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EVIDENCE

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INTRODUCTION

The survey year April 1985 to April 1986 was rather quiet with respect to evidence issues. Although no landmark or seminal cases were decided, the New Mexico Court of Appeals and Supreme Court ruled upon several evidentiary issues that should prove instructive to trial practitioners in presenting evidence. This survey will focus on a number of those cases, with emphasis placed on the practical implications for the trial lawyer.

I. RELEVANCY

A. *Character Evidence and Proof of Other Acts of Crimes in Criminal Cases*

Perhaps no area of the law of Evidence is fraught with greater uncertainty than is the admissibility of character evidence.[1] The dangers of improper use of character evidence are compounded in criminal cases where either purposeful or inadvertent references to the defendant's past misconduct can have grave consequences.[2]

The general rule prohibiting the prosecution from introducing evidence of the bad character of the accused stems not from the lack of probity of

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1. The admissibility of character evidence is addressed in N.M.R. Evid. 11-404 (1986 Recomp.) (The numbers of the Evidence Rules have changed since the date of these cases. The authors are using the current numbering system). Generally speaking, character evidence is not admissible to support the inference that a person acted in conformity with his character on a particular occasion. The rule, however, is subject to exceptions for: (1) a criminal defendant; (2) a victim in a criminal case; and (3) a witness whose credibility is under attack. Rule 11-404(b) sets forth examples of prior conduct that may be proved for purposes other than to support the inference that a person acted in conformity with his character, such as identity, State v. Aguirre, 84 N.M. 376, 503 P.2d 1154 (1972); motive, State v. Gardner, 91 N.M. 302, 573 P.2d 236 (Ct. App. 1977); or absence of mistake or common scheme or plan, State v. McCallum, 87 N.M. 459, 535 P.2d 1085 (Ct. App.), *cert. denied*, 87 N.M. 457, 535 P.2d 1083 (1975).

2. Because references by the prosecution to a criminal defendant's bad character traits are likely to evoke prejudicial responses on the part of the trier of fact which outweigh any appropriate probative value, the universal rule has been to exclude such evidence unless the defendant chooses to prove his innocence by offering evidence of his good character. *See, e.g.*, McCormick on Evidence, §§ 186, 189 (3d ed. 1984); 1A J. Wigmore, Evidence, § 57 (Tillers rev. 1983); State v. Rowell, 77 N.M. 124, 419 P.2d 966 (1966).

such evidence, but from the potential for its misuse. Nevertheless, it is not uncommon for such information to come to the attention of the jury from a variety of sources. The prosecutor might elicit such testimony from a witness either in the erroneous belief that it is admissible or for the more sinister express purpose of improperly influencing the jury. Or a prosecution witness might unexpectedly blurt out the evidence in response to an otherwise proper question. The defense will ordinarily object to the testimony, and the court will admonish the jury to disregard it. Unlike most other forms of irrelevant evidence, however, the defendant's character hangs heavy in the courtroom air like a bad odor that cannot be freshened.

Misguided prosecutorial zeal or inadequate witness preparation that produces an improper reference to the defendant's bad character or past misconduct is a recurrent problem in New Mexico courts. An earlier survey article discussed three such cases decided by the court of appeals in which a criminal defendant's prior criminal behavior had been elicited during direct examination of a prosecution witness.[3] Those cases suggest that prosecutorial misconduct is an important factor in determining whether the presentation of such evidence by the state constitutes grounds for mistrial or reversible error. In other words, the court must determine whether the prosecuting attorney purposefully elicited the evidence in an effort to improperly prejudice the jury against the defendant. The court of appeals decisions, taken together, seem to treat prosecutorial misconduct as a definitive factor in determining whether reversible error has occurred. On the other hand, where the prejudicial evidence was produced through inadvertence, misunderstanding, or inadequate witness preparation, various factors should be considered, such as the necessity for resort to the evidence,[4] the likelihood that the jury will follow an admonition by the court to disregard the evidence or to limit consideration to its proper purpose,[5] or the overall strength of the state's case based on properly admitted evidence.[6]

The reported cases of the court of appeals, however, leave no firm guidelines for trial judges and lawyers to follow in a criminal case when the defendant's bad character is exposed through prosecutorial improv-

3. State v. Gutierrez, 93 N.M. 232, 599 P.2d 385 (Ct. App. 1979), State v. Vialpando, 93 N.M. 289, 599 P.2d 1086 (Ct. App.) *cert. denied*, 93 N.M. 172, 598 P.2d 215 (1979), and State v. Martinez, 94 N.M. 50, 607 P.2d 137 (Ct. App. 1980), discussed in Gonzales, *Evidence*, 11 N.M.L. Rev. 159, 163-66 (1980).

4. *Martinez*, 94 N.M. at 52, 607 P.2d at 139 (where an element of the crime could have been proved by alternate means which did not implicate the defendant in prior criminality, resort to the more volatile form of proof was considered unfairly prejudicial).

5. *Vialpando*, 93 N.M. at 296-97, 599 P.2d at 1093-94.

6. *Gutierrez*, 93 N.M. at 235, 599 P.2d at 388 (holding that, although offered by the prosecutor for the purpose of inflaming the jury, the character evidence improperly admitted did not compel reversal because proof of guilt was otherwise overwhelming and the error was therefore harmless).

idence rather than malice. Two recent cases have afforded the supreme court the opportunity to clarify the issue. Homicide prosecutions in *State v. Beach*[7] and *State v. Saavedra*[8] both involved the presentation of inadmissible character evidence by the prosecution against the defendant. In each case the issue had been raised with the court in advance, and the court admonished the prosecution that the defendant's character, that is, his prior criminal activity, was irrelevant and not to be brought up.[9] Despite the trial judges' instructions, prosecution witnesses managed to apprise the respective juries that the defendants were persons of bad character.[10]

In *Beach* the defense claimed diminished capacity because of the defendant's use of drugs, but argued that evidence of his *distribution* of drugs was irrelevant and, therefore, inadmissible.[11] The court agreed, and instructed the prosecution not to make any reference to the defendant's distribution of drugs.[12] At trial the prosecution called the defendant's former wife as a witness.[13] She was asked whether the defendant had used drugs.[14] Without objection she testified that he had.[15] She was then asked whether he distributed drugs to other people, and she answered that he had.[16] The court sustained a defense objection and admonished the jury to disregard the answer.[17] Beach was convicted.[18]

The defendant argued on appeal that the prejudicial effect of the evidence could not have been driven from the jury's mind by the court's admonition.[19] In support of his argument, Beach relied on *State v. Rowell,*[20]

7. 102 N.M. 642, 699 P.2d 115 (1985). The defendant, Beach, was convicted of first degree murder of one David Palaske. *Id.* at 643, 699 P.2d at 116. The evidence showed that Beach had met Palaske in a bar, lured him out to his car, and drove him to a secluded spot. *Id.* The two then engaged in an argument which culminated in Beach's shooting Palaske at close range. *Id.*

8. 103 N.M. 282, 705 P.2d 1133 (1985). Saavedra was convicted of felony murder and robbery. *Id.* at 283, 705 P.2d at 1134. At trial he attempted to prove that the crime had been committed by another person who had been convicted of a series of similar robberies. *Id.* The trial court refused to permit proof of these other crimes. *Id.* On appeal the supreme court held that such proof should have been permitted and that the trial court's ruling on that issue was reversible error. *Id.* at 284, 705 P.2d at 1135. The impropriety of the state's reference to Saavedra's bad character was the second allegation of error advanced by the defendant. *Id.*

9. *Beach,* 102 N.M. at 646, 699 P.2d at 119; *Saavedra,* 103 N.M. at 284, 705 P.2d at 1135.

10. *Id.*

11. *Beach,* 102 N.M. at 646, 699 P.2d at 119.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 643, 699 P.2d at 116.

19. *Id.* at 646, 699 P.2d at 119.

20. 77 N.M. 124,419 P.2d 966 (1966). The supreme court noted in *Rowell* that, "[W]e would be deluding ourselves if we were to believe that human nature being what it is, at least some of the jurors would not assume . . . that indeed appellant had been convicted of another forgery as stated by the district attorney." *Id.* at 127, 419 P.2d at 969.

in which the supreme court held that the prosecution's reference to a prior felony conviction by the accused could not be cured by the trial judge's instruction to disregard the testimony. The court rejected the argument, holding that *Rowell* was limited to cases in which the offending testimony could have "no possible place in the trial."[21] The opinion acknowledged that the testimony seemed to have no relevance at the point in the trial where it was elicited, but went on to speculate that the evidence might later have become relevant if the defendant had attempted to show that his threats against and confrontation with the victim had their genesis in prior drug dealings.[22] Because the evidence could have become relevant later in the trial, the court reasoned, bad faith could not be imputed to the prosecution.[23]

Four months after *Beach* was decided, the supreme court decided *Saavedra,* in which the defendant sought reversal of his murder conviction on the ground that a prosecution witness had testified that he had known Saavedra "[s]ince he got out of the penitentiary."[24] The trial court promptly sustained a defense objection to the testimony and admonished the jury to disregard it,[25] but declined to grant the defendant's motion for a mistrial.[26] In reversing the conviction, the supreme court emphasized that the trial judge had repeatedly cautioned both prosecution and defense attorneys to avoid any references to the defendant's prior convictions.[27] Moreover, at the grand jury hearing, the state's witness had previously testified that he had known the defendant since the defendant's release from prison.[28] The court concluded, accordingly, that the prosecutor's failure to prepare the witness adequately to avoid the offending reference suggested an improper motive requiring reversal.[29]

Reconciliation of the two results is problematic, at best. Although both cases were simultaneously pending before the court, they seem virtually oblivious to each other.[30] In fact, one might conclude that the prosecutor's conduct in *Beach* was more egregious than that in *Saavedra*. The prosecutor in *Beach* specifically elicited the character evidence by asking

21. *Beach,* 102 N.M. at 646-47, 699 P.2d at 119-20.
22. *Id.*
23. *Id.* at 647, 699 P.2d at 120.
24. *Saavedra,* 103 N.M. at 284, 705 P.2d at 1135.
25. Saavedra's attorney requested that no admonition be given because such an instruction would serve only to emphasize the offending testimony, thereby compounding its prejudicial effect. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. Justice Riordan wrote for the court in *Beach,* 102 N.M. 642, 699 P.2d 115 (1985); Justice Walters wrote the court's opinion in *Saavedra,* 103 N.M. 282, 705 P.2d 1133 (1985). In both cases Justices Sosa and Federici concurred. 102 N.M. at 647, 699 P.2d at 120; 103 N.M. at 286, 705 P.2d at 1137.

whether the defendant "distributed those drugs to other people,"[31] while in *Saavedra* the prosecutor's question did not necessarily prompt a reference to the defendant's prison background (although the response might reasonably have been foreseen).[32] *Saavedra* relies heavily on the 1979 and 1980 court of appeals cases referred to above[33] in which the prosecutorial misconduct test was articulated. *Beach* does not mention those cases at all. It focuses instead on the notion that the stricken testimony might have become relevant if the defendant had elected to offer evidence that his earlier threats against the victim were prompted by his fear of the victim.[34] Thus, concluded the court, any inference of prosecutorial misconduct was negated.[35]

Both opinions acknowledge that the prosecutor's motives in offering the evidence must be examined, but they offer little guidance as to the implications of such motives. On one hand, *Saavedra* seems to regard any improper reference by the prosecution or its witnesses to the defendant's character as grounds for a mistrial, incurable by an admonition to the jury. On the other hand, *Beach* suggests that the court is willing to countenance such references if there is any conceivable theory upon which such evidence might become relevant later in the trial. These recent cases cast serious uncertainty upon the proper disposition of defense motions for mistrial where prosecution witnesses, either by design or faulty preparation, disclose the dark side of the defendant's character.

Perhaps all that can be said in light of the supreme court's pronouncements on the subject is that the prosecution runs a serious risk of mistrial if such references reach the jury, but such a result is by no means certain. The emphasis placed by the courts on prosecutorial misconduct suggests that the trial judge might question the prosecutor at the side bar to determine whether the witness's answer had been anticipated and, if so, whether the witness had been cautioned by the attorney to confine the answer to its proper scope. The defense, on the other hand, is well-

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31. 102 N.M. at 646, 699 P.2d at 119.

32. 103 N.M. at 284, 705 P.2d at 1135.

33. *See supra* note 3.

34. Although not entirely clear from the text of the opinion itself, it appears that during a pretrial hearing on defendant's motion *in limine* the prosecution suggested that certain defense witnesses might testify about the defendant's fear of Palaske. *Beach*, 102 N.M. at 646, 699 P.2d at 119. The state admitted that it was unsure what the basis for such fear might have been, but that if that fear and subsequent threats by defendant against Palaske became an issue, the state should be permitted to show that they arose out of prior drug deals, presumably between the two of them. *Id.* The opinion does not state that evidence of fear was ever offered by the defense. If it *had* offered such evidence in its case-in-chief, then, arguably, the defense would have opened the door for the prosecution to show the basis for the fear, including drug distribution by the defendant. In any event, the prosecution's evidence would not have been admissible in its case-in-chief; rather, it would have been admissible, if at all, only during the state's rebuttal.

35. *Id.* at 647, 699 P.2d at 121.

advised to raise the issue by motion *in limine* and attempt to obtain a ruling prohibiting any allusion to the defendant's character. Defense counsel should ask the court to advise the prosecutor to caution witnesses about such references. At trial, defense counsel might consider approaching the bench at the beginning of the testimony of a witness who might refer to the defendant's bad character and asking the court to rule again for the record that such evidence will not be permitted. Such a request will undercut a later attempt by the prosecution to attribute the witness's character reference to inadvertence. Of course, counsel should be alert to any character reference during the testimony so that a timely objection and motion for mistrial might be made.

B. Proof of Other Acts or Crimes for Purposes Other than Propensity

Just as vicious dogs tend to bite and Miura bulls tend to charge, people tend to act in conformity with their characters.[36] Generous people are more likely to donate to charity than are misers; forgetful people are more likely than others to leave their keys in their cars; deceitful people tend to lie more often than truthful people. But the credence that people place on character in making judgments about the behavior of others in everyday life has found little acceptance in technical rules of trial practice, where character as circumstantial evidence of behavior is largely excluded.[37]

Although the use of character evidence to support an inference that a person acted in a particular way on a particular occasion is limited to the narrow exceptions set out in N.M.R. EVID. 11-404(a),[38] a person's prior behavior might be relevant for some purpose *other* than to show activity in conformity with character.[39] Thus, Rule 11-404(b) permits proof of other acts in order to show ". . . motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."[40] The subtle

36. *See* J. MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 92, 104 (1981).

37. *See supra* note 1.

38. In those circumstances where proof of character is permitted by the rule, the *manner* of proof is controlled by Rule 405. Of the three possible techniques—opinion testimony, reputation testimony, or testimony regarding specific instances of conduct—only opinion and reputation are permitted on direct examination. N.M.R. EVID. 11-405(a) (1986 Recomp.). If opinion or reputation evidence is given on direct examination, the cross examiner may ask about specific instances of conduct. *Id.* If character is an essential element of a charge, claim or defense—such as in a defamation case or in a claim for punitive damages—then specific instances of conduct may be shown. N.M.R. EVID. 11-405(b) (1986 Recomp.). *See generally* MCCORMICK, *supra* note 2 § 187 at 551. *See also* McCarson v. Foreman, 102 N.M. 151, 692 P.2d 537 (Ct. App. 1984); State v. Bazan, 90 N.M. 209, 561 P.2d 482 (Ct. App.), *cert. denied,* 90 N.M. 254, 561 P.2d 1347 (1977).

39. MCCORMICK, *supra* note 2, § 190 at 557, contains extensive citation to cases in which proof of other acts is admissible for purposes other than to show conduct.

40. N.M.R. EVID. 11-404(b). In cases where character may be proved under the limited exceptions to Rule 11-404(a), that is, where a character trait may be offered as circumstantial evidence that a person acted in a particular way on a particular occasion, only evidence in the form of opinion or reputation is permitted. If, on the other hand, the evidence is relevant to an issue such as motive, opportunity, etc., under Rule 11-404(b), reference to specific instances of conduct is permitted.

distinction between past acts as evidence of behavior and past acts as relevant to some other purpose invariably poses a danger that the evidence will be misused by the trier of fact. This is particularly true where the person against whom the evidence is offered is a party to the litigation. Thus, the trial court must assess the probative value of the evidence in light of its potential for unfair prejudice.[41]

Perhaps the clearest examples of the prejudicial effect of prior behavior testimony occur in criminal cases where the evidence is offered against the accused.[42] But civil cases, too, present the same opportunities for misuse. *Jaramillo v. Fisher Controls*[43] raised a host of evidentiary issues, some of which touched on the plaintiff's character. Jaramillo was injured in a propane gas explosion while installing a regulating device on a stove.[44] He claimed that the regulator was negligently manufactured.[45] At trial Jaramillo testified about the manner in which he had installed the regulator.[46] The cross examination focused extensively on numerous acts of Jaramillo's misconduct, including one misdemeanor conviction for shoplifting, and another for driving under the influence of alcohol, reckless driving, disorderly conduct involving the use of obscene and abusive language, and failure to obey one-way street signs.[47] The court of appeals held, in conformity with the prevailing view in New Mexico,[48] that questions about the shoplifting conviction were relevant to Jaramillo's credibility and therefore permissible.[49]

Inquiry into the alcohol-related driving and disorderly conduct offenses, however, was predicated on a different theory of admissibility: that the evidence was relevant to the plaintiff's life expectancy and, therefore, damages.[50] The court upheld the introduction of the evidence on the authority of *De La O v. Bimbo's Restaurant, Inc.*[51] In that case, the plaintiff was injured in a fracas in the defendant's bar.[52] The defendant

41. The receipt of all evidence, of course, is conditioned upon compliance with the familiar precept embodied in N.M.R. EVID. 11-403 (1986 Recomp.): "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay, waste of time or needless presentation of cumulative evidence."

42. *See supra* Section I.A.

43. 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985).

44. *Id.* at 617, 698 P.2d at 890.

45. *Id.*

46. *Id.* at 622, 698 P.2d at 895.

47. *Id.* at 622-23, 698 P.2d at 895-96.

48. State v. Day, 94 N.M. 753, 759, 617 P.2d 142, 148 (1980); State v. Melendrez, 91 N.M. 259, 572 P.2d 1267 (Ct. App. 1977). Both cases and the New Mexico courts' interpretation of the scope of N.M.R. EVID. 11-609(a)(2) (1986 Recomp.), which permits the introduction of convictions of crimes involving dishonesty or false statement regardless of the punishment as impeachment, are discussed in Norwood, *Evidence*, 12 N.M.L. REV. 379, 384-86 (1982).

49. *Jaramillo*, 102 N.M. at 622, 698 P.2d at 895.

50. *Id.* at 623, 698 P.2d at 896.

51. 89 N.M. 800, 558 P.2d 69 (Ct. App.), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976).

52. *Id.* at 802, 558 P.2d at 71.

attempted to prove that three years after the incident the plaintiff had engaged in drunken and abusive behavior.[53] The court ruled that these subsequent activities did not establish that the plaintiff was habitually drunk and abusive so as to support the inference that he was in such a state when the fight in the bar occurred.[54] *De La O* went on, however, to discuss the relevancy of the plaintiff's behavior with respect to the damages issue.[55] In this regard, the court found that the plaintiff's activities "were relevant to [his] life expectancy and the number of years for which damages for permanent injury and pain and suffering should be assessed . . . ."[56] citing one New Mexico case,[57] two federal cases,[58] and two cases from other states[59] in support of that proposition. All of those cases involved the measure of damages in light of the injured party's health or projected longevity. They all, however, focused on the person's habitual or long term use of alcohol.[60] None of them involved an inquiry into a single, isolated incident, as do both *De La O* and *Jaramillo*.

In view of the specific finding in *De La O* that the evidence of the plaintiff's alcohol-related behavior did not amount to a habit, and the failure of *Jaramillo* to even suggest that approach, it appears that the New Mexico Court of Appeals has recognized a unique category of circumstantial proof when longevity or physical condition is an element of damages. One isolated incident involving rowdy behavior while under the influence of alcohol is deemed sufficiently probative of life span or health that it outweighs any tendency it might otherwise have to impugn the actor's character.

Based, as they are, on misplaced reliance upon cases involving habit evidence,[61] both *Jaramillo* and its progenitor *De La O* seem ill-advised.

53. *Id.* at 803, 558 P.2d at 72.

54. The bar owner defendant had relied on N.M.R. Evid. 11-406 (1986 Recomp.) in order to establish the plaintiff's habit of drunken, abusive conduct, and thus to support the inference that he had been acting in conformity with his habit when he was injured. *De La O*, 89 N.M. at 803-04, 558 P.2d at 72-73. The court, however, found insufficient similarities between the later behavior and the incident in the bar to establish habit. *Id.* at 804, 558 P.2d at 73.

55. *Id.* at 804-05, 558 P.2d at 73-74.

56. *Id.* at 805, 558 P.2d at 74.

57. Dollarhide v. Gunstream, 55 N.M. 353, 233 P.2d 1042 (1951).

58. Century "21" Shows v. Owens, 400 F.2d 603 (8th Cir. 1968); St. Clair v. Eastern Air Lines, Inc. 279 F.2d 119 (2d Cir. 1960).

59. Rawlings v. Andersen, 195 Neb. 686, 240 N.W.2d 568 (1976); Hansen v. Warco Steel Corp., 237 Cal. App.2d 870, 47 Cal. Rptr. 428 (1965).

60. For example, in *Dollarhide* the defendant's attorney cross examined the decedent's widow about his *regular* practice of drinking to excess and whether he drank "every week." 55 N.M. at 356, 233 P.2d at 1044. In *Century "21" Shows* and *St. Clair* the courts were concerned with "drinking habits," 400 F.2d at 610, and "personal habits" regarding "greatly excessive drinking." 279 F.2d at 121. Again, in *Hansen* and *Rawlings* the cross examinations focused on long-term habitual conduct rather than single incidents. 237 Cal. App.2d at 872-73, 47 Cal. Rptr. at 430-31; 195 Neb. at 691, 240 N.W.2d at 573. On the issue of longevity and its impact on damages, the Nebraska court in *Rawlings* referred to "a *history* with respect to the use of alcohol." 195 Neb. at 691, 240 N.W.2d at 573 (emphasis added).

61. *See supra* notes 57-59 and accompanying text.

Not only do they countenance the admission of a single incident involving alcohol, they fail to distinguish between the use of alcohol as a health hazard in itself and the associated abusive behavior which is more tenuously related to health. Both cases admit evidence of intoxication as well as evidence of drunken behavior without any discussion of the nexus between those two types of activities and longevity or good health. Common experience might suggest that while a person is intoxicated, especially if engaged in violent behavior or an activity such as driving which heightens exposure to immediate physical danger, vulnerability to injury or even death is elevated at that time. Evidence of the person's condition or behavior on such an occasion, however, supports no inference at all about longevity or health at some future time unless the inference is that the person will again engage in drunken, violent behavior and thus be placed once again in harm's way. Such an inference, however, is based on "propensity" evidence, which is inadmissible.[62] The relevancy of the habitual or long term use of alcohol seems well-established in the courts,[63] but the court of appeals' decisions simply conclude, without analysis, that an anecdotal account of such behavior has similar probative value.

II. HEARSAY

A. *Admissibility of Hearsay Evidence by Child Victims of Sexual Assault.*

Recently, there has been much concern in child sexual abuse cases regarding balancing the potential emotional trauma of putting a child on the stand against the preservation of a defendant's right to confront witnesses. This conflict raises difficult questions regarding the admissibility of hearsay in child sexual abuse cases. The New Mexico Court of Appeals addressed the conflict in two cases during the survey year.[64]

1. Out of Court Statements by Child Victim.

In *State v. Taylor,* the defendant was charged with digital criminal sexual penetration of a three-year old boy.[65] At the preliminary hearing, the magistrate found the child incompetent to testify and allowed the parents to testify regarding statements made by the boy concerning the incident and the identity of the perpetrator.[66] Regarding the incident, the child's exact words were that an unnamed man "stuck" fingers up the

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62. *See supra* note 1.

63. *See supra* notes 57-59.

64. State v. Taylor, 103 N.M. 189, 704 P.2d 443 (Ct. App. 1985); State v. Vigil, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985).

65. *Taylor,* 103 N.M. at 192, 704 P.2d at 446.

66. *Id.* at 193, 704 P.2d at 447. The magistrate ruled the boy incompetent to testify because his inadequate communication skills would not allow him to testify effectively from the witness stand. *Id.*

child's "butt."[67] His story never varied.[68] Regarding the identity of the perpetrator, however, the child's statements were much more ambiguous and confused.[69] The child gave five different descriptions of the perpetrator.[70]

On appeal, one issue was whether the child's hearsay statements were admissible, and if so, whether they nevertheless denied the defendant his constitutional right of confrontation.[71] Although the court of appeals found the hearsay statement regarding the event admissible, it found the hearsay statement regarding the perpetrator's identity inadmissible and, therefore, did not reach the confrontation issue.[72]

When preparing for trial, an attorney should consider as many possible hearsay exceptions as seem applicable when offering evidence. In *Taylor,* the state argued that the child's statements were admissible under two hearsay exceptions, the residual exception[73] and the excited utterance

67. *Id.* at 197, 704 P.2d at 451. The boy demonstrated the event by pointing to his anal area with two fingers. *Id.*

68. *Id.*

69. *Id.* at 198, 704 P.2d at 452.

70. *Id.* The child named a black man, a man dressed in various items of black color, the defendant, the defendant and a black man, and older children. *Id.* Although the defendant was the only person specifically named, there was evidence that the parents discussed in the presence of the child whether the defendant could have committed the sexual assault, thereby suggesting the defendant to the child. *Id.*

71. *Id.* at 192, 704 P.2d at 446. The confrontation clauses of both the federal and state constitutions provide: "[i]n all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him . . . ." U.S CONST. amend. VI; N.M. CONST. art. II, § 14 (Cum. Supp. 1985). By its own terms, the confrontation clause is applicable only to criminal cases. When hearsay is offered in a criminal case, the constitutional requirement of the right of confrontation, as well as evidentiary requirements, must be met. State v. Martinez, 99 N.M. 48, 51, 653 P.2d 879, 882 (Ct. App. 1982). Evidence admissible under a hearsay exception does not necessarily satisfy a defendant's confrontational right. *Id.* *See infra* text accompanying notes 113-117 for discussion of test to meet the constitutional requirement.

72. *Taylor,* 103 N.M. at 193, 704 P.2d at 447. It is not clear why the court did not address the confrontation issue concerning the statement regarding the event.

73. *Id.* at 196, 704 P.2d at 450. The residual exception provides:

> (X) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

N.M.R. EVID. 11-803(X) (1986 Recomp.).

The court noted that the more appropriate rule would be Rule 804(b)(6) (now at 11-804(B)(6)) because it is the residual exception applicable where the declarant is unavailable, as in this case. *Taylor,* 103 N.M. at 197, 704 P.2d at 451. Rule 803(24) (now at 11-803(X)) is to be utilized where the availability of the declarant is immaterial. *Id.* at 196, 704 P.2d at 450. Because the rules are identical, however, the court referred to Rule 803(24) (now at 11-803(X)). *Id.* at 197, 704 P.2d at 451.

exception.[74] The state might also have offered the statements under the exception for statements of recent perception.[75]

a. The Residual Exception.

Recognizing that a closed system of hearsay exceptions is both unrealistic and undesirable because not every contingency can be treated by detailed rules, the residual exception[76] was incorporated into the exceptions to the hearsay rule.[77] The residual exception admits into evidence probative, necessary statements when the circumstantial guarantees of trustworthiness are equivalent to the recognized exceptions.[78]

In order to determine whether the child's statements had sufficient guarantees of trustworthiness to permit admission under the residual exception, the *Taylor* court tested the child's two statements against the four primary dangers of hearsay: ambiguity, lack of candor, faulty memory, and misperception.[79] The child's statement regarding the incident passed the test.[80] The court found that the statement regarding the event was clear and unambiguous;[81] that the incident was probably not made up because the boy was too young to experience detailed fantasies;[82] that it was unlikely that the boy forgot what occurred because he related the incident the day after it happened;[83] and, finally, that because of his age and lack of experience, it was not likely that he misperceived the event.[84] The statement regarding the identity of the perpetrator, however, failed the test.[85] The court concluded that because the boy named five perpe-

74. Rule 11-803(B) provides:

> (B) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

N.M.R. EVID. 11-803(B) (1986 Recomp.).

75. Rule 11-804(B)(2) provides:

> (2) Statement of recent perception. A statement, not in response to the instigation of a person engaged in investigating, litigating or settling a claim, which narrates, describes or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

N.M.R. EVID. 11-804(B)(2) (1986 Recomp.).

76. N.M.R. EVID. 11-803(X) (1986 Recomp.). *See supra* note 73 for text of rule.

77. MCCORMICK, *supra* note 2, at § 324.1. One court stated, "[w]e are loathe to reduce the corpus of hearsay rules to a straight-jacketing, hypertechnical body of semantical slogans to be mechanically invoked regardless of the reliability of the proffered evidence." United States v. Castellana, 349 F.2d 264, 276 (2d. Cir. 1965).

78. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 78 (1978). A considerable range in degree of trustworthiness among the specific exceptions exists; therefore, the question is presented as to which standard should be utilized with the residual exception. MCCORMICK, *supra* note 2, at § 324.1. An estimated average standard appears to be assumed. *Id.*

79. *Taylor,* 103 N.M. at 197, 704 P.2d at 451.

80. *Id.*

81. *Id.*

82. *Id.* at 198, 704 P.2d at 452.

83. *Id.*

84. *Id.*

85. *Id.* at 199, 704 P.2d at 453.

trators, all of the primary dangers of hearsay existed except for lack of candor.[86] The court found that the identification was patently ambiguous and that the boy probably forgot and/or misperceived the identity.[87]

The court noted that with regard to the event, there were corroborating facts that were absent with regard to the identification.[88] Regarding the event, the court focused on the fact that the child's rectum was irritated and that the child began acting in a bizarre manner.[89] On the other hand, the court found no corroboration of the identity of the defendant as the perpetrator other than the child's statement.[90] Because the child was at school as well as at the defendant's home that day, a number of people had access to him.[91]

It is not clear whether the corroborating facts were essential to the court's holding that the statement regarding the incident was admissible, but it is clear that the New Mexico Court of Appeals recognizes corroborating factors that tend to support the truthfulness of a declarant's statement.[92] Contrary views claim that corroboration is irrelevant for purposes of the residual exception.[93] In fact, it has been suggested that corroboration may tend to undermine a claim that the hearsay is the most probative evidence available.[94] A careful practitioner may, therefore, be wise to present corroborating facts sufficient only to help support the hearsay statement.

The New Mexico courts have acknowledged that the residual exceptions should be applied more stringently in criminal rather than civil cases, particularly in light of the Sixth Amendment's confrontation clause.[95] The *Taylor* court reaffirmed this principle when it refused to admit the child's statement regarding the perpetrator's identity.[96]

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86. *Id.* at 198, 704 P.2d at 452.

87. *Id.*

88. *Id.*

89. *Id.* The court stated: "[t]hus, with regard to the event, there are not only guarantees of reliability inherent in the circumstances surrounding the making of the statement, but there are also indicia of reliability in that the event was corroborated by other facts." *Id.*

90. *Id.*

91. *Id.* The court stated: "[a]bsent an outside factor, corroboration by child alone will not suffice; there must exist an adequate indicia of reliability found in the making of the statement." *Id.* at 199, 704 P.2d at 453.

92. *Id.* at 198-99, 704 P.2d at 452-53.

93. *See, e.g.*, Huff v. White Motor Corp., 609 F.2d 286, 293 (7th Cir. 1979). The *Huff* court stated: "[T]he probability that the statement is true, as shown by corroborative evidence, is not, we think, a consideration relevant to its admissibility under the residual exception to the hearsay rule." *Id.*

94. United States v. Boulahanis, 677 F.2d 586 (7th Cir.), *cert. denied* 459 U.S. 1016 (1982).

95. State v. Barela, 97 N.M. 723, 725, 643 P.2d 287, 289 (Ct. App. 1982).

96. *Taylor*, 103 N.M. at 199, 704 P.2d at 453. Because of the ambiguity and confusion of the child and the fact that the child gave five conflicting descriptions of the perpetrator, the statement probably would not have been admitted even under the less stringent civil standard.

b. The Excited Utterance Exception

Rule 11-803(B) creates an exception to the hearsay rule for a statement relating to a startling event made by a person under a sense of excitement, shock, or stress.[97] The rationale for this exception is that the excitement caused by an external startling event will suspend a person's capacity to reflect and fabricate, thereby assuring that any utterance made will be trustworthy.[98] Additionally, because the person's memory is fresh, the risk of lapse of memory is removed.[99]

There are two requirements to the excited utterance exception. First, there must be an event or condition that excites the person.[100] Second, the person must be under the stress of excitement at the time the statement is made.[101] *Taylor* demonstrates the necessity for laying a proper foundation to meet this second requirement.

In *Taylor,* the state offered the child's statements regarding the event and the perpetrator's identity under the excited utterance exception.[102] Although there was a significant time lapse between the event and the statements,[103] the court acknowledged that "no particular amount of time lapse will render a statement admissible or inadmissible . . . . As long as the statement is produced by the stress of the moment, it is admissible."[104]

In determining whether the child was under stress at the time of the declarations, the court found that no evidence was introduced that the child was then suffering from the stress of the event.[105] The court held that under the facts, the requisite spontaneity and stress were not estab-

97. N.M.R. EVID. 11-803(B) (1986 Recomp.). *See supra* note 74 for text of rule.

98. J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE Para. 803(2)01 (1985).

99. D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 439 (1980). A criticism of this exception is that the very nature of a spontaneous reaction may enhance the other two hearsay dangers—misstatement and misperception. *Id.* It has been suggested, however, that this problem need not result in exclusion, but rather could be considered in weighing the evidence. G. LILLY, *supra* note 78 at § 61. In any case, no jurisdiction has rejected the excited utterance exception. *Id.*

100. MCCORMICK, *supra* note 2, at § 294.

101. *Id.*

102. *Taylor,* 103 N.M. at 199, 704 P.2d at 453.

103. The child did not make the statements until the day after the incident. *Id.* at 200, 704 P.2d at 454.

104. *Id.* at 199, 704 P.2d at 453 (quoting State v. Martinez, 102 N.M. 94, 99, 691 P.2d 887, 892 (Ct. App. 1984)).The time lapse between the event or condition and the making of the statement is, however, an important factor. G. LILLY, *supra* note 78, at § 61. The longer the lapse, the greater the chance for exclusion. *Id.*

In a previous case, the New Mexico Supreme Court recognized that no definite time limit exists under the excited utterance exception. State v. Robinson, 94 N.M. 693, 697, 616 P.2d 406, 410 (1980). Circumstances, more than time, determine the admissibility of the evidence. *Id.*

105. *Taylor,* 103 N.M. at 200, 704 P.2d at 454. The court found that no evidence was presented that the boy was under stress of the event when he talked about the abuse to his babysitter, to his parents, to various doctors, or to the detective. *Id.*

lished; therefore, the excited utterance exception did not apply.[106] *Taylor* reaffirmed the prevailing view that New Mexico courts will admit statements as excited utterances even after significant time lapses, but only if evidence is introduced to establish that the declarant continued to be under stress when the statements were made.[107]

c. Statement of Recent Perception

The state might have attempted to enter the child's statements into evidence under the exception to the hearsay rule for statements of recent perception,[108] especially if the state had no evidence to prove that the child was under the stress of the excitement of the incident. The *Taylor* situation appears to meet the majority of the requirements outlined in the rule: (1) the statements were not in response to the instigation of a person engaged in investigating, litigating, or settling a claim; (2) the event was recently perceived by the child; and (3) the statements were most probably made in good faith and not in contemplation of litigation.[109] The statement regarding the event would also most likely pass the final requirement—that the declarant's recollection was clear. Because the child named five perpetrators, however, an issue would probably arise regarding how clear the child's recollection was regarding the perpetrator's identity.

Even if the state passed the hurdle of clear recollection and the court held that the exception for statements of recent perception was applicable, courts are nevertheless hesitant to allow such an exception in criminal cases because of a defendant's right of confrontation.[110] In *State v. Maestas*,[111] the New Mexico Court of Appeals approved the application of the exception for statements of recent perception in criminal cases.[112] How-

106. *Id.* In State v. Maestas, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978), the court also held statements inadmissible under the excited utterance exception because no evidence was before the court to show that the declarant was suffering from shock or stress at the time the statements were made. *Id.* at 137, 584 P.2d at 185.

107. *See Robinson*, 94 N.M. at 697-98, 616 P.2d at 410-11.

108. N.M.R. EVID. 11-804(B)(2) (1986 Recomp.). *See supra* note 75 for text of rule.

109. *See supra* note 75 for text of rule.

110. State v. Barela, 97 N.M. 723, 725, 643 P.2d 287, 289 (Ct. App. 1982). The court in *Barela* added a further reason for permitting the use of Rule 11-804(B)(2) only sparingly in criminal cases—the defendant's inability to test the reliability of the declarant's statement by cross-examination. *Id.*

Congress omitted the statement of recent perception exception in the Federal Rules of Evidence, stating that the rule created "a new and unwarranted hearsay exception of great breadth," without "sufficient guarantees of trustworthiness to justify admissibility." *Report of Committee on the Judiciary, House of Representatives*, 93rd Cong., 1st Sess., Federal Rules of Evidence, No. 93-650, p.6 (1973). In the revised Uniform Rules (1974), the statement of recent perception exception is included only for civil cases. MCCORMICK, *supra* note 2, at § 296.

111. 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

112. The New Mexico Supreme Court also approved this hearsay exception for use in criminal cases. State v. Robinson, 94 N.M. 693, 616 P.2d 406 (1980). The court stated, "[r]eliability, to

ever, before hearsay will be admitted against a criminal defendant, the evidence must pass the two-pronged test enunciated in *Ohio v. Roberts.*[113] First, the declarant must be unavailable.[114] Because the child was declared unavailable, *Taylor* meets this requirement. Second, certain indicia of reliability or trustworthiness must be met.[115] Courts can infer reliability where the evidence falls within a firmly rooted hearsay exception.[116] If not, the evidence will be excluded, unless there is a showing of particularized guarantees of trustworthiness.[117]

It is this second requirement that would most likely preclude the court in *Taylor* from admitting the child's statement regarding the identity into evidence. Because the exception for statements of recent perception is a novel exception and not a firmly rooted hearsay exception, the court would not have admitted the statements absent a showing of particularized guarantees of trustworthiness. Using the same analysis for trustworthiness as it did for the residual exception, the court probably would have admitted the statement concerning the event, but not the identity of the perpetrator.[118]

2. Videotaped Deposition of Child Victim.

There are a multitude of practical considerations when offering deposition evidence, especially in criminal trials. In New Mexico, the use of a deposition in a criminal proceeding is authorized by New Mexico

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support the recent perception exception to the hearsay rule, should obviate objection to admissibility of a statement so clothed with circumstances showing veracity." *Id.* at 698, 616 P.2d at 411.

113. State v. Martinez, 99 N.M. 48, 51, 653 P.2d 879, 882 (Ct. App. 1982). Because Ohio v. Roberts was decided two years after *Maestas,* the court in *Maestas* did not apply the two-part test.

114. *Id.* at 52, 653 P.2d at 883. The requirement that the declarant must be unavailable is relaxed for the business records exception to the hearsay rule, N.M.R. EVID. 11-803(F) (1986 Recomp.). Rather than proving unavailability, the attorney may establish that the unavailability requirement is not applicable by showing that:

> (1) the utility of cross-examination as to the particular records is minimal or remote;
>
> (2) the other evidence at trial affords defendant an adequate opportunity to test the reliability of the records; or
>
> (3) public policy considerations otherwise excuse the prosecution from producing the out-of-court declarant or showing his or her unavailability.

State v. Austin, 104 N.M. 573, 575-76, 725 P.2d 252, 254-55 (1985).

In *Austin,* the New Mexico Court of Appeals held that computer printouts were not admissible against the defendant because the state did not establish any of the above three exceptions nor did it produce the out-of-court declarants (presumably the people who made the computerized records) or demonstrate their unavailability. *Id.* at 576, 725 P.2d at 255.

115. *Martinez,* 99 N.M. at 52, 653 P.2d at 883.

116. *Id.*

117. *Id.*

118. If the statements would have been admitted under the excited utterance exception, they would have passed the *Roberts* test because it is a firmly rooted hearsay exception.

Rule of Criminal Procedure 5-503(N).[119] Strict compliance with the rule is mandatory.[120]

New Mexico Rule of Criminal Procedure 5-504 is a specialized rule which authorizes the use of a videotaped deposition of a child victim of a sexual assault.[121] The rationale for this rule is to protect children who have allegedly been sexually assaulted from suffering the further emotional trauma of in-court testimony.[122]

119. Rule 5-503(N) provides in pertinent part:

> (N) Use of depositions. At the trial, or at any hearing, any part or all of a deposition may be used as evidence if:
>
> (1) the witness is unavailable, as unavailability is defined in Paragraph (A) of Rule 11-804 of the Rules of Evidence;
>
> (2) the witness gives testimony at the trial or hearing inconsistent with his deposition; or
>
> (3) it is otherwise admissible under the Rules of Evidence.

N.M.R. CRIM. P. 5-503(N) (1986 Recomp.)

Rule 5-503(N) was amended in 1981 to make the rule consistent with Rule 15 of the Federal Rules of Criminal Procedure and to clarify the relationship between the New Mexico Rules of Evidence and the New Mexico Rules of Criminal Procedure authorizing the use of depositions in criminal trials. N.M.R. CRIM. P. 5-503 annot.

The amendment to Rule 5-503(N) authorizes the admissibility of a deposition if it is admissible under the Rules of Evidence. Prior to the amendment, the rule defined unavailability different from the Rules of Evidence such that it was possible for a deposition to be admissible under N.M.R. EVID. 11-804(B)(1) but inadmissible under Rule 5-503. *See* McGuinness v. State, 92 N.M. 441, 444, 589 P.2d 1032, 1035 (1979).

120. *McGuinness*, 92 N.M. at 442, 589 P.2d at 1033 (1979).

121. Rule 5-504 provides in pertinent part:

> (A) Upon motion, and after notice to opposing counsel, at any time after the filing of the indictment, information or complaint in district court charging a criminal sexual penetration or criminal sexual contact on a child under thirteen (13) years of age, the district court may order the taking of a videotaped deposition of the victim, upon a showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. The district judge must attend any deposition taken pursuant to this paragraph and shall provide such protection of the child as the judge deems necessary.
>
> (B) At the trial of a defendant . . . any part or all of the videotaped deposition ... may be . . . admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:
>
> (1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;
>
> (2) the deposition was presided over by a district judge and the defendant was present and was represented by counsel or waived counsel; and
>
> (3) the defendant was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

N.M.R. CRIM. P. 5-504 (1986 Recomp.)

Rule 5-503(N) authorizes the use of a deposition if "it is otherwise admissible under the Rules of Evidence." N.M.R. EVID. 11-804(B)(1) authorizes the use of a deposition if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by cross-examination. Rule 11-804(B)(1), therefore, appears to cover the situation addressed in Rule 5-504, and it seems that Rule 5-504 would be an unnecessary rule except for the provision that the judge must be present at the deposition and provide protection of the child as is necessary. The commentary accompanying the rule does not discuss why a new rule was necessary rather than using Rule 11-804(B)(1) to cover the situation.

122. State v. Vigil, 103 N.M. 583, 585, 711 P.2d 28, 30 (Ct. App. 1985).

Rule 5-504 implements the statutory protections afforded by N.M. STAT. ANN. § 30-9-17, which provides in pertinent part:

> A. In any prosecution for criminal sexual penetration or criminal sexual contact

In *State v. Vigil*,[123] the New Mexico Court of Appeals held that the videotaped deposition of a child sexual assault victim was admissible. In *Vigil*, the defendant was tried on three counts of criminal sexual penetration of a minor girl.[124] The trial court admitted the videotaped deposition of the child based on the testimony of the clinical psychologist who had been treating the child regularly.[125] The psychologist testified that the child cried frequently, experienced nightmares, was frequently ill, and often missed school.[126] In the psychologist's opinion, testifying before a jury would be a frightening experience for the child, would undermine the child's progress, and would be an unreasonable imposition.[127]

On appeal, the defendant argued that the use of the videotaped deposition violated both the standards set out in the rule and his constitutional right of confrontation.[128] Regarding the violation of standards, the defendant contended that the state failed to introduce substantial evidence to support the court's finding that the child would suffer unreasonable emotional harm if required to testify in court.[129] In response, the court of appeals utilized the substantial evidence test[130] and concluded that the psychologist's testimony clearly qualified as substantial evidence and the standards of the rule were therefore satisfied.[131]

> of a minor, upon motion of the district attorney and after notice to the opposing counsel, the district court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner as permitted at trial under the provisions of Rule 611 of the New Mexico Rules of Evidence. Any videotaped deposition taken under the provisions of this act [this section] shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim.

N.M. STAT. ANN. § 30-9-17 (1978).

123. 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985).

124. *Id.* at 584, 771 P.2d at 29. The jury reached a guilty verdict on two counts but was unable to reach a unanimous decision as to the third count; therefore, a mistrial as to that count was declared. *Id.*

125. *Id.* at 585, 771 P.2d at 30.

126. *Id.*

127. *Id.* The psychologist concluded that the child could tolerate a videotaped deposition because it was less traumatic. *Id.*

128. *Id.* at 584, 771 P.2d at 29.

129. *Id.* at 586, 771 P.2d at 31.

130. *Id.* The court enumerated the following rules for the substantial evidence test:

> (1) that substanial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;
> (2) that on appeal, all disputed facts are resolved in favor of the successful party, with all reasonable inferences indulged in support of the finding, and all evidence and inferences to the contrary discarded; and
> (3) that although contrary evidence is presented which may have supported a different verdict, the appellate court will not weigh the evidence or foreclose a finding of substantial evidence.

Id.

131. *Id.* It is troubling that the court applied the substantial evidence test by simply enumerating the rules and promptly concluding that the state met the test without applying the facts to the rules.

The *Vigil* court further rejected the defendant's contention that the use of the videotaped deposition violated his confrontation right.[132] The court noted that generally a defendant has the right to confront his accusers at trial, but that this general rule of law "must occasionally give way to considerations of public policy."[133] The court balanced the defendant's right of confrontation against the strong public policy of protecting child victims of sexual assaults.[134] The court noted that the videotaped deposition rule satisfies the primary interest secured by the confrontation right—cross examination—by specifically providing that the defendant be afforded an adequate opportunity to cross-examine the witness.[135] In *Vigil*, the defendant never argued that he was deprived of his right to cross-examination.[136] Weighing the above factors, the court concluded that the defendant's right of confrontation was not violated.[137]

Vigil suggests to the practicing attorney that the testimony of the psychologist treating the sexually assaulted child indicating that the child would suffer unreasonable emotional trauma if required to testify in court will be sufficient evidence to uphold the use of Rule 5-504. Furthermore, if the standards of Rule 5-504 are satisfied, the confrontational right defense will not succeed.

B. Admissibility of Deposition of Witness Greater Than 100 Miles from Trial.

The hearsay rule establishes a distinct preference for live, in-court testimony; consequently, deposition testimony is ordinarily allowed only when the witness is unavailable to testify in person.[138] The conditions imposed by New Mexico Rule of Civil Procedure 1-032(A)(3)[139] on the

132. *Id.* at 587, 771 P.2d at 32.

133. *Id.* at 586, 771 P.2d at 31 (quoting Mattox v. United States, 156 U.S. 237 (1895)).

134. *Id.*

135. *Id.* The cross examination is subject to such protection as the court deems appropriate. *Id.* The court also noted that the jury had an adequate opportunity to observe the child's demeanor while she testified via the videotape. *Id.* at 587, 771 P.2d at 32.

136. *Id.*

137. *Id.*

138. Salsman v. Witt, 466 F.2d 76 (10th Cir. 1972). Judge Learned Hand stated: "[t]he deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand." Napier v. Bossard, 102 F.2d 467, 469 (2d Cir. 1939).

139. Rule 1-032(A)(3) provides:

> (3) the deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (a) that the witness is dead; or (b) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (c) that the witness is unable to attend or testify because of age, illness, infirmity or imprisonment; or (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (e) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

N.M.R. Civ. P. 1-032(A)(3) (1986 Recomp.).

use of depositions in court proceedings illustrate that there has been no change in the established principle.[140]

A recent New Mexico Court of Appeals case helped to clarify the rule that a deposition may be used if the witness is at a greater distance than 100 miles from the place of trial or hearing.[141] In *Dial v. Dial*, the mother of two teenage sons filed a contempt motion when the father failed to return the sons from Texas to New Mexico after the school year ended.[142] The father took depositions of the children in Texas and offered the depositions in evidence at the contempt hearing.[143] The trial judge refused to admit the depositions, finding that the father failed to lay a proper foundation that the children were more than 100 miles from the court.[144] The trial court ruled that the fact that the depositions were taken nine days earlier, reflecting that both children were then in Texas, was insufficient to establish where the children were at the actual time of the hearing.[145] Additionally, the court rejected the sworn testimony of a witness attorney who called Texas during a recess at the hearing to verify that the children were in Texas because the witness did not talk directly with the children.[146] The father was held in contempt and ordered jailed until the children were returned to New Mexico.[147]

On appeal, the father argued that the refusal to admit the children's depositions in evidence was error.[148] The New Mexico Court of Appeals agreed with the father, holding that it was improper for the trial court to exclude the use of the deposition testimony.[149] In reaching its decision, the court of appeals addressed two issues regarding what constituted a proper foundation to satisfy the requirement that the witness be more than 100 miles from the court.[150]

The first issue concerned the proper foundation for showing that the actual distance was greater than 100 miles from the court proceeding.[151] The court of appeals noted that the trial court could take judicial notice that the distance between Austin, Texas, and Santa Fe, New Mexico, was greater than 100 miles, thereby relieving the proponent of the deposition testimony of the necessity of proving the actual distance.[152]

140. *Salsman*, 466 F.2d at 79.

141. Dial v. Dial, 103 N.M. 133, 703 P.2d 910 (Ct. App. 1985).

142. *Id.* at 135, 703 P.2d at 912.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 134, 703 P.2d at 911.

148. *Id.*

149. *Id.*

150. Because this was a case of first impression in New Mexico, the court looked to federal law. *Id.* at 136, 703 P.2d at 913.

151. *Id.*

152. *Id.* To support its conclusion, the court cited Ikerd v. Lapworth, 435 F.2d 197 (7th Cir. 1970), where the court held that the trial court could take judicial notice that Madisonville, Kentucky, was more than 100 miles from Terre Haute, Indiana. *Id.*

If a court does not take judicial notice of the distance, the method for measuring the distance of

The more significant issue, however, was whether the proximity of the witness to the place of trial was to be determined as of the time the deposition was offered or some earlier time.[153] The court of appeals rejected the trial court's interpretation of the rule that a showing must be made that the children were more than 100 miles away at the actual time of the hearing.[154] Rather, the court of appeals held that in the absence of evidence to the contrary, a showing that the children resided beyond 100 miles at some "recent earlier time" was sufficient to permit admission of the depositions.[155]

The court of appeals did not provide firm guidelines for what constitutes a "recent earlier time." In *Dial,* the children's depositions were taken in Texas nine days prior to the hearing.[156] The court, however, cited one case where the showing was that the witness was at the required distance approximately seven months before trial[157] and another case where the deposition witness was at the required distance eight months before the trial.[158]

It seems apparent, therefore, that the New Mexico courts will permit some leeway when showing that the witness is beyond the 100-mile requirement. Exactly how much leeway the courts will allow will probably depend on the facts of each case.

CONCLUSION

Although the survey year produced little that might be characterized as major changes of direction in New Mexico evidence law, numerous cases presented the appellate courts with opportunities to assess and refine existing doctrine. The cases selected for inclusion in this survey represent a sampling of recent opinions thought to have practical significance to the trial bar.

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the witness from the place of trial varies. Some courts have held that the proper method is to measure the distance along a straight line. *See, e.g.*, SCM Corp. v. Xerox Corp., 77 F.R.D 16 (D.C. Conn. 1977). The rationale for utilizing this method, as opposed to measuring the ordinary, usual, and shortest routes of travel, is to avoid trivial disputes as to which actually are the ordinary, usual, and shortest routes. *Id.* One court held that the proper method was to be based on the shortest railroad route between the two points in question. Colonial Realty Corp. v. Brunswick Corp., 337 F. Supp. 546 (S.D.N.Y. 1971). The court noted that this method is used by jury commissioners in calculating mileage for jury fees. *Id.*

153. *Dial,* 103 N.M. at 136, 703 P.2d at 913.

154. *Id.* There are cases that support the trial court's interpretation. *See, e.g.*, Mark IV Properties, Inc. v. Club Dev. & Management Corp., 12 B.R. 854 (Bankr. S.D. Cal. 1981) (where the court held that the proximity of witnesses deposed to the court was to be determined at the time their depositions were offered into evidence).

Other cases have held that the time at which a witness's location may be examined is at the time the deposition is offered or a time during the proponent's case when a trial subpoena could be served. *See, e.g.*, SCM Corp. v. Xerox Corp., 77 F.R.D 16 (D.C. Conn. 1977).

155. *Dial,* 103 N.M. at 136, 703 P.2d at 913. The court noted that no contrary evidence was presented. *Id.* at 135, 703 P.2d at 912.

156. *Id.*

157. Hartman v. United States, 538 F.2d 1336, 1346 (8th Cir. 1976).

158. Ikerd v. Lapworth, 435 F.2d 197 (7th Cir. 1970).