

Appellate News

Volume VII • Summer 1999



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State Bar of New Mexico

MESSAGE FROM THE SECTION CHAIR

Kerry Kiernan, Esq.

It is an honor to serve the Section this year as Chair. This Section is one of the most active in the State Bar, and so the work that I am involved in is very challenging. I wanted to report to you briefly on the Section Board's activities this year and encourage all of you to participate in section activities.

The Section began this year by funding the printing of a brochure describing the process of taking a civil appeal from Bernalillo Metropolitan court to district court. Judge Lynn Pickard of the Court of Appeals authored the brochure, and requested that the Section support the printing for those litigants in Metropolitan Court. The Section approved \$175 for printing, and the brochure was printed for less. It is currently available to all interested litigants. As you may know, the Section last year also funded the printing of Judge Pickard's criminal appeal brochure, which detailed how to process a criminal appeal from Metropolitan Court to district court. The Board views the printing of these brochures as a vital service to the affected litigants.

Also at the beginning of the year, the Board approved \$100 for the establishment of an Appellate Practice Web site. The Board is currently working on the format, and when it is finally determined, notice and more information will be placed in the *Bar Bulletin* for the use of members. The Board is very excited at the prospect of disseminating appellate information to members with this electronic technology.

Additionally, the Board has just approved two CLE seminars for this year. The first will be a satellite CLE concerning the nuts and bolts of appellate practice. It will be broadcast throughout the state and will be designed to educate practitioners on the basics of the appellate process. The date for this CLE will be August 28, 1999. The current format of the seminar, as approved by the Board, will take

the practitioner through the appellate process from formation of docketing statements to preparation for oral argument. The CLE will be broadcast from the University of New Mexico campus, and all appellate practitioners located in Albuquerque are encouraged to attend in person on that date.

The second CLE will occur at the State Bar Convention in Santa Fe. The Board will sponsor a seminar on appellate practice in the district courts on the afternoon of October 22, 1999. Because of various recent statutory and rule changes, appellate practice in the district courts is expanding, especially appeals from administrative entities. It is worthwhile for any practitioner to understand this new appellate process. To that end, Judge Hartz of the New Mexico Court of Appeals, District Judge Wendy York, and various other practitioners will speak on this subject. More details regarding these presentations will appear in the *State Bar Bulletin* as the State Bar convention approaches.

As you know, the dates of our Board meetings are always published in the *Bar Bulletin* ahead of time so that all Section members who wish to attend can attend. I would encourage all Section members to attend at least one meeting a year, if possible, so that you can understand how your interests are being represented by the Board and how your Section dues are being spent.

If any of you have any ideas on how to continue to improve the delivery of appellate information to Section members, or to any other practitioners within the state, please do not hesitate to call me. My number is (505) 888-4300, and my mailing address is Kerry Kiernan, 6400 Uptown Blvd. NE, Suite 110-W, Albuquerque, NM 87110.

I look forward to seeing you at future Board meetings and at our upcoming CLE seminars.



4.5 GENERAL MCLE CREDITS
8:00 A.M. TO 12 NOON
SATURDAY, AUGUST 28, 1999

Cosponsored by State Bar of New Mexico
 Center for Legal Education
 and the Appellate Practice Section

Program Schedule

This seminar will be broadcast live via satellite to various locations around the state. You will be able to phone or fax your questions and comments directly to the broadcast studio.

7:30 a.m.	Check-in and registration
8:00 a.m.	Program
10:00 a.m.	Break
10:15 a.m.	Program
12:00 noon	Adjourn

Faculty

Kerry C. Kiernan, Esq. — Program Chair
 Eaves, Bardacke, Baugh, Kierst, & Kiernan, P.A.
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 New Mexico Energy, Minerals
 and Natural Resources Department
 Santa Fe, New Mexico

Call Center for Legal Education
 at (505) 797-6020,
 for further information and registration

Program Description

Find out how to prosecute or defend a successful appeal from start to finish. This program will address each aspect of the unique New Mexico appellate process. The first part of the program will focus on analyzing the appeal and strategies for persuading the Court to place the case on the general calendar if you are the appellant, or to summarily affirm the trial court's decision in your favor if you are the appellee. Topics to be addressed will include:

- What is the appropriate standard of review that the Court will use to judge your case and how can you use that standard to persuade the Court of your position?
- How to write an effective docketing statement.
- A description of the Court of Appeals' calendaring system and how to respond to a calendar notice as appellant or as appellee.

The second part of the program will concentrate on the traditional aspects of the appeal and new approaches to resolving disputes in the appellate courts. Topics include:

- How to write a persuasive brief that will convince the Court and your opponent of your position.
- What an answer brief or reply brief should and shouldn't include.
- Presenting an oral argument that is interesting, informative, and not the same old stuff in the briefs.
- Mediation programs available for cases in the appellate courts - the substance and the procedure.

AN INTERVIEW WITH JUSTICE DAN A. MCKINNON, III

by Bruce Rogoff

Rogoff: Why did you become a lawyer?
McKinnon: By accident. I was going to be a doctor, like my daddy; however, during the second year of college I decided I wanted to be the greatest jazz drummer who ever lived. So I went to New York City in the spring of 1960 to “play those damn drums” as my daddy called them. After starving and playing precious little for six months I beat it back here with tail between my legs, and completed my work for a Bachelor of Science degree in biology and chemistry at UNM. Then I played an extended engagement at the St. Anthony Hotel in San Antonio, and on a lark applied to three western law schools. To my surprise I was accepted at the University of Colorado, and really enjoyed the experience. I was fascinated with the many and varied subjects covered in law school, and that may be in part why I came to enjoy general practice as a lawyer.

Rogoff: Any jazz drummer heroes?
McKinnon: Yes. The late Tony Williams, who played for Miles Davis for several years was my idol. Others whose playing inspired me greatly were Mel Lewis, Louis Hayes, Elvin Jones, Frank Butler, and Jack De Johnette.

Rogoff: What was the name of the band you played with in San Antonio?
McKinnon: It was a hokey name that eludes me, but unbeknownst to me before I started, the band played only old, society-type music. A trumpet player friend had landed the job for me by misrepresenting my age and experience to the band leader, who was a Paul Whiteman look-alike! Somehow we managed to co-exist with, if not love, each other’s playing.

Rogoff: Tell me about your legal career.
McKinnon: During the summer breaks at law school I clerked for Owen Marron and Howard Houk who were both excellent and very professional lawyers and mentors. After graduating I became an associate and a few years later a partner in the firm. I handled a wide variety of civil and criminal matters which included many “con-

troversial” cases as a Cooperating Attorney with the dreaded ACLU! In the late 1970’s Steve Ewing joined the firm and we carried on the practice until I joined the Supreme Court in 1996.

Rogoff: Are you the only justice ever to be appointed twice?
McKinnon: [Laughs] I think so.
Rogoff: When you became a Supreme Court justice was there anything that surprised you?
McKinnon: Yes, I was surprised by the process used to decide cases on appeal. I’d done a lot of appellate practice. I thought everyone was at their peak by oral argument, and that the clerks had done their job in searching the record and reading all of the relevant cases and legal authorities. I thought that after oral argument there’d be some discussion, and later a final conference where the decision would be made. Wrong! [Laughs heartily.]

Rogoff: Tell us how it really happens then. We’ve been wondering.
McKinnon: It’s no secret. The late Justice Montgomery’s article on the Court’s appellate process was published last year. There, he noted that while the justices do read the briefs before oral argument generally the clerks are not involved at all until *after* oral argument. One or two of the justices may have their clerks prepare bench memoranda for use at oral argument; however most cases were heard and decided before any critical review of the record or the cited authorities occurred. Instead the justices would confer immediately after oral argument and in most cases reach a tentative decision. While subsequent review and research by the clerks and the justices occasionally led to a change of the tentative decision, in most cases the original decision would stand.

Rogoff: Is oral argument important then?
McKinnon: I think it’s absolutely crucial. On occasion, I used to waive oral argument. I thought the briefs said it all!

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Rogoff: I think that's what they tell you not to do now.

McKinnon: Being ignorant of the process I was foolish to waive argument, especially if I represented an appellee. Imagine being an appellee and waiving oral argument – sitting back in your office pontificating about what a great brief you wrote. I'm not saying your oral argument will necessarily change the minds of the justices, but you want to be there to make sure you can respond to anything that needs clarification, keeping in mind they're immediately going into conference to decide the case.

Rogoff: Did things ever become heated in the back room?

McKinnon: No, the spirit of collegiality was always present even when the court was divided on an important issue.

Rogoff: So you'd have these discussions in that short time between oral arguments?

McKinnon: Yes.

Rogoff: So you decided pretty quickly.

McKinnon: Yes. But there were times when we didn't immediately arrive at a decision. So we'd confer again at a later date after further review of the case.

Rogoff: I think that makes us feel a little better. Any frustrations while you served on the court?

McKinnon: Yes, the lack of enough time to perform all of the tasks of the job. We're the only supreme court I know that requires each justice to review every petition for certiorari – comes to one thousand a year, or so; and the vast majority are without merit. Then I learned that relatively little time was spent working on authorships. Justice Ransom did his own time study for one year and found that twenty-five percent of his time was spent working on authorships, he being one of the most prolific writers ever to serve on the Court. I had to campaign, as well as spend time sitting on judicial selection commissions, addressing district court staff meetings and conferences, appointing people to committees, approving new rules or amendments (as if we didn't have enough) and attending many social or public functions on behalf of the Court. There was also substantial time devoted to legislative matters, the budget, judicial salaries,

and other administrative matters, as well as reviewing and hearing petitions for writs for extraordinary relief. Thus, the ninety-day rule for issuing opinions was hardly ever complied with. The Court is thinking about utilizing a screening mechanism for all or some of the cert petitions. I think that this should be done. Does the court meet on Wednesdays?

Rogoff:

McKinnon: Yes.

Rogoff: How long does that take?

McKinnon: Generally about two to three hours in the morning, and that is also the day a panel of three justices will hear motions and petitions for extraordinary relief.

Rogoff: Would you have a screening clerk?

McKinnon: It may be more than one, maybe two or three, who do other things as well. I hope the Court would still give the cases careful attention. I have some real fears about screening, but time is such a problem, especially where the important, if not crucial rights or interests of the litigants are at stake.

Rogoff: What did you like?

McKinnon: The collegiality, respect. It's good to exchange different views in a non-threatening setting. We also had a very dedicated and hardworking staff, including the law clerks; they all were very helpful to me. Justice Franchini did a good job of reaching out to the lower courts in an effort to create a productive working relationship. I used to call the Supreme Court a convent the phone would hardly ever ring; you are isolated up there, not many visitors. Since I've always liked lawyers, and enjoyed exchanging views with lawyers about a case, it was fun to question lawyers at oral argument. I tried to show the lawyers that I gave a damn about their cases. I was also impressed with the caliber of representation by the Attorney General's Office and the Public Defender. I always enjoyed the intellectual challenge, the wide variety of cases. One thing that did perplex me was trying to understand the magic formula or reason for granting certiorari. I had problems with that because the commonly expressed view was, well, we're not an error correcting court, and therefore X petition should be denied.

Rogoff: I know.

McKinnon: What do you mean, we're not an error correcting court!

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Rogoff: Are you supposed to look the other way or something?

McKinnon: Our Supreme Court is now called a “cert. court” meaning, in general, that only the most important cases deserve its attention. Analogously, the United States Supreme Court now fully addresses the merits in only eighty-some odd cases each term. While not denying that many, many more cases may have merit, apparently they are not important enough to warrant an opinion. The “error correcting” court in New Mexico is thought to be the Court of Appeals which utilizes a panel of clerks in “calendarizing” cases. This process results quite often in the summary affirmation or reversal of a tremendous number of cases without the benefit of a transcript, full briefing or oral argument. I had great difficulty in identifying accurate criteria for distinguishing between error correcting cases which resulted in summary disposition and those with claimed errors that warranted the granting of a certiorari petition. It seems to me that an increasing case load requires more judges, not summary dispositions.

Rogoff: Do you have any ideas about the problems facing our profession?

McKinnon: The lack of trust is a problem, of lawyers and the system. We’re considered too expensive, too time consuming, and there are questions about the effectiveness of such an overburdened system. People are also suspicious of the system because they do not know how it works. Is there a better way of resolving disputes, especially when ninety-five percent of civil lawsuits end up settling anyway? Of course there are cases that have to be tried, but there are just too many lawsuits, and more often than not the winners and losers are not satisfied primarily because the *real* interests of the parties are not addressed in a jury verdict or trial court decision.

Rogoff: I’ve been thinking about this, because now I’m reading somebody’s filing suit be-

cause toothbrushes cause abrasions, and why didn’t anyone tell us? Last summer Barney the dinosaur sued the San Diego Chicken. Where is it going to end? Everybody sues everybody for every stupid thing they can think of.

McKinnon: Well, I believe that under our system courts are confronted with a number of frivolous law suits. But I also believe there are those who would love to do away with our jury system because of their distrust of the people who serve on juries, and their desire to have “professional” juries or no jury but instead have a judge decide all cases. These views are often held by those who want to “reform” the system in accordance with their private agendas. I find these views to be dangerous and an unwarranted attack on the constitutional right to trial by jury. For example, on national television I recently heard, for the umpteenth time, a well-known politician attack the jury verdict in the McDonald’s case which he claimed resulted in a verdict of “tens of millions of dollars” for a plaintiff who spilled some coffee on herself. In fact, the verdict was for 2.9 million dollars, and later was reduced substantially by the trial court. Apparently McDonald’s knew that many persons had sustained burns from excessively hot coffee and did nothing to correct the problem despite such knowledge. Further, the burns suffered by the elderly plaintiff were extremely severe, resulting in thousands of dollars in medical bills. Finally, the jury determined that the plaintiff was comparatively at fault for her own injuries. The McDonald’s case, when analyzed with these facts in mind, hardly furnishes a reasonable basis for such an exaggerated attack on the jury system. Nevertheless, we need to dispel the image of lawyers as greedy shysters by treating all involved in the litigation process with civility and by adhering to the principles of our Oath and the Code of Professionalism.

Rogoff: Okay, Judge, I think we have enough now. I’ll see you soon.

McKinnon: Peace.

COURT OF APPEALS MEDIATION UPDATE

*By Richard Becker, Appellate Mediator
New Mexico Court of Appeals*

Last September the New Mexico Court of Appeals launched a pilot mediation program for a broad variety of civil appeals.¹ The purpose of this article is to remind appellate practitioners how the program operates, discuss the results of the Court's efforts, and suggest how counsel can prepare for mediation and use it for their clients' benefit.

The Appellate Mediation Process

The Appellate Mediation Office may schedule and conduct mediation conferences in any civil matter pending before the Court except requests for stays, appeals in which one of the parties is incarcerated or in which a non-attorney is a pro se party and in cases involving the revocation of a driver's license, a petition for extraordinary relief, or an appeal arising from the Children's Code. Counsel for any party may request a conference, and judges may also refer cases for mediation. Otherwise, the Appellate Mediation Office randomly selects cases for conferencing from the pool of eligible non-summary cases.

We started with random selection for two reasons: we assumed that limited staffing would prevent mediating every case, and the experience in other programs suggested that it is difficult to predict which cases are more likely to settle. In the first nine months of operation initial mediation sessions have been scheduled in every eligible case, and conferences in approximately 15 new cases have been held each month. The kinds of cases that have settled represent the breadth of the Court's civil docket—contract, wrongful death, false arrest, domestic relations, water rights, condemnation, tax, slip and fall, wrongful termination, and worker's compensation to name a few.

The Court's decision to focus its efforts on non-summary cases represents a compromise between low cost and efficiency. The prospects of settlement, at least in cases not involving high stakes, tend to lessen with the expenditure of additional effort and expense as parties invest more heavily in a litigated result. At the point that a case is assigned to a non-summary calendar, an appellant will have filed a docketing statement, and one or both parties may have filed memoranda in response to calendar notices. On the other hand, the expense of full briefing has not yet been incurred. And, since the mediator will have access to the court file, record proper, and analysis prepared by central staff for the benefit of the calendaring

judge, it is not necessary for clients to incur the additional expense of preparing position papers.

The Appellate Mediation Office initiates the mediation process by sending a conference notice to counsel. The conference notice informs counsel of the time and date, whether the session will be in person or by telephone, and the names of all attorneys who have been notified. Additionally, counsel are provided with an information packet that includes information on what to expect and suggestions on how to prepare for the conference.²

Conferences are scheduled approximately three to five weeks after notices are sent. Anyone with an unavoidable scheduling conflict may ask that the conference be rescheduled; the Appellate Mediation Office will then provide one or more alternate dates and ask the attorney with the conflict to arrange a new conference date with the other participants.

The regular time lines for filing notices, designations, and briefs are not suspended during the mediation process. However, the appellate mediator has authority to issue orders granting verbal requests for an extension of time until after the mediation process has run its course. We have heard that the bar is pleased that the Court has implemented this user-friendly procedure.

Mediation conferences are mandatory, meaning that lead counsel are required to participate in the process. Most conferences are initiated by a telephone call from the appellate mediator in order to minimize costs, although in some cases counsel and clients are required to attend in person. Generally, we attempt to encourage attorneys to consider inviting their clients to participate rather than insist on the parties' attendance. Our theory is that the lawyers must feel comfortable with the process in order for it to be successful and that forcing clients' participation upon them may be counterproductive. On the other hand, it is very encouraging when counsel on both sides recommend that all parties participate. On occasion, the mediator may travel to a conference site. The influencing factors are budget and time constraints plus the level of commitment and hopefulness expressed by the attorneys.

Throughout the conference, whether in joint or private session, the mediator seeks to find out the reasons why the parties are pursuing the case, learn their underlying interests, explore common ground, and examine

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bases for settlement. Discussion of the legal merits of the case for the purpose of understanding the key issues on appeal and evaluating the risks of continuing with litigation are usually handled in private session; there seems to be little value in having counsel re-argue positions they have already staked out.

Statements made during a conference and in related discussions are confidential and may not be disclosed to any court by the mediator, counsel, or the parties. The mediator may not communicate anything to the other side that was revealed in a private discussion without authorization from counsel. The purpose of confidentiality is to encourage full and candid discussions and to ensure the impartiality of decision-making in the event a case does not settle. The Court is not aware of the progress of settlement efforts, and judges, law clerks, staff attorneys, and administrative personnel of the Court do not have access to information related to settlement that is generated by the activities of the Office.

While the Court is optimistic about its new program, its continuing commitment will depend on a showing that its efforts are statistically efficient and also that its customers, lawyers and clients, are satisfied with the services being provided. In the three full calendar years before the pilot program began, an average of only 12 eligible-type cases per year were settled and voluntarily dismissed after assignment to a non-summary calendar. By way of contrast, in only nine months since the Court commenced its mediation program, 34 eligible cases have already settled. Additionally, the responses to anonymous questionnaires that the Court mails to participants in closed cases, whether or not they have been settled, express a high support for the program.

The Role of Lawyers

The importance of the role of counsel in the outcome of mediation efforts in specific cases and in the overall success of the Court's program cannot be over-emphasized. Skill and planning contribute both to advocates' powers of persuasion and to the capacity of mediators to effectively perform their functions.

Before the mediation, counsel should probe their client's objectives, develop some realistic options, and avoid substituting their own values for those of their clients. Counsel participating in mediation should know the strengths and weaknesses possessed by their own clients as well as those of their adversaries. They must also ask themselves what their opponents know about their specific situation. Acknowledgment of one's own weakness in private discussions with the mediator does not have to undermine the inner confidence that may be essential should further litigation become necessary. The party that has more accurately evaluated the circumstances has a distinct advantage over the party that unthinkingly anticipates victory.

By listening closely to what the other side has to say and avoiding interrupting, counsel can gather information that will help in a realistic assessment of the case and pick up clues as to the underlying interests that a settlement proposal can be structured to accommodate. When counsel respond to proposals with a reasoned and objective rationale rather than with inflexible positions, real collaboration can occur.

Lawyers interested in learning more about mediation and gaining some hands-on experience may want to consider taking one of the basic courses such as are regularly offered at UNM Law School. The content of a basic course typically includes mediation and negotiation theory, discussion and demonstration of effective mediation techniques, and extensive opportunities to practice skills in coached role plays. While such courses do not focus on the process of assisting clients in the settlement of cases, the classes teach how mediation works and illuminate its potential for helping resolve disputes.

Conclusion

Based on the information the Court has reviewed about other programs and the results obtained thus far, it is confident that the support and commitment embodied in the procedures it has adopted, along with the talent of the New Mexico bar, will lead to a successful pilot program.

¹ Ct. App. Order No. 1-23, In the Matter of the Court of Appeals Pilot Settlement Conference Procedures <<http://www.nmcourts.com/FTP/coaorder.htm>>

² The information packet is regularly revised. The current version is available at <<http://www.nmcourts.com/FTP/stuffer.pdf>>.

RECENT DEVELOPMENTS IN NEW MEXICO APPELLATE PRACTICE

Compiled by Edward Ricco
Rodey, Dickason, Sloan, Akin & Robb, P.A.

Finality/Appealability of Judgments

Khalsa v. Levinson, 1998-NMCA-110, Vol. 37, No. 42, SBB 34.

To be final for purposes of appeal, a decision must include decretal language that carries the decision into effect by ordering that something happen or by entering judgment in favor of a party. Although decision found former wife entitled to attorney's fees in a sum certain, made other findings of fact, and stated that it was final and appealable, it did not order entry of judgment, grant or deny any motions, or order specific relief and therefore lacked decretal language and was non-appealable.

Appeal lies from post-judgment order affecting substantial rights if order finally resolves all issues presented by post-judgment motions or is properly certified for immediate appeal under Rule 1-054(C). Court dismissed appeal from order that did not resolve all issues raised by series of post-decree motions in divorce matter and that could not be treated as properly certified under Rule 1-054(C) because appeal would entail review of issues that were intertwined with issues that remained unresolved.

State v. Ahasteen, 1998-NMCA-158, Vol. 37, No. 47, SBB 42, *cert. denied*, No. 25,334 (1998).

Order remanding to magistrate court DWI prosecution that had been filed there, dismissed without prejudice, and refiled in district court was final and appealable under practical finality doctrine because state was unlikely to be able to obtain review of remand order following either conviction or acquittal in magistrate court; given lack of authority for remand, order in essence operated as dismissal of charges; furthermore, state had constitutional right to appeal disposition in criminal case that was contrary to law.

Appeals from Partial Final Judgments (Rule 1-054(C))

Khalsa v. Levinson, 1998-NMCA-110, ¶¶ 18-20, Vol. 37, No. 42, SBB 34.

Rule 1-054(C) "has generally been interpreted to require both an express determination that there is no just reason for delay and an express direction for entry of judgment." However, "there are at least two reasons why an appellate court will refuse to entertain an appeal" even though it has been so certified by the trial court. "First, the order must still be final in the sense that it finally determines at least one discrete claim. . . . Second, the trial court's determination that

'there is no just reason for delay' is subject to review for abuse of discretion. . . . [A] trial court abuses its discretion in certifying a judgment for immediate appeal . . . when the issues decided by the judgment are intertwined, legally or factually, with the issues not yet resolved, or when resolution of the remaining issues may alter or revise the judgment previously entered." (citations omitted).

Proper Appellate Forum - Court of Appeals vs. Supreme Court

Wilson v. Denver, 1998-NMSC-016, ¶ 7, Vol. 37, No. 5 SBB 29.

Interlocutory appeal in election contest properly taken to Supreme Court under statutes providing direct appeal to Supreme Court.

Standing to Appeal

State ex rel. Salazar v. Roybal, 1998-NMCA-093, Vol. 37, No. 34 SBB 17, *cert. denied*, No. 25,215 (1998).

Although state agency lacked standing to bring paternity and child support action, child who was real party in interest was represented by counsel and participated as interested party in trial court proceedings, and child could bring his own proceeding. No substantial rights were affected by incorrect nominal petitioner. Court's "interest in judicial economy" prevented it from ordering dismissal; instead, case was remanded to district court to decide whether to substitute child as petitioner.

Crumacker v. DeNaples, 1998-NMCA-169, Vol. 37, No. 50, SBB 18, *cert. denied*, No. 25,420 (1998).

Victim of alleged malpractice had standing to sue even though her trustee in bankruptcy was real party in interest; consequently, victim's motion to amend complaint to add trustee as additional plaintiff was properly before trial court and she was aggrieved party entitled to appeal denial of motion.

Ripeness/Exhaustion of Administrative Remedies

U S West Communications, Inc. v. N.M. State Corp. Comm'n, 1998-NMSC-032, ¶¶ 7-11, Vol. 37, No. 43, SBB 23.

Contrasting doctrine of ripeness, which applies to removal proceedings from SCC, and exhaustion of administrative remedies, which does not.

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State ex rel. Hyde Park Co. v. Planning Comm'n, 1998-NMCA-146, Vol. 37, No. 46, SBB 25.

Party would not be permitted to bypass statutory procedure for review of administrative decision by seeking writ of mandamus to compel administrative action and appealing from denial of writ; appeal dismissed for failure to exhaust administrative remedies.

Post-Judgment Motions During Pendency of Appeal

Edwards v. Franchini, 1998-NMCA-128, Vol. 37, No. 41, SBB 26, *cert. denied*, No. 25,281 (1998).

Appellate court will remand to permit district court to entertain post-judgment motion during pendency of appeal upon showing of exceptional circumstances and where it is reasonably apparent that trial court would be disposed to grant motion. Neither condition met where bankruptcy court ruling during pendency of appeal did not have effect claimed by appellees of retroactively vesting claims in them as if bankruptcy proceeding had never occurred.

Trial Court's Oral Statements vs. Written Rulings as Reviewable on Appeal

Enriquez v. Cochran, 1998-NMCA-157, ¶ 25, Vol. 37, No. 47, SBB 16, *cert. denied*, No. 25,365 (1998).

Although appellant argued, correctly in light of transcript, that at hearing trial court reserved ruling on its discovery objections rather than overruling objections as stated in order, this discrepancy was of no aid on appeal. "Formal written orders filed of record normally supersede oral rulings, and oral rulings cannot normally be used to contradict written orders."

Attorney General v. Montoya, 1998-NMCA-149, ¶ 16, Vol. 37, No. 49, SBB 36, *cert. denied*, No. 25,336 (1998).

Although error should normally not be predicated on trial court's oral remarks in rendering decision, conviction was remanded where trial court's remarks indicated that it did not apply standard of proof beyond reasonable doubt, nothing in record indicated that court was aware of or applied correct standard, and issue was profoundly important.

Lack of Jurisdiction as Appellate Issue

Khalsa v. Levinson, 1998-NMCA-110, ¶ 12, Vol. 37, No. 42, SBB 34.

"Whether an order is a 'final order' . . . is a jurisdictional question that an appellate court is required to raise on its own motion."

Wilson v. Denver, 1998-NMSC-016, ¶ 8, Vol. 37, No. 35 SBB 29.

Appellate court may sua sponte raise question whether district court had subject matter jurisdiction.

Masterman v. State Taxation & Revenue Dept., 1998-NMCA-126, Vol. 37, No. 41, SBB 36.

District court's order reversed sua sponte because district court lacked subject matter jurisdiction.

Interpretation of Trial Court's Rulings, Orders, Findings and Conclusions

Wilson v. Denver, 1998-NMSC-016, ¶ 12 n.1, Vol. 37, No. 35, SBB 29.

Where trial court entered summary judgment in one of two election contests prior to consolidation, but both contests appeared in caption of court's order and both were certified for interlocutory appeal on same issue, Supreme Court concluded that trial court intended to grant summary judgment in both contests.

Harrell v. Hayes (In re Estates of Hayes), 1998-NMCA-136, ¶ 19, Vol. 37, No. 42, SBB 30.

Although order granting relief "pursuant to Rule 1-060" did not specify that relief was granted under paragraph (A) of rule, trial court clearly intended that basis for its ruling where language of Rule 1-060(A) was incorporated into order.

State v. Munoz, 1998-NMCA-140, ¶ 16, Vol. 37, No. 43, SBB 39.

Court would not presume from trial court's conclusions of law that trial court made finding necessary to support its ruling, where record indicated that because trial court misconstrued law it did not consider correct factual issue; "that would constitute too great a stretch in favor of affirmance."

Preservation of Issues Purposes of Preservation Rule

Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 39, Vol. 37, No. 37, SBB 19, *cert. granted*, No. 25,293 (1998).

Timely objection to verdict claimed to be ambiguous "would have allowed the trial court to send the jury back to the jury room to clarify its verdict, thereby correcting any error."

Issue Must Be Preserved On the Record

Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 36, Vol. 37, No. 37, SBB 19, *cert. granted*, No. 25,293 (1998).

"[W]e will not consider arguments concerning matters that occurred off the record and that were not memorialized on the record after-the-fact either by the court or by the parties."

Appellant Must Show Preservation

Gillingham v. Reliable Chevrolet, 1998-NMCA-143, ¶ 24, Vol. 37, No. 45, SBB 31.

"Defendant has not informed us of how this issue was preserved. We will not consider this issue on appeal." (citing Rule 12-213(A)(4)).

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Rights Under State Constitution

State v. Sarracino, 1998-NMSC-022, ¶ 11, Vol. 37, No. 36, SBB 13.

Where there is no existing federal constitutional scheme from which to argue that court should depart in order to accord party greater rights under state constitution, preservation rules of *Gomez* do not apply; claim was preserved by requesting jury instruction embodying desired constitutional principle.

Miscellaneous Issues Preserved

State v. Walker, 1998-NMCA-117, ¶ 11, Vol. 37, No. 39, SBB 30, *cert. denied*, No. 25,283 (1998).

State adequately preserved contention that trial court's findings at suppression hearing were erroneous by pointing out error after trial court ruled and again at hearing on motion for reconsideration.

Miscellaneous Issues Not Preserved

Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 13, Vol. 37, No. 37, SBB 19, *cert. granted*, No. 25,293 (1998).

Where trial court amended jury instruction in response to party's first objection, party's second objection failed to clarify that additional grounds were being asserted, in response to trial court's statement that objection had been resolved by prior amendment. Claim of error raised in second objection was not preserved, because trial court was not adequately alerted to nature of that objection.

Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 23, Vol. 37, No. 37, SBB 19, *cert. granted*, No. 25,293 (1998).

Argument that expert should not have included certain data in estimating lost profits was not preserved by general objections relating to causation; neither the timing nor the wording of the objections sufficiently linked the objection to the use of the challenged data.

Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 37, Vol. 37, No. 37, SBB 19, *cert. granted*, No. 25,293 (1998).

Where trial court announced language that would be added to special verdict form and asked counsel whether that was "correct?", counsel had sufficient opportunity to respond; claim that language was ambiguous was not preserved.

City of Carlsbad v. Grace, 1998-NMCA-144, ¶ 15, Vol. 37, No. 46, SBB 27.

Argument that statute of limitations should be calculated from each of a series of overpayments, so recoupment could be obtained for overpayments made during three years prior to suit, was not preserved by passage in summary judgment brief stating "should the recoupment go back three years . . . ? We are willing to face these issues on appeal." This "oblique reference" was "not specific enough to alert the trial court to the nature of the argument."

State v. Vallejos, 1998-NMCA-151, ¶ 16, Vol. 37, No. 46, SBB 41, *cert. denied*, No. 25,379 (1998).

Defense counsel claimed not to have anticipated witnesses's prejudicial answer to question, but where counsel did not object after hearing answer or object to subsequent question regarding same information, claim of error was not preserved.

State v. Vallejos, 1998-NMCA-151, ¶ 31, Vol. 37, No. 46, SBB 41, *cert. denied*, No. 25,379 (1998).

Where trial court deferred ruling on objection to evidence and defense counsel did not renew objection when evidence was offered during trial, counsel failed to seek a ruling and issue was not preserved.

Preservation Not Required - Fundamental Error, Plain Error, Structural Error

Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 40, Vol. 37, No. 37, SBB 19, *cert. granted*, No. 25,293 (1998).

Error in civil verdict form, like error in jury instructions, is generally not fundamental; in civil cases, fundamental error should be recognized "sparingly, and only in extraordinary circumstances."

State v. Begay, 1998-NMSC-029, ¶¶ 18-23, Vol. 37, No. 32, SBB 16.

Failure to object at trial precluded appellate consideration of defendant's argument that trial testimony and counsel's comments were inflammatory and prejudicial; error was not "plain," "structural," or "fundamental."

Change of Theory on Appeal

Famiglietta v. Ivie-Miller Enters., Inc., 1998-NMCA-155, ¶ 13, Vol. 37, No. 45, SBB 16, *cert. denied*, No. 25,316 (1998).

Where party tried case on theory that opposing party breached material provision of contract, thereby excusing party's further performance, Court of Appeals would not consider argument that breached provision was actually a condition precedent as to which materiality was irrelevant, which was not raised until appellate briefing after trial court found against party on issue of materiality.

Famiglietta v. Ivie-Miller Enters., Inc., 1998-NMCA-155, ¶ 21, Vol. 37, No. 45, SBB 16, *cert. denied*, No. 25,316 (1998).

A party may not argue for relief on appeal that it did not request in the trial court.

"Right for Any Reason" Rule

Meiboom v. Watson, 1998-NMCA-091, ¶¶ 13-15, Vol. 37, No. 33 SBB 24, *cert. granted*, No. 25,207 (1998).

Application of "right for any reason" rule was precluded by unfairness, where trial court's decision was based on jurisdictional grounds and court never reached merits of discretionary alternative basis, record was insufficient for review of additional arguments on appeal, and parties did not fully argue nor did trial court thoroughly evaluate evidence pertaining to alternative basis.

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Standards of Review

Importance of Standards of Review

Lackey v. Darrell Julian Constr., 1998-NMCA-121, ¶ 23, Vol. 37, No. 39, SBB 33.

Employer's brief argued that workers' compensation judge had made findings contrary to weight of evidence; "As we do not reweigh the evidence, we affirm the judge on this issue. While we deny Worker's request for sanctions, we caution Employer's counsel to be more mindful of the standard of review in future appellate briefs."

Statutory Construction

Blackwood & Nichols Co. v. New Mexico Taxation & Rev. Dept., 1998-NMCA-113, ¶ 5, Vol. 37, No. 39, SBB 24, *cert. denied*, No. 25,255 (1998).

Determining whether statutory language is ambiguous is question of law subject to de novo review.

Construction/Application of Procedural Rules

State v. Roman, 1998-NMCA-132, ¶ 8, Vol. 37, No. 41, SBB 34, *cert. denied*, No. 25,239 (1998).

Trial court's interpretation and application of procedural rule is question of law subject to de novo review.

Personal Jurisdiction

Campos Enters., Inc. v. Edwin K. Williams & Co., 1998-NMCA-131, Vol. 37, No. 41, SBB 41, *cert. denied*, No. 25,342 (1998).

To the extent a district court's conclusions regarding personal jurisdiction rest on legal precepts, those conclusions are reviewed de novo. The district court's factual findings are not disturbed on appeal unless clearly erroneous. If the court decides factual issues relating to jurisdiction on affidavits rather than conducting an evidentiary hearing, the affidavits are viewed in the light most favorable to the plaintiff but must set forth specific facts sufficient to demonstrate that the court has jurisdiction.

Substantial Evidence

Twin Forks Ranch, Inc. v. Brooks, 1998-NMCA-129, ¶¶ 8-9, Vol. 37, No. 41, SBB 30, *cert. denied*, No. 25,321 (1998).

Substantial evidence standard is not applied identically in all circumstances but parallels the trial court burden of proof. Where issue had to be proved by clear and convincing evidence, appellate court would determine whether reasonable fact finder could find that evidence clearly and convincingly supported trial court's findings of fact.

Administrative Agency Decisions

Gonzales v. New Mexico Bd. of Chiropractic Examiners, 1998-NMSC-021, ¶ 15, Vol. 37, No. 36, SBB 18.

Where uncontradicted expert testimony before agency is that practitioner did not violate standard of care, agency determination, based on its own expertise, that violation of standard occurred is beyond the record and not supported by substantial evidence.

Atlixco Coalition v. Maggiore, 1998-NMCA-134, Vol. 37, No. 44, SBB 29.

Where agency departs from findings and recommendations of hearing officer, it must provide reasoned explanation for doing so to facilitate judicial review; in absence of such explanation, agency action is set aside and matter is remanded to agency to reconsider and explain its reasoning. *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 21, Vol. 37, No. 44, SBB 29.

Agency action must stand or fall on agency's express findings and reasoning; other grounds appearing in record but not relied on by agency cannot be used to sustain action. *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 24, Vol. 37, No. 44, SBB 29.

Agency acts arbitrarily and capriciously "if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand." *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶¶ 38, 40, Vol. 37, No. 44, SBB 29.

Court will defer to agency's reasonable interpretation of its own regulations based on application of agency expertise.

Discovery Sanctions

Enriquez v. Cochran, 1998-NMCA-157, ¶¶ 20-21, Vol. 37, No. 47, SBB 16, *cert. denied*, No. 25,365 (1998).

Trial court's imposition of discovery sanctions is reviewed for abuse of discretion. "In conducting our review we must be mindful of the nature of the conduct and level of culpability found by the trial court and whether the trial court's sanction appears more stern than necessary in light of the conduct prompting the sanction. Because the trial court's decision must be based on its conclusions about a party's conduct and intent, implicit in the standard of review is the question of whether the court's findings and decision are supported by substantial evidence. [¶] In addition, part of our calculus includes a review of the trial court's exploration of alternatives to the sanctions ultimately imposed."

Costs

Gillingham v. Reliable Chevrolet, 1998-NMCA-143, ¶ 25, Vol. 37, No. 45, SBB 31.

"[T]he district court has discretion to award the prevailing party necessary and reasonable costs incident to its prosecution or defense of the action. While a district court's ruling will not be disturbed absent an abuse of discretion, such discretion should be exercised sparingly when considering expenses not specifically authorized by statute and

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precedent. Additionally, when a district court taxes unusual items as costs, it should explain the circumstances justifying the award." Trial court's remarks during cost hearing were inadequate to explain basis for award of unusual items in cost bill; award of these cost items reversed and remanded for reconsideration and for specific explanation of circumstances justifying award if trial court determines to tax unusual items as costs on remand.

Prior Decisions - Precedential Effect

Meiboom v. Watson, 1998-NMCA-091, ¶ 12, Vol. 37, No. 33 SBB 24, *cert. granted*, No. 25,207 (1998).

Court of Appeals may depart from Supreme Court precedent that was based on civil procedure rule which was subsequently amended.

Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶¶ 33-39, Vol. 37, No. 44, SBB 16

Factors to be considered in deciding whether to overturn precedent. Court departs from recently adopted equal protection analysis which court is convinced was incorrectly adopted as a matter of law and which has proved intolerably burdensome in implementation.

Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶¶ 40-43, Vol. 37, No. 44, SBB 16.

Although law of the case principles ordinarily will not be used to uphold clearly incorrect decision, in interest of justice court would apply law of case adopted in two prior appeals and employed in two trials in case before it, while overruling that analysis for future cases.

Appellate Court vs. Trial Court Functions

State ex rel. Children, Youth & Families Dept. v. Vincent L., 1998-NMCA-089, ¶ 6, Vol. 37, No. 34 SBB 24, *cert. denied*, No. 25,227 (1998).

Although appellant's docketing statement contained statement of evidence tending to show why its evidence was more worthy of belief than opposing party's evidence, appellant "has commendably not raised a sufficiency-of-the-evidence issue" because "[a]n appellate court does not weigh the evidence."

Attorney General v. Montoya, 1998-NMCA-149, ¶ 17, Vol. 37, No. 49, SBB 36, *cert. denied*, No. 25,336 (1998).

"[T]here is a world of difference between the existence of sufficient evidence to prove a proposition and a finding of that proposition by the trier of fact." Case remanded, rejecting argument that conviction should be upheld because evidence was sufficient to sustain it, where trial court's application of incorrect standard of proof made it unclear whether trial court was in fact convinced of guilt beyond a reasonable doubt, and evidence did not compel such a finding.

Expedited Bench Program

Khalsa v. Levinson, 1998-NMCA-110, ¶ 11, Vol. 37, No. 42, SBB 34.

"After oral argument it became apparent that the question [whether post-judgment decision was final order for purposes of appeal] warranted a formal opinion; thus, this appeal was removed from the expedited bench program."

Briefs

Medrow v. State Taxation & Rev. Dept., 1998-NMCA-173, ¶ 5, Vol. 37, No. 50, SBB 36.

Counsel for appellant admonished to follow rule requiring that factual statements in summary of proceedings be accompanied by citations to the record. Appellant "did not make a single citation to the record. This failure resulted in the use of scarce judicial resources to search the record for proof of the [appellant's] factual contentions." Adherence to rule "is important for efficiency and accuracy in the appellate process."

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