

Appellate News

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The Appellate Bench and Bar: Two Tastes That Taste Great Together

Message From the Appellate Practice Section Chair

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A while ago, as I walked through the lobby of the Supreme Court building in Santa Fe, I watched in stunned amazement as an appellate lawyer scurried through the room clutching numerous loose documents and folders as he raced to file them in the Clerk's office. From the opposite direction, a judge on the New Mexico Court of Appeals strolled in deep thought, loosely grasping copies of a draft opinion as she considered their contents. They violently collided, sending their respective documents into a cloud of paper that approached the ceiling and then drifted to the floor.

"Hey," yelled the judge at the lawyer, "you got thoroughly analyzed and well crafted legal argument in my well constructed judicial analysis!"

"No," shot the lawyer right back at the judge, "you got judicial analysis in my legal argument!"

Then, in an epiphany, the judge and lawyer each collected a mixed assortment of their jumbled documents and simultaneously exclaimed, "These work great together!" I then lost sight of them as they cheerfully walked down the hall together. Long after the lawyer and judge disappeared, I was left appreciating just how important cooperation and collaboration between appellate bench and bar is in our small and quickly growing State.

New Mexico is a jurisdiction with a steep growth rate, where many legal issues are questions of first impression. As the appellate courts consider these new and sometimes novel issues, they are contending with their rapidly expanding caseloads and, in the case of the Supreme Court, with the role of crafting and retooling administrative functions and procedural rules to accommodate the growing dockets of the district courts throughout New Mexico. As the questions brought

to our appellate courts become increasingly complicated, the courts, in many instances, have less time to devote to those questions.

In order for New Mexico caselaw to develop in a positive, well reasoned direction, both the appellate courts and the attorneys that appear before them must be at the top of their respective games. The judges must work hard to consider the cases before them and to find innovative ways to improve the management of their dockets. Appellate lawyers must strive to present the courts with sound and well articulated arguments. The good news for the development of law in New Mexico is that both the courts and the appellate bar are constantly working to improve and fulfill their roles so that the body of caselaw in our State retains its level of quality as it grows in size.

On August 18, 2006, the Appellate Practice Section of the State Bar of New Mexico will hold its 2006 Appellate Practice Institute at the State Bar Center in Albuquerque. This full day seminar will showcase the collaborative spirit that exists between committed and skilled lawyers and judges in New Mexico and the Tenth Circuit Court of Appeals. The "nuts and bolts" of Appellate Practice will be covered by appellate practitioners that understand how those bolts fit into the machinery of appellate review and dedicated appellate judges will offer their insight into the elements of effective analysis and argument. In addition, the New Mexico Court of Appeals Mediator will explain one of the newest innovations in Appellate procedure, that being court ordered mediation at the appellate level.

Please join us on August 18th at the Institute to see just how tasty a jurisprudential buttercup is formed when the appellate bench and bar come together for the full-day seminar. Speaking of tasty, did I mention that lunch will be provided? I look forward to seeing you there.

RECENT DEVELOPMENTS IN NEW MEXICO APPELLATE PRACTICE

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January 2006

(Cases from *Bar Bulletin*, Vol. 44, Nos. 1-51)

FINALITY/APPEALABILITY

State ex rel. Children, Youth & Families Dep't v. Frank G. (In re P.A.G.), 2005-NMCA-026, ¶¶ 39-41, 137 N.M. 137, 108 P.3d 543, cert. granted, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

Adjudication that child is abused and neglected is final for purposes of appeal; trial court "has resolved all issues of law and fact before it to the fullest extent possible," and adjudication affects important rights and interests of parents and state in subsequent stages.

Alliance Health of Santa Teresa, Inc. v. National Presto Industries, Inc., 2005-NMCA-053, ¶¶ 10-24, 137 N.M. 537, 113 P.3d 360.

Party was dismissed from case but continued active participation as if still a party, because it faced liability as agent for another party against whom claims remained. A subsequent order issued at its request more than one year later dismissing all claims as to it was appealable. Prior order of dismissal was not final; party's conduct reflected understanding that suit was not finished, and remaining claims still carried potential impact on its rights.

Collado v. New Mexico Motor Vehicle Division, 2005-NMCA-056, ¶ 7, 137 N.M. 442, 112 P.3d 303.

District court's final order in mandamus proceeding is reviewable by appeal rather than by writ of error (clarifying ambiguity in statute authorizing appeal, in light of current appellate practice).

Chavarria v. Fleetwood Retail Corp., 2005-NMCA-082, ¶¶ 4-11, 137 N.M. 783, 115 P.3d 799, cert. granted, 2005-NMCERT-006, 137 N.M. 767, 115 P.3d 230.

Judgment that awarded damages under alternative theories, subject to election following appeal, was final for purposes of appeal. Appellant attacked damage awards under all theories, and allowing appeal from judgment without first requiring election would prevent piecemeal appeals, promote judicial economy, and facilitate meaningful review of the issues.

Healthsource, Inc. v. X-Ray Assocs. of N.M., P.C., 2005-NMCA-097, ¶¶ 13-15, 138 N.M. 70, 116 P.3d 861, cert. denied, 2005-NMCERT-007, 138 N.M. 146, 117 P.3d 952.

Court had jurisdiction over appeal although notice of appeal from dismissal of claims was filed while counterclaim remained pending. Order dismissing counterclaim was filed approximately six weeks later. Although order from which appeal was taken was not final, "it is this Court's practice, when a notice of appeal is filed prematurely, to take jurisdiction if the final order is entered during the early pendency of the appeal. For example, in many calendar notices, we will propose dismissal, but then give the appellant an opportunity to obtain and

file the final order within the time provided for responding to the calendar notice." Part of the case was final when appealed, and a final judgment was issued around the time the record proper was filed and well before the calendar notice.

State v. Gonzales, 2005-NMSC-025, ¶ 19, 138 N.M. 271, 119 P.3d 151.

In view of state's strong interest, order disqualifying district attorney's office in criminal prosecution is immediately appealable under the collateral order doctrine.

State v. Heinsen, 2005-NMSC-035, ¶¶ 16-22, 138 N.M. 441, 121 P.3d 1040.

Doctrine of practical finality would not apply to allow immediate appeal from suppression order in magistrate court, in absence of any basis in constitution or statute for such an appeal and where state's interests could be met through dismissal and refile of case in district court.

NOTICE OF APPEAL – FORM

Williams v. Stewart, 2005-NMCA-061, ¶ 33, 137 N.M. 420, 112 P.3d 281, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

Notice of appeal with attached final order granting summary judgment as to all remaining claims was sufficient; prior interlocutory ruling dismissing one claim did not also have to be attached to notice. Appeal from final order "simultaneously perfected an appeal from the district court's previous interlocutory order."

NOTICE OF APPEAL – TIMING

Valley Bank of Commerce v. Hilburn, 2005-NMCA-004, 136 N.M. 741, 105 P.3d 294.

Section 39-1-1 automatic denial of post-trial motions applies only to non-jury trials; under current version of Rule 1-050, which contains no automatic denial provision for motion for judgment as matter of law, in jury cases the time to file notice of appeal does not begin to run until motion is ruled upon.

Cf. Paule v. Santa Fe County Bd. of County Comm'rs, 2005-NMSC-021, ¶¶ 18-25, 138 N.M. 82, 117 P.3d 240 (under rules governing administrative appeals in district court, which differ from rules of appellate procedure, motion for reconsideration is not subject to automatic denial by operation of law; petition for writ of certiorari to district court was timely filed in Court of Appeals within 20 days of district court's order denying motion).

See proposed amendments to Rules 1-052, -054.1, -059 – eliminating automatic denial language from 1-052 & -059 (already eliminated from

rule 1-050) and overriding automatic denial effect of 39-1-1; instead of automatic denial, rule 1-054.1 requires (w/o enforcement mechanism) that orders on post-trial motions be entered within 60 days after "submission" (when court takes matter under advisement); no effect on automatic denials under other rules. Vol. 45, No. 9, SBB 22.

INTERLOCUTORY APPEALS

Baker v. BP America Production Co., 2005-NMSC-011, ¶ 4, 137 N.M. 334, 110 P.3d 1071.

After Court of Appeals refused application for interlocutory appeal on question of how venue statute should be applied where all defendants are foreign corporations, Supreme Court granted writ of certiorari and addressed issue as matter of substantial public interest.

MOOTNESS

State v. Wilson, 2005-NMCA-130, 138 N.M. 551, 123 P.3d 784, cert. granted, 2005-NMCERT-011, 138 N.M. 587, 124 P.3d 565.

Court decides appeal as to whether defendant who is acquitted of domestic violence or DWI charges in metro court is entitled to de novo district court appeal on other charges, even though appellant had served sentence on other charges and appeal was moot; other defendants in similar circumstances are likely to have completed their sentences before having their claim of a right to trial de novo heard on appeal, and therefore issue is one that is capable of repetition but may evade review.

RECORD ON APPEAL

— Appellant Must Bring Up Adequate Record

Collado v. New Mexico Motor Vehicle Division, 2005-NMCA-056, ¶ 10, 137 N.M. 442, 112 P.3d 303.

Where appellant failed to designate transcript of hearing at which claim of defective service was addressed, Court of Appeals affirmed trial court's ruling against appellant. Failure deprived appellate court of record sufficient to review issue. Because defects in service can be waived, court presumed that any defects in service were waived or cured at hearing.

State v. Maestas, 2005-NMCA-062, ¶ 37, 137 N.M. 477, 112 P.3d 1134, cert. granted, 2005-NMCERT-005, 137 N.M. 523, 113 P.3d 346.

Court would not determine whether trial court properly excluded evidence under rationale that prejudicial effect outweighed probative value where appellant did not provide transcript of in camera hearing at which ruling was made; in absence of adequate record, court indulges every presumption in favor of correctness.

— Material Omitted from Record/Supplementation

State v. Vincent, 2005-NMCA-064, ¶¶ 9-10, 137 N.M. 462, 112 P.3d 1119, cert. granted, 2005-NMCERT-005, 137 N.M. 523, 113 P.3d 346.

Defendant attempting to demonstrate trial counsel's conflict of interest could not rely on documents attached to his appellate briefs to do so; claimed conflict lacked factual basis in record on appeal and was rejected. "Since at least 1928, the rule has been that unless the facts necessary to consider a contention are in the record on appeal, we cannot consider the claim."

State v. Notah-Hunter, 2005-NMCA-074, ¶ 4, 137 N.M. 597, 113 P.3d 867, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

Where court erroneously entered judgment and sentence on wrong form, indicating defendant had pled guilty rather than been adjudged guilty after bench trial, and later entered amended judgment correcting the error, defendant properly moved to supplement record on appeal to clarify that defendant had right to appeal from judgment.

TRANSCRIPT OF PROCEEDINGS

Jones v. Schoellkopf, 2005-NMCA-124, ¶¶ 32-34, 137 N.M. 477, 122 P.3d 844.

Trial court could properly require, on appellee's request, production of entire trial transcript for appeal in which appellant challenged trial court's findings of fact, and court could require appellant initially to pay half of transcript cost. Appellant's assertion that transcript would not aid him was inadequate basis for not designating transcript for appeal; appellant challenging factual findings "must designate all portions of the proceedings bearing on the propositions that the appellant will be challenging. The appellant cannot rely solely on the portions of the proceedings that favor its position."

"If the appellant does not designate the necessary portions [of the transcript of proceedings], the appellee may do so or may rely on the proposition that the appellant has not brought a sufficient record to the appellate court, but the appellee may do the latter at its peril." (citing one case in which Court of Appeals had ruled against appellant who failed to bring up adequate record to review sufficiency of evidence and another case in which court relied on record designated by appellant and pointed out that appellee did not indicate what testimony was missing and could have designated portions of record that appellant did not designate).

PRESERVATION OF ISSUES

State v. Ponce, 2004-NMCA-137, ¶¶ 33-35, 136 N.M. 614, 103 P.3d 54, cert. granted, 2004-NMCERT-012, 136 N.M. 666, 103 P.3d 1098.

Where counsel in questioning witness elicited, and in argument briefly mentioned, that defendant had not been given Miranda warning before being questioned, but counsel did not further discuss the matter, ask for suppression of evidence, or ask for any ruling regarding failure to give warning, Miranda issue was not preserved.

State v. Montoya, 2005-NMCA-005, ¶¶ 8-9, 136 N.M. 674, 104 P.3d 540, cert. quashed, 2005-NMCERT-011, 138 N.M. 587, 124 P.3d 565.

Issue whether facts met statutory definition was adequately preserved, although objection was nebulous, where court was sufficiently alerted to issue to have asked opposing counsel for definition during closing arguments and counsel recited definition and argued why it was met (with two specially concurring judges also agreeing on this point).

Crutchfield v. New Mexico Dep't of Taxation & Revenue, 2005-NMCA-022, ¶¶ 12 & 14, 137 N.M. 26, 106 P.3d 1273.

Where plaintiff's pleadings referred to constitutional rights but never expressly and directly sought declaration that statute was

unconstitutional, nor did plaintiff do so in argument at hearing or in written closing argument or in requested findings and conclusions, issue of constitutionality was not preserved for review; plaintiff failed to invoke a ruling of the district court on the issue or otherwise adequately preserve it.

State v. Mercer, 2005-NMCA-023, ¶ 31, 137 N.M. 36, 106 P.3d 1283, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Contention that cross-examination was unduly limited was not preserved where counsel agreed not to ask about matters until later point and never later raised issue; ruling by trial court was not invoked.

State v. Collins, 2005-NMCA-044, ¶¶ 32-33, 137 N.M. 353, 110 P.3d 1090.

Defendant began to cross-examine witness on a subject, trial court cautioned that examination was becoming tedious, and court then sustained “asked and answered” objection when question was repeated. Defendant thereafter did not ask further questions on subject. Defendant did not preserve claim that his confrontation clause rights were violated; he made no specific argument to court that its ruling violated his right to confront adverse witnesses, and trial court was not alerted to issue.

Grant v. Cumiford, 2005-NMCA-058, ¶ 37, 137 N.M. 485, 112 P.3d 1142.

Although appellant parent did not argue in trial court against guardian ad litem’s motion to limit public access to hearing on custody and child support issues, television station responded and opposed motion. Issue would be considered preserved in parent’s appeal because it “was clearly before the district court, as argued by the television station.”

State v. Torres, 2005-NMCA-070, ¶¶ 12-13, 137 N.M. 607, 113 P.3d 877, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

Where no motion to suppress evidence was filed, plain error doctrine would not be applied to trial court’s failure to suppress evidence sua sponte; there were no factual findings on which to base determination regarding suppression of evidence, and finding that search was illegal and evidence suppressible was not the only one rationally supported by record.

Paule v. Santa Fe County Bd. of County Comm’rs, 2005-NMSC-021, ¶¶ 27-29, 138 N.M. 82, 117 P.3d 240.

Court would review whether agency had acted arbitrarily and capriciously in allegedly changing its voting procedure to approve application after vote was taken and meeting adjourned without decision having been announced (written decision was issued later); although issue was not raised before agency, party opposing application had no opportunity to object in circumstances.

Blea v. Fields, 2005-NMSC-029, ¶ 16 n.2, 138 N.M. 348, 120 P.3d 430.

Party claiming error in trial court’s decision to hear equitable claims before submitting fact issues relevant to legal claims to a jury did not fail to preserve error by submitting to evidentiary hearing on equitable

claims; party had requested jury trial and objected to court hearing equitable issues before jury heard legal issues.

Bogle v. Summit Investment Co., 2005-NMCA-024, ¶ 8, 137 N.M. 80, 107 P.3d 520.

Appellant could not change theory on appeal from challenging termination date of contract to arguing that no contract existed. Contention not raised below would not be considered.

– Preservation by Appellee/“Right for Any Reason”

Williams v. Stewart, 2005-NMCA-061, ¶¶ 23-24, 137 N.M. 420, 112 P.3d 281, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

Appellee’s challenge to standing of class representatives would not be considered initially on appeal as alternative basis for affirmance because, although standing is jurisdictional, question of standing is fact-dependent and opposing parties were not on notice to introduce relevant facts; it would be unfair to decide standing issue based on facts offered by appellee for a different purpose.

STANDARDS OF REVIEW

Archuleta v. Santa Fe Police Dep’t, 2005-NMSC-006, ¶¶ 16, 18, 137 N.M. 161, 108 P.3d 1019.

Standard of review for discovery ruling by administrative agency is abuse of discretion; “[t]here is a sound basis to afford substantial deference to an agency’s ruling on such an order and reverse the ruling only for an abuse of discretion that is arbitrary or capricious or contrary to law.” But where claim is that agency’s denial of discovery violates due process, court “review[s] de novo whether a ruling by an administrative agency is in accordance with the law”; “[w]e should reverse the ruling if the agency unreasonably or unlawfully misinterprets or misapplies the law, but we may recognize agency expertise.” (citations omitted)

ADMINISTRATIVE APPEALS (TO COURT OF APPEALS)

Team Specialty Products, Inc. v. New Mexico Taxation & Revenue Dep’t, 2005-NMCA-020, ¶ 20, 137 N.M. 50, 107 P.3d 4.

To challenge a finding of an administrative hearing officer on appeal to Court of Appeals, appellant must follow requirements of Rules 12-213(A)(3) and (4): specifically attack the finding, set out all the evidence on the issue, and show that the finding is unsupported by substantial evidence.

ADMINISTRATIVE APPEALS (TO DISTRICT COURT)

– Timing

Paule v. Santa Fe County Bd. of County Comm’rs, 2005-NMSC-021, ¶¶ 9-11, 138 N.M. 82, 117 P.3d 240.

Time within which to commence appeal to district court from final administrative agency action under NMSA § 39-3-1.1 begins to run from filing of agency’s written decision, earlier vote by agency on application is not final action by agency for appeal purposes.

– Further Review by Court of Appeals/Supreme Court

Paule v. Santa Fe County Bd. of County Comm’rs, 2005-NMSC-021, ¶¶ 13-16, 138 N.M. 82, 117 P.3d 240.

Where Court of Appeals quashes writ of certiorari it had issued to district court to review action of administrative agency, Supreme Court may grant writ of certiorari to allow further review pursuant to NMSA § 39-3-1.1. Supreme Court does not review lower court's discretionary decision to quash writ but determines whether case meets Supreme Court's own criteria for issuance of writ of certiorari.

EXTRAORDINARY WRITS

Albuquerque Rape Crisis Ctr. v. Blackmer, 2005-NMSC-032, 138 N.M. 398, 120 P.3d 820.

Supreme Court granted emergency stay and entertained, on petition for writ of prohibition or superintending control, challenge by rape crisis center to district court order requiring disclosure of communications between alleged rape victim and counselors.

See also State ex rel. Brandenburg v. Blackmer, 2005-NMSC-008, ¶¶ 7, 9, 137 N.M. 258, 110 P.3d 66 (review by extraordinary writ of order requiring disclosure of communications between alleged rape victim and victim advocate; disclosure would irrevocably destroy any confidentiality that was due, and question was important legal issue of statewide interest).

BRIEFS

– Form

Murken v. Solv-Ex Corp., 2005-NMCA-137, ¶¶ 17-20, 138 N.M. 653, 124 P.3d 1192.

Court of Appeals “does not reject a brief that contains a few or several footnotes, even when they are single spaced and in smaller than permissible print.” But court criticizes, and “probably should have . . . rejected” and required resubmission of, brief containing 111 single-spaced footnotes in very small print containing “law review-type explanatory notes, citations to transcripts of proceedings, citations to treatises, . . . discussions of the content of court-filed documents” and “citations . . . to cases – many with parenthetical comment, some quite lengthy.” Brief violates rules regarding type size and requiring double spacing of contents except quotations and would undoubtedly exceed 35-page limit if footnotes were placed in text.

– Record Citations

State v. Tarver, 2005-NMCA-030, ¶ 5, 137 N.M. 115, 108 P.3d 1.

Court declines appellee's request to strike portions of brief in chief for failure to cite to specific pages of record proper and because factual representations are allegedly unsupported; although citations are to pleadings generally by title and filing date rather than to specific pages, “the record is quite small and we have easily been able to find [appellant's] references”; court also found “most of [appellant's] factual assertions] in the parties' memoranda or exhibits below, and the factual assertions were not disputed below”; rules of appellate procedure give court discretion to decide applicable sanction, if any, for failure to comply with rules.

Murken v. Solv-Ex Corp., 2005-NMCA-137, ¶ 14, 138 N.M. 653, 124 P.3d 1192.

Court declines to review arguments lacking citations to record proper which exceeds 4,700 pages “to the extent that we would have to comb the record” to review the arguments.

– Argument

Headley v. Morgan Management Corp., 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076, cert. denied, 2005-NMCERT-004, 137 N.M. 454, 112 P.3d 1111.

Where brief in chief contains less than one page of argument on issue, with no explanation of argument or any relevant facts, and argument in reply is equally brief and asserts facts without record citations, court “decline[d] to consider such an undeveloped argument.” “We will not review unclear arguments, or guess at what [the party's] arguments might be.”

Coppler & Mannick, P.C. v. Wakeland, 2005-NMCA-098, ¶ 39, 138 N.M. 113, 117 P.3d 919, aff'd, 2005-NMSC-022, 138 N.M. 108, 117 P.3d 914.

Appellee does not concede issue by failing to brief it or cite authorities. Rule applies only to appellant, because on appeal every reasonable presumption is indulged in favor of affirmance and appellant has burden of clearly showing error. “In contrast, an appellee does not even have to file a brief.”

– Amicus Briefs

Crutchfield v. New Mexico Dep't of Taxation & Revenue, 2005-NMCA-022, ¶ 15, 137 N.M. 26, 106 P.3d 1273.

Amicus brief would not be considered where brief raised issues not raised and preserved by party below.

Wagner v. AGW Consultants, 2005-NMSC-016, ¶¶ 16 n.5 & 28 n.8, 137 N.M. 734, 114 P.3d 1050.

Court would not consider facts presented in amicus brief which were not included in record.

HARMLESS ERROR

Santa Fe Custom Shutters & Doors, Inc. v. Home Depot, Inc., 2005-NMCA-051, ¶¶ 30-32, 137 N.M. 524, 113 P.3d 347, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

Evidence improperly admitted by court in bench trial would not be considered harmless where there was high probability that evidence influenced court: evidence was presented through detailed testimony, was emphasized in argument at trial, was used to support requested findings which court adopted, and was only evidence to support one of court's findings.

NEW OR AMENDED RULES

NMRA 12-203A: new rule regarding Rule 1-023(F) appeals from orders on class certification

NMRA 12-211 & -213: rules regarding transcripts of proceedings amended to accommodate digital transcripts

NMRA 12-302: limited appearances

NMRA 12-305: captions involving children

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2006 Appellate Practice Institute

Friday, August 18, 2006

State Bar Center, Albuquerque

5.8 General and 1.0 Ethics CLE Credits

This seminar will cover the nuts and bolts of appellate practice. It will include information about how to present a persuasive appeal, how to write effective briefs, memoranda, and petitions for certiorari, and how to deliver powerful oral argument. It will also include information about the Court of Appeals' calendaring process and mediation program. Attendees will receive one hour of ethics credit.