grounds for reopening a judgment. N.M. R. Civ. P. 60(b). The opinion of the court of appeals in *James* does not specify which ground for relief was asserted.

329. 94 N.M. at 293, 609 P.2d at 1250. Appellate Procedure Rules permit an aggrieved party to appeal within thirty days of the entry of "any final order after entry of judgment which affects substantial rights." N.M. R. Civ. App. 3(a)(3).

330. The court conceded that it could not directly review the district court's grant of summary judgment: "An appeal from the denial of a Rule 60(b) motion cannot review the propriety of the judgment sought to be reopened; the trial court can be reversed only if it is found to have abused its discretion in refusing to grant the motion." 94 N.M. at 294, 609 P.2d at 1251.

331. For example, when a default judgment is sought to be opened pursuant to Rule 60(b), the party seeking to reopen the judgment must demonstrate that it has a valid defense, and the court must necessarily determine whether the original judgment should remain in light of the defense offered. *See, e.g.,* Gengler v. Phelps, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976). Where the ground for reopening the judgment is newly discovered evidence, the judge must determine if the new evidence is sufficiently important that it would probably change the result reached in the first trial. *E.g.,* Hill v. Burnworth, 85 N.M. 615, 514 P.2d 1312 (Ct. App. 1973).

332. 94 N.M. at 295, 609 P.2d at 1252 (Sutin, J., dissenting).

correct, if one accepts as he does the view "that timely filing is a jurisdictional requirement" which precludes consideration of broader principles of fairness.[333] Nonetheless, *James* demonstrates that the creative use of Rule 60(b) is one way for a party to obtain appellate review of a judgment despite his failure to file a timely notice of appeal.

Issues not properly raised, briefed and argued on appeal are waived.[334] After the Supreme Court of the United States remanded a case to the New Mexico Court of Appeals for reconsideration, the court of appeals invoked this rule to bar consideration of issues not raised when the case was originally appealed. *Tiffany Construction Co. v. Bureau of Revenue*[335] involved a challenge to the state's taxing power over contractors doing business on Indian land. The district court ruled in favor of the state and the contractor appealed. The contractor argued that state taxation would violate its due process rights, but did not assert that the doctrines of federal preemption[336] or the policy of noninfringement of the Indian right to self-government[337] were involved. Tiffany filed a petition for certiorari with the United States Supreme Court, seeking review of the ruling by the New Mexico Court of Appeals.[338] The United States Supreme Court remanded the case to the court of appeals and ordered it to reconsider its decision in light of two recently decided Supreme Court opinions,[339] which were based upon the doctrine of federal preemption. The court of appeals never reached the preemption issue because the issue had not been presented to it by Tiffany in the first appeal. Instead, the court merely cited the "well settled" rule that "any errors claimed must be specifically briefed and argued" and reinstated its prior decision.[340]

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333. *Id.*

334. *E.g.*, Alfred v. Anderson, 86 N.M. 227, 522 P.2d 79 (1974); Petritsis v. Simpier, 82 N.M. 4, 474 P.2d 490 (1970); Irwin v. Lamar, 74 N.M. 811, 399 P.2d 400 (1964). Jurisdictional issues, however, may be raised at any time. *See, e.g.*, Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967).

335. 19 N.M. St. B. Bull. 918 (Ct. App., Oct. 2, 1980); *see* Hughes, *Indian Law*, 12 N.M. L. Rev. 409 (1982), for a discussion of this case from another viewpoint.

336. *See* Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

337. *See* Williams v. Lee, 358 U.S. 217 (1959).

338. *See* 93 N.M. 593, 603 P.2d 332 (Ct. App. 1979), *cert. denied*, 94 N.M. 629, 614 P.2d 546 (1980).

339. White Mountain Apache Tribe v. Bracker, 48 U.S.L.W. 4897 (1980); Central Mach. Co. v. Arizona State Tax Comm'n, 48 U.S.L.W. 4904 (1980).

340. 19 N.M. St. B. Bull. at 918. The court of appeals' reliance upon the procedural rule to bar consideration of the question may be sufficient to isolate the case from subsequent review by the United States Supreme Court under the "adequate state grounds" rule. *E.g.*, Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); *see generally* C. Wright, Law of Federal Courts § 107, at 535-45 (3d ed. 1976).

One decision handed down during the Survey year concerned a question of competing jurisdiction between the appellate and district courts. In New Mexico as elsewhere, after a judgment has been rendered, the district court has jurisdiction to entertain a timely motion for new trial,[341] or judgment n.o.v.[342] The district court may also open a judgment to correct clerical errors,[343] or when justice so requires.[344] New Mexico also authorizes the trial court to modify its judgments for a period of thirty days after entry.[345] In *North v. Public Service Co.*,[346] the court of appeals addressed the question of the district court's power to exercise this unusual post-judgment jurisdiction once an appeal has been taken. The court of appeals ruled that the district court has only limited power: "When an appeal has been taken, the trial court loses jurisdiction except for the purpose of perfecting the appeal . . . or passing upon a pending motion directed to the judgment."[347] This holding is too broadly stated. It would prohibit the trial court from entertaining timely post-trial motions for a new trial or judgment n.o.v. when one party files a notice of appeal prior to the filing of the post-trial motion. This is an invitation to tactical gamesmanship which serves no valid procedural objective.[348] It would be preferable to permit the district court to hear post-trial motions for new trial or judgment n.o.v. whenever

341. N.M. R. Civ. P. 59.

342. N.M. R. Civ. P. 50(b).

343. N.M. R. Civ. P. 60(a).

344. N.M. R. Civ. P. 60(b).

345. N.M. Stat. Ann. § 39-1-1 (1978). The history and purpose of the statute are detailed in Fairchild v. United Serv. Corp., 52 N.M. 289, 197 P.2d 875 (1948). *See also* Laffoon v. Galles Motor Co., 80 N.M. 1, 450 P.2d 439 (Ct. App. 1969).

346. 94 N.M. 246, 608 P.2d 1128 (Ct. App.), *cert. denied,* 94 N.M. 629, 614 P.2d 546 (1980).

347. *Id.* at 247, 608 P.2d at 1129; *see* Wagner Land & Inv. Co. v. Halderman, 83 N.M. 628, 495 P.2d 1075 (1972); Ledbetter v. Lanham Constr. Co., 76 N.M. 132, 412 P.2d 559 (1966); Mirabal v. Robert E. McKee, Gen. Contractor, Inc., 74 N.M. 455, 394 P.2d 851 (1964).

There is language in the opinions stating that the statute is applicable only in nonjury cases. State v. Clemmons, 83 N.M. 674, 675, 496 P.2d 167, 168 (Ct. App. 1972); Scofield v. J.W. Jones Constr. Co., 64 N.M. 319, 324, 328 P.2d 389, 394 (1958). The language of the statute does not clearly articulate the limitation, and the rationale for limiting the statute to nonjury cases does not have current significance. *See, e.g.,* Fairchild v. United Serv. Corp., 52 N.M. 289, 197 P.2d 875 (1948) (jury trials were confined to specific terms while nonjury trials were not).

348. Motions for a new trial or judgment n.o.v. may be brought within ten days after the entry of judgment. N.M. R. Civ. P. 50(b), 59(b). Notice of appeal may be filed immediately upon the entry of the judgment. *See* N.M. R. Civ. App. 4(a); King v. McElroy, 37 N.M. 238, 21 P.2d 80 (1933).

Under *North,* filing of a notice of appeal may forestall opposing parties' motions for new trial or judgment n.o.v. Normally, however, the party who seeks a new trial or judgment n.o.v. is the same party who would wish to appeal. Thus, it will not often happen that one party would file a notice of appeal immediately upon the entry of judgment in order to prevent the trial court from entertaining post-trial motions. The possibility of foreclosing one avenue of relief may be sufficient incentive to file a notice of appeal in some cases, however.

Rule 60(a) motions, which authorize the district court to correct clerical errors "at any

the motions are timely made, even if a notice of appeal has been filed in the interim.[349] With this exception, the decision is sound, though it may prove a bit cumbersome. For example, if grounds for a Rule 60 motion become apparent while a case is on appeal, it will be necessary, under *North,* to get permission from the appellate court before presenting a motion to the district court.[350]

The *North* decision illustrates a serious and growing problem which affects the appellate process in the New Mexico Court of Appeals. The opinion of the court in *North* was written by Judge Sutin, with Judge Walters specially concurring in a separate opinion, and Judge Hernandez dissenting. The number of court of appeals decisions in which the opinion of the court does not receive the endorsement of two judges is increasing.[351] Though decisions in which a

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time," would not be forestalled in any case. N.M. R. Civ. P. 60(a). Presumably, Rule 60(a) modifications are permitted while a case is pending on appeal.

349. In Fairchild v. United Serv. Corp., 52 N.M. 289, 197 P.2d 875 (1948), the supreme court permitted the trial court to hear post-trial motions filed after an appeal had been taken. In *Fairchild,* the plaintiff suffered a summary judgment. He filed a motion for permission to appeal, which was granted. He then sought post-trial relief from the trial court and appealed when the district court denied relief.

The supreme court held that the district court could hear the post-judgment motion after permission to appeal had been granted. The decision rested upon the fact that the method for appeal was to seek permission from the district court to do so. Despite the fact that appeals are taken today by filing a notice of appeal rather than by obtaining permission of the court, *Fairchild* should be followed. Timely motions for post-judgment relief should be heard even if an appeal has already been taken. *Contra,* Earle v. United States, 152 F. Supp. 554 (E.D.N.Y. 1957).

350. *See* 7 J. Moore, Federal Practice ¶60.30[2], at 419 (1979).

351. *E.g,* Barngrover v. Barngrover, 95 N.M. 42, 618 P.2d 386 (Ct. App. 1980) (Hernandez, J.; Sutin, J., & Walters, J., specially concurring); Black v. Bernalillo County Valuation Protests Bd., 95 N.M. 136, 619 P.2d 581 (Ct. App. 1980) (Sutin, J.; Hernandez, J., concurring in result; Walters, J., dissenting in part & concurring in part); Cervantes v. Skelton, 94 N.M. 402, 611 P.2d 225 (Ct. App. 1980) (Sutin, J.; Hernandez, J., concurring in result; Andrews, J., specially concurring in a separate opinion); Davis v. New Mexico State Bureau of Revenue, 95 N.M. 218, 620 P.2d 376 (Ct. App. 1980) (Sutin, J.; Wood, C.J., & Andrews, J., specially concurring in a single separate opinion); Gallegos v. Los Lunas Consol. Schools Bd. of Educ., 95 N.M. 160, 619 P.2d 836 (Ct. App.), *cert. quashed,* 95 N.M. 299, 621 P.2d 516 (1980) (Andrews, J.; Sutin, J., specially concurring; Wood, C.J., dissenting); Garcia v. Albuquerque Public Schools Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980), *cert. denied,* 95 N.M. 426, 622 P.2d 1046 (1981) (Lopez, J.; Sutin, J., specially concurring; Walters, J., dissenting); Gas Co. of N.M. v. O'Cheskey, 94 N.M. 630, 614 P.2d 547 (Ct. App. 1980) (Sutin, J.; Wood, C.J., & Hernandez, J., specially concurring in a single, separate opinion); Kerr-McGee Nuclear Corp. v. Property Tax Div., 95 N.M. 685, 625 P.2d 1202 (Ct. App.), *cert. denied,* 94 N.M. 674, 615 P.2d 991 (1980) (Hernandez, J.; Hendley, J., & Andrews, J., concurring in part, dissenting in part in a single, separate opinion); Perea v. Gorby, 94 N.M. 325, 610 P.2d 212 (Ct. App. 1980) (Sutin, J.; Hernandez, J., concurring in result; Lopez, J., specially concurring in a separate opinion); Richard v. Upjohn Co., 95 N.M. 675, 625 P.2d 1192 (Ct. App.), *cert. denied,* 94 N.M. 675, 615 P.2d 992 (1980) (Lopez, J.; Sutin, J., & Andrews, J., specially concurring in separate opinions); Rickerson v. State, 94 N.M. 473, 612 P.2d 703 (Ct. App.), *cert. denied,* 94 N.M. 675, 615 P.2d 992 (1980) (Walters, J.; Sutin, J., specially concurring in separate opinion; Hernandez, J., dissenting); State v. Montano, 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980) (Lopez, J.; Hendley, J., concurring in result; Andrews, J., concurring in part and dissenting in part).

judge specially concurs or concurs in the result of an opinion authored by another judge satisfy the constitutional requirement that "a majority of those participating must concur in any judgment of the court,"[352] the rash of "1 + 1/1" opinions[353] has seriously undermined the precedential value of court of appeals' opinions, causing confusion among New Mexico attorneys and lower court judiciary who are obligated to interpret and apply the law. The case of *Silva v. City of Albuquerque*[354] is typical. After the district court granted a summary judgment in favor of the defendant, plaintiff appealed to the court of appeals, relying primarily upon the precedent of another decision[355] rendered months earlier by the court of appeals. The precedent received little deference:

> [The] opinion with which one judge of this court concurred in the result and another judge dissented . . . is not an opinion expressing the views of a majority of this court as now constituted; and, because one of the participating judges concurred only in the result reached, we may reasonably conclude that the rationale of the opinion does not even express the view of a majority of the panel which considered that case.[356]

The statement is troublesome. The opinion suggests that where the membership of a subsequent panel varies from that of an earlier panel, the second bench may disregard the decision reached by the first court. That is bad policy. Particularly where, as in the New Mexico court of appeals, the court is forbidden to sit *en banc,*[357] the precedential value of an appellate opinion should not be made to turn upon the composition of a panel which is randomly brought together to hear the question.[358] No lawyer can intelligently advise a

352. N.M. Const. art. 6, §28.

353. Though the problem is most clearly perceived where one judge concurs only in the result reached by the court and another judge dissents, several other variations arise. *See* note 351 *supra.* Whenever two judges do not join in the opinion of the court, the precedential value of the decision is diminished.

354. 94 N.M. 332, 610 P.2d 219 (Ct. App. 1980).

355. Strickland v. Roosevelt Co. Rural Elec. Coop., 94 N.M. 459, 612 P.2d 689 (Ct. App. 1980).

356. 94 N.M. at 333, 610 P.2d at 220. As an alternative rationale, the court in *Silva* distinguished *Strickland,* claiming that *Strickland* had no application in cases decided by summary judgment. *Id.*

357. A statute mandates that "not more than three judges shall sit in any matter on appeal" in the court of appeals. N.M. Stat. Ann. §34-5-11 (Repl. Pamp. 1981).

358. The federal courts have stated the policies supporting the use of decisions of particular panels as precedent for the whole court:

> [I]n a multi-judge Court it is most essential that it acquire an institutional stability by which the immediate litigants of any given case, and equally the bar who must advise clients or litigants in situations yet to come, will know that in the absence of most compelling circumstances, the decision on identical questions,

client based upon a precedent so subject to whim. No lower court judge should be forced to base a ruling on such an ephemeral precedent.

Another aspect of the argument in *Silva* is almost as troubling. An opinion not concurred in by another judge lacks precedential value.[359] One would hope that this would lead the court of appeals judges to reconsider their unwillingness to join in the opinions of their fellow judges and to strive for more consensus. If they do not, the judicial chaos which is exemplified by *Casias v. Zia Co.*[360] may represent the wave of the future rather than an indication of the court of appeals' temporary loss of direction. When *Casias* was first decided by the court of appeals,[361] Judge Walters wrote an opinion affirming the decision of the trial court that disability payments should be based upon rates in effect at the time the disability is manifested rather than those in effect at the time of the accident. In her opinion, Judge Walters also stated that benefits were to be reviewed periodically and could be revised thereafter based upon changing circumstances.[362] Judge Sutin concurred in the result. He wrote a separate opinion which did not refer to the issue of periodic review of benefits.[363] In a short opinion, Judge Hendley concurred in the result "and particularly . . . in the holding" that the date of disability, not the date of accident, controlled.[364]

After the supreme court denied certiorari,[365] the trial court entered judgment on the mandate of the court of appeals,[366] without conducting the review of the benefit scale which Judge Walters authorized in her opinion. The plaintiff appealed to the court of appeals. A different panel, consisting of Judges Wood, Hernandez and Hendley, affirmed the trial court's decision to ignore the portion of Judge

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once made, will not be re-examined and redecided merely because of a change in the composition of the Court or of the new panel hearing the case.

Lincoln Nat'l Life Ins. Co. v. Roosth, 306 F.2d 110, 114 (5th Cir. 1962).

It must be conceded that the possibility of inconsistent opinions by different panels of the court of appeals was foreseen. Section 34-5-14 provides that when a decision of the court of appeals is in conflict with another court of appeals opinion, the supreme court can review by writ of certiorari. N.M. Stat. Ann. §34-5-14(B)(2) (Repl. Pamp. 1981).

359. Primus v. Clark, 58 N.M. 588, 594-95, 273 P.2d 963, 968 (1954).

360. 94 N.M. 723, 616 P.2d 436 (Ct. App. 1980).

361. 93 N.M. 78, 596 P.2d 521 (Ct. App. 1979).

362. *Id.* at 81-82, 596 P.2d at 523-24.

363. *Id.* at 83, 596 P.2d at 525.

364. *Id.*

365. 93 N.M. 8, 595 P.2d 1203 (1979).

366. A mandate is the "[o]fficial mode of communicating judgment of appellate court to lower court, directing action to be taken or disposition to be made of cause by trial court." Black's Law Dictionary 867 (5th ed. 1981). Mandate practice is set forth in N.M. R. Civ. App. 20.

Walters' opinion which authorized periodic adjustment of benefits. Writing for a unanimous court, Judge Wood conceded that the trial court did not comply with the opinion of Judge Walters, but framed the relevant inquiry as whether the district court judge "complied with the mandate and opinion of the Court of Appeals."[367] Judge Wood found that the trial judge did comply:

> The only result concurred in by at least two judges was that benefits were to be calculated when disability began; that was the only decision of the Court. Judge Walters' opinion concerning escalating benefits not being concurred in by another judge, her view concerning escalating benefits was not a decision of the Court of Appeals.[368]

There is precedent for the proposition that the reasoning expressed in an opinion is not binding when the other judges on the panel concur only in the result.[369] Judge Walters herself adhered to this position in her opinion in *Silva*.[370] Nonetheless, the practice is harmful to the proper development of the law. The court of appeals itself has now ruled that "1 + 1/1" opinions have no precedential value apart from their holdings. Yet the court regularly renders such opinions. The court of appeals is charged with primary responsibility for determining important subject areas of the law.[371] By failing to create binding precedents and by declining to honor its own prior opinions, the court of appeals fails to fulfill one of its functions.

One solution to this burgeoning problem is for the supreme court to accept certiorari as a matter of course to review these split opinions.[372] It is unlikely that the court could do so, however, given its already heavy case load. A reconsideration by the court of appeals of its role and responsibilities would be far preferable.

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367. 94 N.M. at 725, 616 P.2d at 438.

368. *Id.*

369. *See* Primus v. Clark, 58 N.M. 588, 594-95, 273 P.2d 963, 969 (1954).

370. Silva v. City of Albuquerque, 94 N.M. 332, 610 P.2d 219 (Ct. App. 1980).

371. The court of appeals hears appeals in almost all criminal cases, all tort and workmen's compensation cases, and most reviews of administrative agency determinations. N.M. Stat. Ann. §34-5-8 (Repl. Pamp. 1981).

372. N.M. Stat. Ann. §34-5-14(B) (Repl. Pamp. 1981). In addition to the supreme court's power to take cases by certiorari, the court of appeals is authorized to certify cases pending in the court of appeals to the supreme court if the case involves a matter of substantial public interest "that should be determined by the supreme court." N.M. Stat. Ann. §34-5-14(C)(2) (Repl. Pamp. 1981). As an interim solution to the problem, the court of appeals may wish to consider certifying cases to the supreme court when no judge on the court of appeals panel is willing to concur in the opinion of the court.

IX. REOPENING JUDGMENTS

Rule 60(b) authorizes the district court to reopen judgments upon proof that one of six listed grounds is present.[373] The motion must be presented within one year after entry of the judgment[374] or within a reasonable time,[375] depending on which ground is presented as a basis for reopening. Rule 60(b) seeks to balance competing values. One goal is to ensure that justice was done in a particular case. The other is to ensure that finality will at some stage attach to judgments. The tension between these competing policies is reflected in the reported opinions. Sometimes Rule 60 is construed strictly in order to ensure finality. At other times the courts, influenced by proof of injustice done, interpret the rule liberally and reopen the judgment.

New Mexico courts have been sympathetic to a party who failed through some error to obtain any hearing at all in the initial proceeding.[376] In *Dean Witter Reynolds, Inc. v. Roven,*[377] the supreme court again demonstrated that it gives special protection to those who suffer default judgments. Defendants alleged that plaintiff assured them that there was no need to file an answer to the complaint so long as settlement negotiations continued between the parties. Contrary to the agreement, plaintiff obtained a default judgment without notice to the defendants.[378] Defendants' motion to reopen the judgment on the ground of excusable neglect[379] was filed three

373. N.M. R. Civ. P. 60(b).

374. The one-year requirement applies to motions based on (1) mistakes, inadvertence, surprise or excusable neglect; (2) newly discovered evidence; or (3) fraud. N.M. R. Civ. P. 60(b)(1), (2), (3).

375. The motion may be made within a "reasonable time" if the motion is grounded on (1) void judgment; (2) satisfied, released or discharged judgment; or (3) any other reason justifying relief from the operation of the judgment. N.M. R. Civ. P. 60(b)(4), (5), (6).

376. *E.g.,* Springer Corp. v. Herrera, 85 N.M. 201, 510 P.2d 1072 (1973); Wakely v. Tyler, 78 N.M. 168, 429 P.2d 366 (1967).

377. 94 N.M. 273, 609 P.2d 720 (1980).

378. Notice that a default judgment will be sought need only be given to a party who has entered an appearance in the lawsuit. N.M. R. Civ. P. 55(b). The defendants in *Roven* neither filed an answer nor a notice of appearance in the suit. Notice of appearance should be filed as a matter of course in order to ensure that no default judgment will be entered in the absence of notice to the defendant.

379. The motion was accompanied by an affidavit setting forth the facts supporting the assertion of excusable neglect, and a proposed answer to the complaint. 94 N.M. at 274, 609 P.2d at 721. N.M. R. Civ. P. 60(b)(1) permits a court to reopen a judgment upon proof of "mistake, inadvertence, surprise or excusable neglect." An alternative ground to reopen the judgment in *Roven* may have been rule 60(b)(3), which permits the court to reopen a judgment obtained by fraud. N.M. R. Civ. P. 60(b)(3); *see generally* Unser v. Unser, 86 N.M. 648, 526 P.2d 790 (1974) (elements of claim for fraud described).

In addition, defendant claimed that the court lacked subject matter jurisdiction because the

days later. The trial court denied the motion. The supreme court reversed. The supreme court declared that when the trial court refuses to reopen a default judgment, the supreme court will apply a liberal standard in reviewing the decision, and will reverse upon a showing of even slight abuse of discretion by the trial court.[380] Applying this standard, the court concluded that there was sufficient proof of excusable neglect or mistake,[381] that the defendants had tendered proof of a meritorious defense,[382] and that the plaintiffs would suffer no undue prejudice if the judgment were reopened.[383]

The supreme court demonstrated a similar willingness to apply a liberal interpretation of Rule 60 in *Click v. Litho Supply Co.*[384] In *Click,* the party seeking to reopen the judgment did not suffer a default judgment, but was denied an opportunity to present his case fully. Defendant was denied a continuance of a scheduled trial despite the fact that defendant's most important witness was unable to be present because inclement weather forced cancellation of the witness's flight to the trial site. The trial took place, though no witnesses for the defendant were present to testify. The trial court denied defendant's motion to reopen pursuant to Rule 60.[385] The su-

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parties had agreed to arbitrate the dispute. 94 N.M. at 274, 609 P.2d at 721. If this argument were sound, the defendant could assert that the judgment should be reopened because it was void. N.M. R. Civ. P. 60(b)(4).

380. 94 N.M. at 274, 609 P.2d at 721; *see* Springer Corp. v. Herrera, 85 N.M. 201, 510 P.2d 1072 (1973).

381. The court did not explain its finding that excusable neglect, mistake or surprise was established. If the Rovens were represented by an attorney at the time they were persuaded by plaintiff not to file an answer, the decision may conflict with the principle that mistakes of counsel do not justify reopening of judgments. *See, e.g.,* Kostenbauder v. Sec'ty of H.E.W., 21 F.R. Serv. 2d 1186 (M.D. Pa. 1976); *see* Link v. Wabash, R.R. Co., 370 U.S. 626 (1962).

382. 94 N.M. at 274, 609 P.2d at 721. Though not required to do so by Rules 55(c) or 60(b), New Mexico courts require the party seeking to reopen a default judgment to tender adequate proof of the existence of a meritorius defense as well as proof that a ground for reopening exists. Marberry Sales, Inc. v. Falls, 92 N.M. 578, 592 P.2d 178 (1979); Springer Corp. v. Herrera, 85 N.M. 201, 510 P.2d 1072 (1973).

The supreme court has established a liberal standard for determining whether a meritorious defense has been tendered. Springer Corp. v. Herrera, 85 N.M. 201, 203, 510 P.2d 1072, 1074 (1973).

383. The court framed the requirement in terms of the absence of "intervening equities." 94 N.M. at 274, 607 P.2d at 721. *See* Weisberg v. Garcia, 75 N.M. 367, 404 P.2d 565 (1965); Board of County Comm'rs v. Boyd, 70 N.M. 254, 372 P.2d 828 (1962).

384. 95 N.M. 419, 622 P.2d 1039 (1981).

385. The supreme court does not identify the ground upon which defendant's motion to reopen rested. None of the specific grounds contained in Rule 60(b)(1)-(5) clearly applies. N.M. R. Civ. P. 60(b)(6) permits the court to reopen a judgment for "any other reason justifying relief." Perhaps this was the basis of defendant's motion.

A more appropriate remedy in this case is provided by Rule 59. A motion for new trial addressed to the trial judge is the preferred manner for bringing to the trial court's attention errors that it committed in the course of the trial. When, as in *Click,* the moving party is challenging the court's ruling during the proceedings, and is aware of the error in time to do so, *see* N.M. R. Civ. P. 59(b) (motion must be served within ten days of entry of judgment), a motion for new trial should be filed. *See, e.g.,* New Mexico Feeding Co. v. Keck, 95 N.M. 615, 624 P.2d 1012 (1981).

preme court noted that review of the trial judge's refusal to reopen the judgment was limited to a search for an abuse of discretion.[386] The court unanimously concluded, however, that the trial court erred in refusing to reopen the judgment when presented with proof that the defendant's explanation of the reason for the nonappearance of the witness was true.[387]

In *Barker v. Barker,*[388] the supreme court went out of its way to emphasize its position that Rule 60(b) should be given a liberal interpretation.[389] At issue was the interpretation to be given to Rule 60(b)(6), which permits judgments to be reopened for "any other reason justifying relief."[390] The court held that the provision serves as a general grant of authority to the courts to do justice when the ground upon which relief is sought is not specified in other portions of Rule 60.[391] The supreme court also confirmed dicta in an earlier case, which stated that a trial court may grant relief *sua sponte* under Rule 60(b) despite the language of the rule, which suggests that the court can act only at the instigation of a party.[392]

The supreme court's liberal approach to Rule 60(b) finds a sympathetic counterpart in the court of appeals. In *Jemez Properties,*

386. 95 N.M. at 420, 622 P.2d at 1040; *see, e.g.,* Home Savings & Loan Ass'n v. Esquire Homes, Inc., 87 N.M. 1, 528 P.2d 645 (1974); Freedman v. Perea, 85 N.M. 745, 517 P.2d 67 (1973); Guthrie v. U.S. Lime & Mining Corp., 82 N.M. 183, 477 P.2d 817 (1970).

In *Guthrie,* the court stated that the abuse of discretion standard involves a determination of whether "the trial court acted arbitrarily or unreasonably or was unaware of the general policy that disputes should be tried on their merits." 82 N.M. at 184, 477 P.2d at 818.

387. The decision should not be taken as a portent that the court will insist that trial courts always grant continuances. During the survey year, the supreme court affirmed a decision of the trial court to refuse a continuance. In New Mexico Feeding Co. v. Keck, 95 N.M. 615, 624 P.2d 1012 (1981), the court held that it was not an abuse of discretion to refuse a continuance just prior to trial even though the party asserted as one ground for this request that his principal witness had been called out of state due to a relative's severe illness. *Id.* at 618, 624 P.2d at 1015.

388. 94 N.M. 162, 608 P.2d 138 (1980).

389. *Id.* at 167, 608 P.2d at 143. The issue presented to the court was the propriety of reopening an order which had declared that an Indiana judgment was entitled to full faith and credit, but had not reduced the Indiana judgment to a New Mexico judgment. The supreme court acknowledged that the order may not have been final, in which case a Rule 60 motion would not be necessary, 94 N.M. at 165, 608 P.2d at 141, but chose to address the Rule 60 question anyway.

There is another procedural peculiarity in this case. Though the court did not address the issue, it is probable that Rule 60(a), not Rule 60(b), was the appropriate procedural device for correcting the oversight. Rule 60(a) authorizes the district court to correct errors in an order which arise "from oversight or omission." N.M. R. Civ. P. 60(a). Failure to reduce the full faith and credit order to a judgment would seem to qualify for application of Rule 60(a).

390. N.M. R. Civ. P. 60(b)(6).

391. The court stated: "It is not necessary that relief from a final judgment fit precisely into any of the specific grounds for relief set forth in Rule 60(b)." 94 N.M. at 167, 608 P.2d at 143. *Accord,* Foundation Res. Ins. Co. v. Martin, 79 N.M. 737, 449 P.2d 339 (Ct. App. 1968).

392. 94 N.M. at 167, 608 P.2d at 143. *See* Martin v. Leonard Motor-El Paso, 75 N.M. 219, 221, 402 P.2d 954, 956 (1965).

Inc. v. Lucero,[393] the trial court reopened a judgment in a quiet title action upon a showing that the prevailing party in that action had forged a deed and had fraudulently tampered with public records. Rule 60(b)(3) authorizes reopening of judgments upon a showing of fraud, but, unlike Rule 60(b)(6), requires that the motion be made within one year of the entry of judgment.[394] The judgment in the quiet title action was more than one year old. Undeterred, the court of appeals accepted the trial court's characterization of the motion as one asserting "any other reason justifying relief" pursuant to Rule 60(b)(6).[395] The court of appeals acknowledged that this constituted an apparent violation of a supreme court case which held that "Rule 60(b)(6) may not be used to circumvent the time limit set out for Rule 60(b)(1), (2) and (3) and may be used only for reasons *other* than the ones therein set out."[396] Nonetheless, the court upheld the use of Rule 60(b)(6) to reopen the judgment. Because this subdivision of Rule 60(b) is not subject to the one-year limitation,[397] the effect of the opinion is to avoid the one-year time limit imposed on Rule 60(b)(3) motions.

The trend in New Mexico is to liberalize the application of Rule 60, diminishing the finality goal in favor of an attempt to ensure that justice is done in the initial proceeding. *Jemez Properties* is particularly significant because it evinces a liberal interpretation even where judgments affecting title to land are involved. Traditionally, the finality goal has been considered most important in cases in which land titles are dependent upon the effect of completed litigation.[398]

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393. 94 N.M. 181, 608 P.2d 157 (Ct. App. 1979), *cert. denied,* 94 N.M. 628, 614 P.2d 545 (1980).

394. N.M. R. Civ. P. 60(b)(3).

395. 94 N.M. at 184, 608 P.2d at 160.

396. *Id. See* Parks v. Parks, 91 N.M. 369, 371, 574 P.2d 588, 591 (1978). The court of appeals is bound to apply the precedents established by the supreme court. Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973). The court of appeals in *Jemez Properties* was obligated to distinguish *Parks* in order to affirm the trial court. It attempted to do so by purporting to find an "exceptional circumstances" exception in *Parks.* 94 N.M. at 184, 608 P.2d at 160. However, as the court of appeals itself acknowledged, *Parks* did not hold that exceptional circumstances could permit Rule 60(b)(6) to be used to circumvent the time requirements of Rule 60(b)(1), (2), and (3). Instead, the supreme court in *Parks* said that *even where* the ground asserted for relief properly fits within Rule 60(b)(6), the movant must *also* demonstrate that exceptional circumstances exist. *See* Parks v. Parks, 91 N.M. 369, 371, 574 P.2d 588, 590 (1978).

Jemez Properties seems to be a thinly veiled attempt to overrule *Parks.* The supreme court, however, chose not to correct this. The supreme court denied certiorari. 94 N.M. 628, 614 P.2d 545 (1980).

397. Rule 60(b)(6) motions must be made within a "reasonable time" of the entry of judgment. N.M. R. Civ. P. 60(b). What constitutes a reasonable time depends on the circumstances of each case. Home Savings & Loan Ass'n v. Esquire Homes, Inc., 87 N.M. 1, 528 P.2d 645 (1974).

398. *See, e.g.,* Virgin Islands National Bank v. Tyson, 506 F.2d 802 (3d Cir. 1974), *cert. denied,* 429 U.S. 896. *See also* Durfee v. Duke, 375 U.S. 106 (1963).

X. MULTIPARTY LITIGATION

The "necessary party" doctrine has posed more difficulty for New Mexico courts than any other procedural concept.[399] Rule 19 is inherently ambiguous, and New Mexico has compounded the difficulty by an unfortunate series of opinions which have equated necessary parties with indispensable parties.[400]

Kilcrease v. Campbell[401] demonstrates one difficulty with the application of Rule 19. If Rule 19 is liberally interpreted, it could require the presence of an unwieldy number of persons in order to adjudicate matters presented to the court in an uncomplicated suit involving only a few parties. In *Kilcrease,* plaintiff purchased a plot of land which was part of a subdivision. The subdivision was built in the 1950's. The plat of the subdivision, upon which all deeds of lot owners was based, was taken from a 1950 survey. Years later, an owner commissioned a survey of his lot and learned that the original survey was wrong. Plaintiff sued the adjoining landowner, claiming title to a portion of his neighbor's lot in accordance with the new survey. Defendant asserted that all property owners within the subdivision were necessary parties because, if the plaintiff were successful in establishing that the 1950 plat was erroneous, all current owners in the subdivision would be in possession of some land belonging to their neighbors.[402] The court rejected the defendant's

399. Though courts frequently refer to "necessary parties," *e.g.,* State *ex rel.* Walker v. Hastings, 79 N.M. 338, 340, 443 P.2d 508, 510 (Ct. App. 1968), Rule 19 does not use the phrase. N.M. R. Civ. P. 19. The phrase "necessary joinder of parties" did exist in early formulations of Rule 19, *e.g.,* N.M. Stat. Ann. §19-101(19) (1941); N.M. Stat. Ann. §21-1-1(19) (1953), but was omitted when amendment of Rule 19 occurred in 1969. N.M. Stat. Ann. §21-1-1(19) (Repl. 1970). The courts continue to analyze the issue in these terms even though Rule 19 no longer refers to necessary parties.

400. Rule 19 identifies a class of persons who are not parties to the lawsuit, but who should be "joined if feasible." N.M. R. Civ. P. 19(a). If a person should be joined, but cannot be joined, two options are open: (1) the court may continue in his absence if this can be done "in equity and good conscience." N.M. R. Civ. P. 19(b); (2) if the court concludes that it would be unfair to proceed in the absence of someone who should, but cannot, be joined, then only is the absent person "indispensable." N.M. R. Civ. P. 19(b). The court must dismiss the lawsuit in the absence of an indispensable party.

An enduring problem in New Mexico jurisprudence is the continuation from old precedent of two erroneous statements of law: (1) that certain persons are "necessary parties," and (2) that all "necessary parties" are indispensable parties. *See, e.g.,* State Farm Mut. Auto Ins. Co. v. Foundation Res. Ins. Co., 78 N.M. 359, 431 P.2d 737 (1967); Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957). Until the courts abandon these concepts and analyze problems in light of the language and policies embodied in current Rule 19, the existing confusion will continue.

401. 94 N.M. 764, 617 P.2d 151 (1980).

402. *Id.* at 766, 617 P.2d at 153. The court expressed doubt that all other landowners would be affected, but accepted defendant's assertion for purposes of analysis. *Id.*

Each lot owner, seeking to attain a portion of land occupied by his neighbor, would be vulnerable to a similar claim from his neighbor on the other side. Unless all of these claims are

argument. The court did not rely upon an analysis of the language of Rule 19, but upon the practical problems that such a holding for defendant would create: "[D]isplacement of [defendant's neighbors'] land would involve his neighbors as indispensable parties . . . and the litigation could involve a theoretically infinite number of parties."[403]

The supreme court's ruling is consistent with precedent in New Mexico[404] and elsewhere.[405] The decision is a wise one. It permits plaintiff to obtain relief on his single claim without compelling him to adjudicate the claims of all others. The element of compulsory joinder of all parties is eliminated when the court avoids the necessary party label.[406] The other means provided by the Rules for getting third parties into a lawsuit are still available, however. If the defendant wishes to press his claim against his neighbor, he probably may do so by joining him as a third-party defendant.[407] If nonparties would be affected by the outcome of the litigation, they might be permitted to intervene.[408] If plaintiff wanted to resolve the rights of all subdivision members, he could file a class action seeking declaratory and injunctive relief.[409] Rejection of necessary party status furthers efficiency by providing an opportunity for flexibility that is lacking in the New Mexico version of the rule.

Rule 19 also poses special problems with respect to insurance subrogation claims in some tort and workmen's compensation cases. New Mexico has sought to resolve the question of the role of a subrogated insurer in litigation in terms of Rule 19,[410] with unfortunate consequences. Cases involving the subrogated insurer reflect sub-

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resolved in a single lawsuit, a landowner might find that in one lawsuit he lost a piece of land, but in another was unable to establish a right to an equivalent piece of land from his neighbor. The potential for such inconsistency of outcome is a basis for finding that other persons should be joined if feasible. N.M. R. Civ. P. 19(a).

403. 94 N.M. at 766, 617 P.2d at 153.

404. *See, e.g.*, Alston v. Clinton, 73 N.M. 341, 388 P.2d 64 (1963).

405. *See, e.g.*, Smith v. Anderson, 117 Wash. 307, 201 P. 1 (1921).

406. Because New Mexico continues to insist that all necessary parties are indispensable, all lot owners in the subdivision would have to be brought into suit if the court labeled them as necessary parties. *See* note 400 *supra*.

407. N.M. R. Civ. P. 14.

408. N.M. R. Civ. P. 22. Permissive intervention would clearly be appropriate because a common question of law or fact—the adequacy of the 1950 plat—affects all lot owners. *See* N.M. R. Civ. P. 24(b). Furthermore, the stare decisis impact of a decision in the initial suit upon the nonparty lot owner's ability to assert his claim in subsequent litigation might support a claim for intervention of right. *See* N.M. R. Civ. P. 24(a). *See* Atlantis Development Corp. v. United States, 379 F.2d 818 (5th Cir. 1967) (possible stare decisis impact supports motion to intervene of right).

409. N.M. R. Civ. P. 23.

410. *E.g.*, Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957).

stantive policies dealing with the issues of insurance and trial tactics rather than with procedure. Therefore, this category of Rule 19 decisions must be considered in a different light from all others. An insurance company which pays benefits to its insured has a right to reimbursement from a judgment obtained by the insured from a third party.[411] In New Mexico, the insurance company is a necessary party to litigation brought by the insured against the third party.[412] The result is that if the insured sues, the insurance company must be joined.[413] Insured plaintiffs have thus been placed in a disadvantageous position in litigation against a wrongdoer. When a jury knows that plaintiff is insured, it may be less inclined to award damages, because damages will not go to the injured plaintiff but to an insurance company.

In *Maldonado v. Haney,*[414] the court of appeals approved a procedure which ensures that the insurance company's subrogation rights are protected, without requiring that the jury learn that plaintiff received compensation from his own insurance company. The injured person and her insurance company were co-plaintiffs in a suit against a third party.[415] They stipulated that the injured person alone would pursue the claim at trial and would account to the insurance company for all amounts to which the company was entitled under the law of subrogation.[416] The defendant failed to object to this procedure, and the trial court accepted the stipulation.[417] The trial was conducted in the absence of the insurance company. The trial court's decision to accept and to enforce the stipulation was appealed. The court of appeals approved of the agreement and authorized its en-

411. *E.g.,* United States Fidelity & Guar. Co. v. Raton Nat'l Gas Co., 86 N.M. 160, 521 P.2d 122 (1974).

412. Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957).

413. Torres v. Gamble, 75 N.M. 741, 410 P.2d 959 (1966). Other jurisdictions permit the insurance company and the insured to adjust their relationship by contract in such a way that the insurance company is not a necessary party. *E.g.,* N.Y. C.P.L.R. §1004 (McKinney's 1976). Where this is permitted, the insured is able to sue alone without giving the jury the impression that the proceeds will go to an insurance company rather than to the injured person. New Mexico has not unambiguously accepted these devices. *See* Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957). *But see* Home Fire & Marine Ins. Co. v. Pan American Petroleum Co., 72 N.M. 163, 381 P.2d 675 (1963).

414. 94 N.M. 335, 610 P.2d 222 (Ct. App. 1980).

415. Plaintiff alone initiated the suit. Plaintiff's insurance company intervened as a co-plaintiff. 94 N.M. at 336, 610 P.2d at 223.

416. *Id.*

417. The trial court incorporated the stipulation of the parties into its pre-trial order. The order followed the stipulation of the parties. It provided: "(1) Intervenor Allstate's subrogation rights . . . would be protected by the court; (2) Intervenor was prohibited by the court from participating in the case. . . ." *Id.* at 336, 610 P.2d at 223.

forcement.[418] The *Maldonado* decision demonstrates that it is possible to fashion a method for ensuring that subrogation rights are protected, that defendants are not subject to multiple litigation, and that the plaintiff is not saddled with the presence of the insurance company before the jury.[419]

Unfortunately, the supreme court chose not to reconsider its decision requiring joinder of subrogated insurance companies,[420] nor to encourage the use of stipulations of the type approved by the court of appeals in *Maldonado*. Instead, in *Maurer v. Thorpe,*[421] the supreme court seemed to fashion a "what is good for the goose is good for the gander" solution, although the opinion is unclear.[422] The *Maurer* court focused on the tactical disadvantage suffered by a plaintiff who must necessarily join his claim with that of the subrogated insurance company. *Maurer* held that the plaintiff who must join with his insurer is denied due process of law because of this disadvantage. The opinion seems to suggest that the cure for the problem is to allow plaintiff to join defendant's insurance company, thus equalizing the disadvantage.[423] The court did not hold this expressly, however, but remanded to the trial court. It may have been within the trial court's discretion to cure the due process problem by dis-

418. After a jury verdict for plaintiff for $3000, the court entered judgment for the insurance company in the sum of $717.60, the amount of its subrogated claim. Judgment was entered for plaintiff for the remainder. Plaintiff appealed, asserting that there was no proof in the record that demonstrated that the insurance company was entitled to that amount. The court of appeals rejected this attempt to "sit back with complacence until the trial court puts its order into effect, with the intention of sandbagging the trial court on appeal." *Id.* at 337, 610 P.2d at 224.

419. The agreement between plaintiff and insured in *Maldonado* is beneficial to both plaintiff and the insurance carrier, as against defendant. The defendant loses whatever advantage flows from the presence of the insurance company as a co-party. A defendant might object to this loss, but he is unlikely to succeed. So long as defendant is protected from multiple litigation and double liability, it is unlikely that an appellate court would reverse on the ground that defendant has an absolute right to the tactical advantage of opposing an insurance company in the trial. *See* N.M. R. Civ. P. 16.

420. Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957).

421. 95 N.M. 286, 621 P.2d 503 (1980).

422. The court stated: "[T]he rights of the parties are balanced and protected only when both insurance companies are named as parties to the action." *Id.* at 288, 621 P.2d at 505.

423. At the trial court level, the plaintiffs filed suit against both the wrongdoer and the insurer, Allstate. Allstate filed a motion to dismiss the claim against it. The trial court granted the motion to dismiss Allstate. The court of appeals affirmed. The supreme court reversed the order dismissing Allstate and "remanded to the trial court for further proceedings consistent herewith." *Id.* at 288, 621 P.2d at 505.

Logically, it follows that if the dismissal of the motion to dismiss Allstate is to be corrected, then Allstate should be reinstated as a party defendant. In describing its holding, however, the court said: "This decision . . . does not . . . declare the insurer to be an interested party and therefore subject to joinder as was held in Shingleton v. Bussey, 233 So. 2d 713 (Fla. 1969)." *Id.*

missing plaintiff's insurer as a party. If the supreme court intended to permit this discretion, it did not communicate that intent with sufficient clarity. Upon remand the district court in fact authorized the joinder of the insurance company as co-defendant.[424]

The *Maurer* decision is inadequate for several reasons. First, the actual holding is ambiguous.[425] Second, the supreme court based its decision on constitutional grounds without providing any constitutional analysis.[426] Most important, the remedy which the court seems to suggest—allowing defendant's insurer to be joined—does not solve the problem. If defendant is insured, this remedy succeeds in equalizing the disadvantage flowing to plaintiff from having an insurance company as a co-party. If the defendant has no insurance, however, the plaintiff is worse off than he was before *Maurer* was decided. Plaintiff must join with his insurance company and cannot name an insurance company as co-defendant. Sophisticated jurors may realize that the absence of an insurance company as a defendant signals that the defendant is uninsured. In this posture, the plaintiff is cast in a more clearly unfavorable position than when the jury could only speculate as to the existence of liability insurance.

Other problems arise as a result of *Maurer.* If defendant's insurance company does not do business in New Mexico, it may not be amenable to suit here, even though the defendant is subject to per-

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424. Telephone conversation with Robert H. Graham, Farmington, New Mexico, Co-Counsel for Respondent (Dec. 2, 1981). The ruling is limited to permitting joinder of the insurance company in the action brought against the defendant. The court expressly preserved prior law, holding that a separate direct action suit directed only against defendant's insurance carrier is not permitted: "This decision, however, does not create a direct action against the defendant's insurer. . . ." 95 N.M. at 288, 621 P.2d at 505; *see* Chapman v. Farmers Ins. Group, 90 N.M. 18, 558 P.2d 1157 (Ct. App. 1976), *cert. denied,* 90 N.M. 254, 561 P.2d 1347 (1977).

425. *See* note 423 *supra.*

426. The court cites two New Mexico decisions, one for the general proposition that due process is a "malleable principle," *In re* Valdez, 88 N.M. 338, 341, 540 P.2d 818, 821 (1975), and the other to establish that the integrity of the fact finding process and the basic fairness of the decisions are the principal considerations of due process. United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 597 P.2d 290, *cert. denied,* 444 U.S. 911 (1979). 95 N.M. at 288, 621 P.2d at 505.

The *Maurer* court cited a single federal case for the general proposition that "a real probability that prejudice will result" must be shown if a due process violation is to be established. United States v. Ramirez, 524 F.2d 283 (10th Cir. 1975).

There may be other constitutional problems with the *Maurer* court's solution of permitting defendant's insurer to be joined. The standard insurance contract provides that no action may be brought against the insurance company until the liability of the insured has been established. The supreme court did not address the issue of whether the decision in *Maurer* would improperly impair this contractual provision. U.S. Const. art. I, § 10; N.M. Const. art. 2, § 19, *see* Shingleton v. Bussey, 233 So. 2d 713, 718 (Fla. 1969).

sonal jurisdiction.[427] Moreover, joinder of the insurance company as a co-defendant may spawn crossclaims and counterclaims which might delay the plaintiff's attempt to achieve a speedy resolution of his claim.[428] Finally, existing New Mexico law provides that the plaintiff is not permitted to inquire in discovery as to the existence of liability insurance purchased by defendant.[429] Unless the *Maurer* decision implicitly overrules the existing law, plaintiffs will have no formal means to determine whether the defendant is insured and will be precluded from benefitting from the *Maurer* decision.

Maurer v. Thorpe does not provide an adequate solution to the subrogated insurer-necessary party problem. To solve this problem properly, the supreme court will have to either reconsider the rule which makes plaintiff's insurer a necessary party,[430] or will have to authorize agreements between plaintiff and his insurer which have the effect of eliminating the plaintiff's insurance company as a necessary party.[431] If the presence of an insurance company in the lawsuit is unfair, the supreme court should eliminate the plaintiff's insurer from the litigation rather than burden the defendant and the judicial process with the presence of another insurance carrier.[432]

One case decided during the Survey year involved Rule 14 of the Rules of Civil Procedure. Rule 14 authorizes a defendant to bring into the lawsuit a person who is or may be liable to defendant for a portion of the amount that the defendant may be obligated to pay

427. New Mexico's long arm statute requires that the defendant must have transacted business or committed a tortious act in the state. N.M. Stat. Ann. §38-1-16(A)(1), (3) (1978). Even the provision making insurance companies subject to New Mexico's jurisdiction only applies when the company insures persons or risks located in New Mexico at the time the insurance is issued. N.M. Stat. Ann. §38-1-16(A)(4) (1978). If a company transacts no business in this state and insures someone outside the state who commits a tort in the state, the insurer will not be subject to New Mexico's jurisdiction and *Maurer* will afford no relief to the plaintiff who is obligated to join with his subrogated insurer, but cannot obtain personal jursidiction over the defendant's insurer.

428. *See, e.g.*, Beta Eta House Corp. v. Gregory, 237 So. 2d 163 (Fla. 1970). The Supreme Court of Florida conceded that issues concerning whether the insurance coverage extended to insured, whether the insured exercised good faith in settlement negotiations and other related issues might arise if the insured and the insurance company can be made co-defenants. *Id.* at 165.

The Florida court noted that the trial court's power to order severances and separate trials was an adequate solution to the problem. *Id.* In Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969), the court acknowledged the usefulness of separate trials, and noted that "such separation for adjudication of issues between insurer and insured would not remove from the case the identity of all parties joined nor their claims and defenses and their right to participate and protect their respective interests." *Id.* at 720.

429. Fort v. Neal, 79 N.M. 479, 444 P.2d 990 (1968).

430. Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957).

431. *E.g.*, Maldonado v. Handy, 94 N.M. 335, 610 P.2d 222 (Ct. App. 1980).

432. A careful reading of *Maurer* suggests that the supreme court is free to reverse its position without actually overruling *Maurer*. *See* text accompanying notes 423-24 *supra*.

the plaintiff.[433] The rule is not compulsory. Defendant may choose instead to sue the third party in a subsequent action after his liability to the plaintiff has been established.[434] When Rule 14 is used, the usual practice is first to determine the liability of the defendant to the plaintiff and then to determine if the third party is liable to the defendant for a portion of that amount.[435] When the third party defendant defaults, a problem arises. Because the liability of the third-party defendant exists only if the defendant is liable to the plaintiff, a judgment of default normally should not be entered against a defaulting third-party defendant. Only an entry of default should be made,[436] and a judgment should be entered only if and when the defendant is found liable to the plaintiff in the main case.

Hubbard v. Howell[437] illustrates an exceptional circumstance where it is correct to enter a default judgment against the third-party defendant before the liability of the defendant to the plaintiff is determined. A law firm sued Hubbard for legal fees. Hubbard impleaded Howell, claiming that Howell had agreed to pay one-half of the fees that Hubbard was obligated to pay plaintiff. Howell neither answered nor entered an appearance. A default judgment was entered against him. Based upon the existence of the default judgment and the assurance it provided that there would be a source of funds to pay the plaintiff, the plaintiff entered into a settlement with Hubbard. Plaintiff's suit against Hubbard was dismissed with prejudice. Howell later claimed that it was error to enter a default judgment against him when Hubbard's liability to plaintiff had not yet been established. The supreme court disagreed. Though the court confirmed that the district court normally should not enter a default judgment in a third-party action when the main claim is unresolved, it found no abuse of discretion in doing so under the circumstances presented. The court emphasized that the main case was settled in reliance upon the assurance that the third-party defendant would be obligated to pay one-half the settlement, an assurance which could

433. N.M. R. Civ. P. 14.

434. Salazar v. Murphy, 66 N.M. 25, 340 P.2d 1075 (1969).

435. *See* Hubbard v. Howell, 94 N.M. 36, 38, 607 P.2d 123, 125 (1980). Even where the third party's liability is contingent upon *payment* by the defendant of the amount of the judgment and not merely upon the entry of judgment, Rule 14 still may be used. In such cases, the court determines the extent of the third party's contingent liability to defendant. When the defendant actually pays the plaintiff, the court then enters a judgment against the third party defendant. Jeub v. B/G Foods, Inc., 2 F.R.D. 238 (D. Minn. 1942); *see* Board of Educ. v. Standhard, 80 N.M. 543, 458 P.2d 795 (1969); C. Wright & A. Miller, Federal Practice and Procedure § 1451 (1971).

436. N.M. R. Civ. P. 55(a).

437. 94 N.M. 36, 607 P.2d 123 (1980).

only be achieved if a default judgment were entered prior to plaintiff's settlement with Hubbard.

XI. STATUTE OF LIMITATIONS

Actions are time-barred if they are not "brought" within the time prescribed by the applicable statute of limitations.[438] In New Mexico, a lawsuit is considered "brought" upon the commencement of the action.[439] Under a New Mexico statute, two things are required for "commencement of the action": an initial pleading must be filed in the proper clerk's office, and the plaintiff must have "intent that process shall issue immediately thereupon."[440] In *Prieto v. Home Education Livelihood Program,*[441] the court of appeals concluded that this statute has been superseded by Rule 3 of the Rules of Civil Procedure,[442] which provides that "an action is commenced by filing a complaint with the court."[443] The *Prieto* decision eliminates the requirement that plaintiff intend for process to be immediately served. The change means that an action will be considered timely filed, for purposes of the statute of limitations, if it was literally "filed" within the applicable time period. This will be true even if plaintiff intentionally caused a delay between filing and service, so that defendant did not get notice of the suit until the time period had elapsed. Defendant must then seek a remedy other than a statute of limitations defense. The defendant may move for a dismissal of the action for failure to prosecute.[444] This is also the proper remedy if

438. N.M. Stat. Ann. §37-1-1 (1978).

439. Section 37-1-1 requires that actions be brought within the time limits set in Chapter 37. N.M. Stat. Ann. §37-1-1 (1978). Though the applicable statutes nowhere expressly equate the "bringing" of the action with its "commencement," the cases equate the two phrases. *See, e.g.,* Murphy v. Citizens Bank, 244 F.2d 511 (10th Cir. 1957) (Applying New Mexico law).

440. N.M. Stat. Ann. §37-1-13 (1978); *see* Murphy v. Citizens Bank, 244 F.2d 511 (10th Cir. 1957) (New Mexico law applied).

441. 94 N.M. 738, 616 P.2d 1123 (Ct. App. 1980).

442. The court acknowledged the principle that if a statute conflicts with a subsequent rule of procedure, the procedural rule would control. 94 N.M. at 741, 616 P.2d at 1126. Applying this principle, the court found that a portion of the statute had "become superfluous and superseded by" Rules 3 and 4(a). *Id.; see* Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976).

443. N.M. R. Civ. P. 3.

444. Rule 41(b) authorizes the courts to dismiss a case with prejudice "[f]or failure of the plaintiff to prosecute." N.M. R. Civ. P. 41(b). The court did not refer to this rule. Instead, it concluded that the trial court could dismiss "in the exercise of its inherent power." 94 N.M. at 742, 616 P.2d at 1127. This view is consistent with prior decisions which have held that the district courts possess inherent power to dismiss for failure to prosecute independent of statute or rule. *E.g.,* Baker v. Sojka, 74 N.M. 587, 396 P.2d 195 (1964); City of Roswell v. Holmes, 44 N.M. 1, 96 P.2d 701 (1939).

the plaintiff fails to exercise diligence in effectuating service,[445] but intent cannot be proved.

The removal of the requirement that plaintiff intend that process issue immediately will not seriously undermine the policy of repose which underlies the statutes of limitation. Only rarely has the statutory provision requiring plaintiff's intent been applied to bar an action filed on time but not served until after the statutory time had passed.[446] The motion to dismiss for failure to prosecute is an adequate remedy to penalize undue delay in the service of process. The court can now consider not only the issue of dilatory intent, but also additional factors, such as the extent to which the defendant has been prejudiced by the delay in receipt of process. The court in *Prieto* thus expanded the field of inquiry on whether a defendant has been treated unfairly if he does not learn of a pending lawsuit until after the statute of limitations had run. Expansion of the inquiry is likely to lead to better results.

Federal judges who must decide whether New Mexico's statute of limitations is a defense in diversity actions should also be pleased with the decision in *Prieto*. Last term the United States Supreme Court concluded that state law and not Rule 3 of the Federal Rules of Civil Procedure controls in determining whether an action had been brought within the statute of limitations.[447] Because of the ruling in *Prieto* federal judges will no longer have to master and apply the intricacies of the New Mexico statutory provision.[448] The familiar and simple mandate found in Rule 3 will apply.[449]

The time for filing an action varies depending upon the legal theory or subject matter of the lawsuit. For example, actions for breach of written contracts must be brought within six years,[450] whereas actions for fraud must be commenced within four years.[451] Occasionally, there is some confusion in determining the proper category applicable to a lawsuit. In resolving the problem, "the

445. One problem with the application of section 37-1-13 was that it made the subjective intent of the plaintiff to delay service the sole criterion for determination. Proof of subjective intent is often difficult to establish. Not every plaintiff will oblige the defendant and the court by expressing an intent to delay service in a writing as did the plaintiff in Murphy v. Citizens Bank, 244 F.2d 511 (10th Cir. 1957).

446. The only reported case is Murphy v. Citizens Bank, 244 F.2d 511 (10th Cir. 1957).

447. Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

448. *See, e.g.*, Murphy v. Citizens Bank, 244 F.2d 511 (10th Cir. 1957).

449. *Compare* N.M. R. Civ. P. 3 *with* Fed. R. Civ. P. 3.

450. N.M. Stat. Ann. §37-1-3 (1978). Suits for breach of oral contract must be brought within four years. N.M. Stat. Ann. §37-1-4 (1978).

451. N.M. Stat. Ann. §37-1-4 (1978). Another statute provides that fraud actions do not accrue until the fraud is discovered by the aggrieved party. *Id.* §37-1-7.

nature of the right sued upon, and not the form of action or relief demanded, determines the applicability of the statute."[452] In *Rito Cebolla Investments, Ltd. v. Golden West Land Corp.*,[453] the court of appeals noted that this test may result in the application of different time periods to a single lawsuit in which the plaintiff asserts rights arising from related transactions. Plaintiff alleged that it had been fraudulently induced to enter into a series of real estate contracts, and that the defendant breached the contracts. The court held that the four-year statute applicable to fraud actions controlled the count sounding in fraud. The court did not consider the fact that plaintiff asserted that the fraud induced him to enter into a written contract to be relevant. Nor was the fact that plaintiff sought rescission of the contract as a remedy for the fraudulent conduct of the defendant relevant. The decision accurately, if narrowly, construes the applicable statute of limitations. Only the legislature has the power to redraft the statutes of limitation to keep them current with modern needs.[454]

452. Taylor v. Lovelace Clinic, 78 N.M. 460, 462, 432 P.2d 816, 818 (1967).

453. 94 N.M. 121, 607 P.2d 659 (Ct. App. 1980).

454. Most of the current statutes of limitation are derived from a century-old statute. *See* 1880 N.M. Laws ch. 5. The result in *Rito Cebolla* indicates that the statutes of limitation are in need of revision.