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This is the second time in recent years that the State Bar Appellate Practice Section has contributed to the *New Mexico Lawyer*. The edition that was published in November 2011 focused on fundamentals of appellate practice.[1] This edition focuses upon alerting practitioners about equally important aspects of appellate practice that are sometimes overlooked.

[1] *See* http://www.nmbar.org/Attorneys/lawpubs/NMLawyer/NMLAppellateLawFall11WEB.pdf

Appellate Law Section

Whether to Appeal: A Checklist of Considerations

By Jocelyn Drennan

When faced with an adverse judicial ruling or trial outcome, the idea of trying to obtain relief through an appeal often springs to mind. Think carefully before acting on that idea. Start by reviewing the procedural rules and statutory provisions that set forth the time limit(s) within which you must act in seeking to modify the decision, both in the trial court and on appeal. If there is no need to act immediately, spend some time working through the following checklist of considerations. Doing so will benefit both you and your client for reasons that should become apparent as you read along.

❑ **Evaluate whether there is a procedural option for obtaining relief short of an appeal.** The analysis will vary depending upon the procedural circumstances that gave rise to the adverse decision. A motion to reconsider, for example, may be an option. *See* Rule 1-059 NMRA. After identifying the option(s), research and analyze whether the positions that you would advance stand a chance of succeeding under the legal standards that govern the analysis. Additionally, analyze whether pursuing relief short of an appeal will enable you to improve the record for any appeal that might follow.

❑ **Determine whether the adverse decision is immediately appealable.** Not every adverse decision is immediately appealable. If necessary, research the answer. If the decision does not appear to be immediately appealable, consider and then research whether a stipulated judgment or some other procedural step might render the decision immediately appealable.

❑ **If the adverse decision appears to be immediately appealable, research the potential appellate options**. Make sure you can satisfy the procedural requirements. Do not forget to check district court and appellate rules as well as statutory provisions for requirements.

❑ **Identify the potential appellate issue(s).** If you did not handle the underlying proceedings, talk to the counsel who did to develop ideas. If you handled the proceedings, consider consulting appellate counsel for ideas. Talk to your client to get ideas. Review available portions of the record to develop ideas. Do some research, both to gain a basic understanding of the strength of the issues and to ensure that you have not overlooked other potentially viable appellate issues.

❑ **Review available portions of the record and relevant case law to determine whether the issue(s) were adequately preserved and, if an issue does not appear to have been preserved, ascertain whether a preservation exception may apply.** Preservation considerations can make or break an appeal. *See* "Making a Better Appeal in the Trial Court", by Edward Ricco, *infra*. Think about any waiver and invited error issues that may pose procedural barriers. Look beyond Rule 12-216 NMRA for a preservation exception. Case law involving analogous procedural circumstances or legal issues may provide ideas for arguing that a preservation exception should apply in your case.

❑ **Consider the applicable standard(s) of review for the potential appellate issue(s).** The applicable standard of review may substantially impact your odds of prevailing on appeal. Research the standard of review for each potential issue. Analyze whether an issue can be framed to obtain a more favorable standard of review.

❑ **Figure out the relief that may result if you prevail on appeal.** The answer to this issue may be obvious based upon the nature of the decision itself. Other times, you may need to do some research to understand both the type of relief available and its potential scope. Beware of harmless error that may foreclose relief. *See* Rule 1-061 NMRA. *Cf.* "Un*Moore*d," by Caren Friedman, *infra*.

❑ **Analyze the financial costs potentially associated with an appeal.** Appellate costs vary from case to case. Factors that may impact the costs include the procedural nature of the adverse decision and the complexity of the legal issue(s). In a case arising out of adverse trial outcome, the costs can be considerable. If damages were awarded, to stay execution, your client(s) likely will need to cover the cost of a supersedeas bond, which can be expensive. *See* "Supersedeas Bonds: Considerations Every Practitioner Should Know," by Alice Tomlinson Lorenz, *infra*. Additionally, do not forget to calculate

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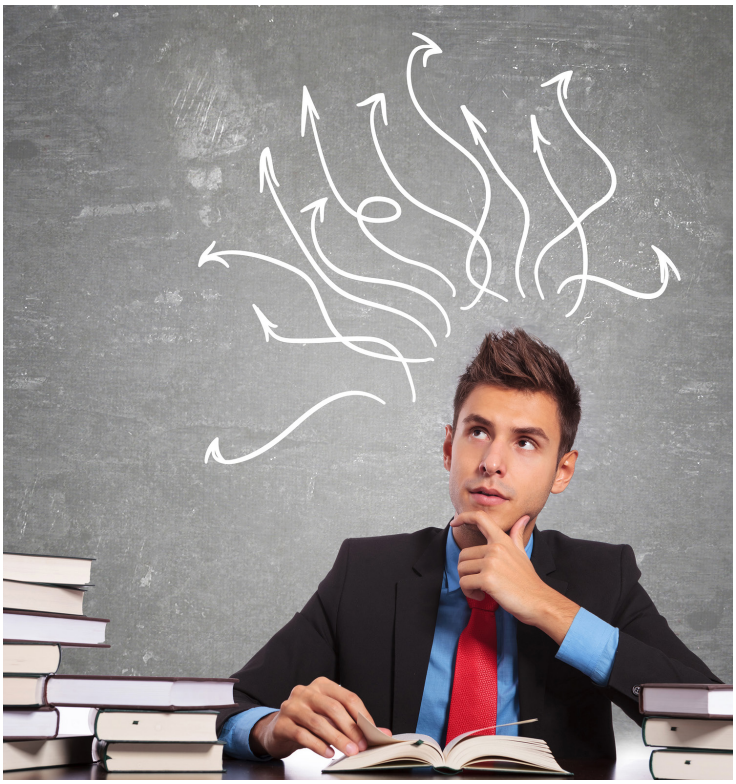
Making a **Better Appeal** in the **Trial Court**

By Edward Ricco

One of the pleasures of appellate practice is looking at the record on appeal in a case that has been litigated well. The legal theories underlying the parties' claims and defenses are set out in the initial pleadings, evolve through the course of discovery and motion practice, and then are tested at trial and embodied in a final judgment. Substantive legal issues are clearly framed for the court to address and are ruled upon. The host of procedural and evidentiary questions that arise along the way likewise are precisely identified, argued, and decided. Appellate counsel for a party dissatisfied with the result of such a well handled case can readily compile a list of potential appellate issues to be examined for the possibility of reversible error.



One of the agonies of appellate practice, on the other hand, is confronting a record in which the theories and proceedings are murky and potential issues or lines of argument are overlooked or undeveloped. Finding viable appellate issues is far more difficult with such a record.

The problem stems from the requirement of appellate courts that issues to be considered on appeal must, almost always, be adequately raised and "preserved" for appellate review during the trial court proceedings. *See* Rule 12-216 NMRA. Preservation exceptions such as "jurisdictional," "fundamental," or "plain" error are narrow and generally inapplicable. To a considerable degree, then, appellate lawyers are dependent for their success on the efforts of trial lawyers to identify and preserve potential appellate issues. In the end, a well-made trial record can make the lawyers at every level look good.

The essence of the preservation rule is captured in an oft-cited passage: "To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." *Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717. The preservation rule promotes litigation efficiency and fairness to the trial court and the opposing party by requiring that alleged errors be raised when the opponent has a chance to address them and the trial court may correct them, thereby avoiding the need for an appeal.

To "fairly invoke" a ruling, "[t]he mind of the trial court must be clearly alerted" to the claimed error. *Shelley v. Norris*, 1963-NMSC-193, ¶ 11, 73 N.M. 148, 386 P.2d 243. The court must understand that the party objects to the court's ruling or course of action and must be aware of the specific legal and factual basis for the party's position.

A claim of error also must be timely. An error must be pointed out when the trial court still is able to correct it. Post-trial motions are poor vehicles for preserving errors, such as a claimed error in the jury instructions, which should have been raised earlier in the trial process. Sometimes, however, a post-trial motion is the first opportunity a party has to raise an issue, such as a claim that a damage award is excessive or that the trial court's judgment does not follow properly from the jury's verdict. A motion for reconsideration of an interlocutory ruling that raises new grounds preserves the claimed error only if the trial court actually considers the grounds advanced in the motion.

Another aspect of "invoking" a ruling is actually obtaining a ruling. To preserve an issue for review, the trial court must in fact rule on it. Motions in limine pose a particular danger in this respect. Trial courts frequently rule only tentatively, or reserve ruling altogether, on questions of evidence admissibility raised in a pretrial motion, preferring to wait until the evidence is offered during trial to determine whether it should be admitted. If an objection to evidence sought to be excluded is not raised again when it is tendered at trial, or if evidence sought to be admitted is not tendered, the issue of admissibility is not preserved. *See State v. Telles*, 1999-NMCA-013, ¶ 15. Any issue on which the trial judge defers decision poses a risk that the need for a ruling will be forgotten in the bustle of trial and a perfectly good appellate issue will be lost.

In order for it to "appear" that an issue has been preserved for appeal, the necessary preservation steps must be found in the record. If the trial transcript contains only a reference to an argument that counsel made in an off-the-record jury instruction conference held the evening before, the issues counsel raised in that argument are not preserved. At a minimum, counsel should ensure that the record reflects what

transpired at the off-record conference. Similarly, bench conferences that are not picked up for the record are of no value for issue preservation.

The record, moreover, must be complete enough to allow appellate review. Where evidence is excluded, an appellate court cannot rule on its admissibility unless the proponent of the evidence has made an offer of proof showing what the evidence would have been. *See State v. Rosales*, 2004-NMSC-022, ¶¶ 19, 20. Occurrences that might have prejudicially affected the trial are simply non-events for purposes of appellate review if they are not adequately reflected in the record.

The requirement that the "same grounds" be advanced in the trial court and on appeal limits appellate counsel's ability to repackage an issue that has not been properly framed. For instance, an objection to relevancy does not preserve a contention that the probative value of the evidence is outweighed by its prejudicial effect: "That is a different objection." *State v. Varela*, 1999-NMSC-045, ¶ 25.

There are recognized ways to preserve error in common situations. Dispositive pretrial motions can preserve major substantive issues. Other motions may preserve procedural issues. Motions to exclude, objections, and offers of proof generally suffice to preserve evidentiary issues. Sufficiency-of-evidence issues may be preserved in New Mexico courts by a variety of methods designed to alert the trial court to the point, including (in jury trials) moving for judgment as a matter of law or objecting to instructing the jury on a factually unsupported question and (in bench trials) submitting requested findings of fact, objecting to the court's findings, or moving to amend the court's findings. *See First National Bank v. Sanchez*, 1991-NMSC-065, ¶ 7; *Cockrell v. Cockrell*, 1994-NMSC-026. A party preserves error in the failure to give a jury instruction by tendering a correct instruction; error in a given instruction is preserved by clearly pointing out the error. *See Williams v. Vandenhoven*, 1971-NMSC-029, ¶ 9. The lazy objection that a particular jury instruction "is not the law" will not preserve a claim of error.

Appellate courts exercise discretion in determining whether preservation requirements have been met. They do not demand an unreasonable degree of perfection in preserving an issue, however. Objections need not be perfectly articulate, *see Garcia v. La Farge*, 1995-NMSC-019, ¶ 28, and legal arguments made in the heat of trial need not be presented with the same thoroughness one would expect in an appellate brief, *see State v. Gomez*, 1997-NMSC-006, ¶ 31. Indeed, preservation requirements may be dispensed with altogether if it is clear that the purposes of the preservation rule were met, *see Trujillo v. Chavez*, 1979-NMCA-178, ¶ 4 (noting that record showed trial court was aware of controlling precedent that was not cited), or where a technical application of the rule would not further its purpose, *see State v. Diaz*, 1995-NMCA-137, ¶¶ 29-30 (pointing out that even correct instruction, if tendered, would not have been given because trial court believed it was not required to instruct on subject).

A trial court record that contains clearly identified, timely raised, and precisely argued points of alleged error is not only pleasurable reading for appellate counsel. It also may be the foundation for a successful appeal.

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Practice Pointer:

New Rules Clarify Post-Trial Motion Practice and Timing of Appeals

The New Mexico Supreme Court adopted amendments to the Rules of Civil Procedure and Rules of Appellate Procedure at the end of 2013 that affect post-trial motion practice and clarify the effect of post-trial motions on the time within which a notice of appeal must be filed. Post-trial motions filed within 30 days after a final judgment, including motions to reconsider the judgment, toll the appeal time until the last such motion is ruled upon or withdrawn. A notice of appeal that is filed while a post-trial motion is pending does not divest the district court of jurisdiction to rule on the motion and does not become effective until the motion is ruled upon. A more complete discussion of the amendments and their operation is contained in the committee comment to Rule 12-201 NMRA.

Whether to Appeal *continued from page 3*

the amount of any judgment interest that will accrue during the year(s) that the appeal may remain pending, especially if you foresee the case ending up in the New Mexico Supreme Court. Review and, if need be, research any other aspects of your opponent's case that may increase the costs if your opponent prevails on appeal.

❑ **Ascertain whether your client's broader interests warrant an appeal**. The dispute that underlies the adverse decision may be likely to recur or may implicate the rights of many individuals. In either scenario, a client may opt to appeal even if the potential cost of the appeal appears relatively high in relation to the individual case before you. Conversely, consider the potential impact of an adverse appellate decision with precedential value. It may be better to appeal an issue in a later case with a stronger record.

❑ **Assess the risk of a cross-appeal by the other side.** If your client won on an issue in the trial court and pursues an appeal, your opponent may counter with a cross-appeal. A successful cross-appeal may strip away your client's victory on an issue important to the client and, in any event, will increase your client's costs because of the additional work entailed in responding to the cross-appeal.

As should be apparent by now, the preceding checklist is oriented toward an adverse decision in state district court. Adjust the checklist as circumstances warrant to fit other procedural settings. Remain alert to the possibility that other case-specific considerations may impact the analysis. Regardless of which checklist you use, the time that you spend should result in a realistic appraisal of whether an appeal has the potential to provide your client with meaningful relief or whether it would be to no avail.

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Supersedeas Bonds:
Considerations Every Practitioner Should Know

By Alice Tomlinson Lorenz

Underlying Rule of Civil Procedure, Rule 1-062, NMRA "Stay of proceedings to enforce a judgment," and Rule of Appellate Procedure 12-207 NMRA, which permit an immediate appeal from a district court decision on supersedeas and stay, is the following assumption: an appellant will be able to obtain a bond. That assumption no longer matches reality. This article outlines factors that have contributed to the predicament in which appellants can find themselves in New Mexico state courts and some potential solutions.

Uninsured appellants currently facing large judgments, or those whose insurer is not obliged to pay for a supersedeas bond, probably won't be able to post a bond because the costs associated with posting a bond have become substantial. The cost has gone from around 10 percent of the bond amount to 1-4 percent (often calculated on a graduated scale), *secured by sufficient assets to cover the entire amount of the bond*.

Bonding companies have become increasingly restrictive about the types of security they will accept. Most require cash collateral, an irrevocable letter of credit (ILOC) or a combination thereof. Where the bonding company will depart from these rigid requirements, stock in publicly traded companies may be accepted, but stock in privately held companies will not be accepted. Only limited types of real estate are likely to qualify—property subject to the uncertainties of the housing market almost certainly will be unacceptable.

So what alternatives are there? New Mexico precedent provides little guidance. But it may be possible to devise a solution based upon the following authorities: (1) the constitutional right to appeal under N.M. Const. art. VI, § 2, (2) New Mexico courts' inherent authority, *see Segal v. Goodman*, 1993-NMSC-018, and (3) complementary principles found in authorities from other jurisdictions. *E.g.*, *Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979) (bond requirement not intended to impair judgment debtor's ability to appeal).

In *Segal* the New Mexico Supreme Court concluded that courts have inherent authority to stay execution, and that supersedeas bonds are not mandatory in all cases. 1993-NMSC-018, ¶¶ 26, 28-29. The Court then provided the following guidelines:

> Factors the courts consider in determining whether to waive the bond include the complexity of the collection process, the apparent ability of the defendant to pay the judgment, the court's confidence that funds will be available to satisfy the judgment, and whether other creditors of the defendant will be adversely affected by the requirement that a bond be posted. *See Dillon v. Chicago*, 866 F.2d 902, 904-05 (7th Cir. 1988). We commend these factors, as a nonexclusive list, to the trial court in the present case—and to any other trial court in similar circumstances—for consideration on remand, along with the other factors mentioned in this opinion.

Id. ¶ 28. The Court emphasized that there should be "a flexible balancing of the parties' respective interests" and that "to properly evaluate requests for stays . . . [a] court must consider the circumstances of each individual case." *Id.* ¶ 29. *Segal's* recognition of the courts' inherent authority to issue stays, and the public policies that underlie that equitable authority, seem to be the best starting place for evaluating alternatives to a traditional supersedeas bond and determining which circumstances might persuade a court to permit a stay of execution.

Irrevocable Letters of Credit

ILOCs have been an acceptable form of alternative security. Currently, however, to obtain an ILOC the purchaser must pay a percentage of the ILOC amount and provide collateral in its full amount. Not surprisingly, the relatively new collateral requirement has reduced the use of ILOCs as alternatives to bonds. As a practical matter, one who cannot post sufficient collateral for a bond is unlikely to be

able to post collateral sufficient for an ILOC, unless the person has a lender that will accept collateral that the issuer of a supersedeas bond will not.

The benefit to the creditor who accepts an ILOC in lieu of a bond is ease of collection. Thus, to persuade the judgment creditor to accept an ILOC, its terms must be such that the creditor need do no more to get paid than present the original letter to the lender upon obtaining a decision upholding the judgment.

Escrow

Placing funds and/or assets in escrow has worked in cases involving modest judgments. Use of an interest bearing account benefits the debtor. It can benefit the creditor as well if the escrow instructions make it easy to collect. Escrow instructions should provide that, upon presentation of a certified copy of a final decision upholding all or part of an award, the escrow agent will determine the amount of interest accrued on the judgment, promptly release that amount to the prevailing party, and return any excess funds to the debtor. Instructions should also provide that, if the case is settled, the parties will present a signed copy of their agreement to the escrow agent, who will then release the funds in accordance with the joint instructions of the parties.

Fallback Options

Absent consent, debtors seeking a stay on alternative security must show that they made reasonable, but unsuccessful, efforts to obtain a bond. *See Salt River Sand and Rock Company v. Dunevant III*, 213 P.3d 251, 255 (Ariz. App. 2009). The debtor must be willing to provide the best security possible, to convince a court that it has the authority to order a stay on alternative security, and that the policies underlying that equitable authority militate in favor of their request. *Id.*

One issue not yet addressed by the appellate courts is whether alternative security must be in an amount sufficient to secure the entire judgment plus interest, costs, and delay damages. *Segal's* language and cases from other jurisdictions indicate that, where a debtor does not have sufficient assets, tendering what the debtor does have should suffice. *Segal*, 1993-NMSC-018, ¶¶ 27-29; *see also* 5 Am.Jur.2d *Appellate Review* § 431 (2012) (while full supersedeas bond should be required in normal circumstances, courts have inherent discretionary authority that extends to both their nature and amount and so can accept less than a full supersedeas bond). Nevertheless, one district court denied a stay on alternative security because the debtor lacked sufficient assets to fully secure the judgment, interest, costs, and delay damages. The Court of Appeals will not be addressing the issue because the denial resulted in the filing of a Chapter 11 bankruptcy, which triggered an automatic stay of the state court proceedings.

Bankruptcy Considerations

A debtor's ability to turn to bankruptcy court to prevent a judgment from resulting in the debtor's financial ruin is one reason a judgment creditor might consider working with the debtor to find alternatives. Where the judgment is dischargeable in bankruptcy and the debtor can meet the requirements for invoking relief from the bankruptcy courts,[1] a creditor's insistence on a traditional supersedeas bond, or successful opposition to a request for stay on alternative security, may well turn out to be counterproductive.

In a Sept. 26, 2012, decision in *In re Hyatt*, No 11-10973, the Bankruptcy Court for the District of New Mexico rejected the claim that the case was filed in bad faith to avoid posting a supersedeas bond. The court identified as key factors: whether the debtor had creditors other than the judgment creditor, whether the bankruptcy proceeding protected those other creditors, and whether the debtor had the ability to post a bond.

Conclusion

Protecting clients from the distress and expense of facing collection efforts during their appeal is no longer a simple matter. The unavailability of supersedeas bonds in today's environment, juxtaposed against rules that assume their availability, creates dilemmas for appellate counsel that, at least until the rules are amended to reflect the reality, require creative thinking for new solutions.

Endnotes

[1] In evaluating potential bankruptcy issues, bankruptcy counsel should be consulted.

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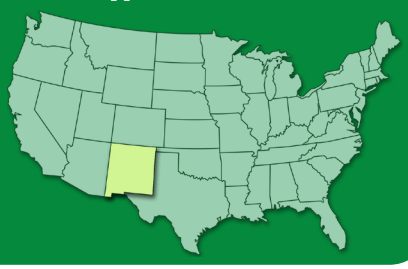
Case Law Update:

U.S. Supreme Court Widens Gap Between Federal and New Mexico Practice in Determining Finality for Cases Including Attorney's Fee Awards

In *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), the U.S. Supreme Court held that a federal court's award of statutory attorney's fees does not affect the finality of the underlying judgment in determining when a notice of appeal is due. Recently, in *Ray Haluch Gravel Co. v. Central Pension Fund of International Union Operating Engineers and Participating Employers*, __ U.S. __, 134 S. Ct. 773 (2014), the Court cited the need for consistency in extending that rule to fee awards based on contract.

The N.M. Supreme Court already has declined to follow *Budinich*, and in light of *Haluch Gravel* it is safe to say that New Mexico practice differs from federal practice with respect to both statute- and contract-based attorney's fee awards. The leading New Mexico cases on this subject establish an unusual approach of flexible finality. An appellant in state court may treat the merits judgment as final and commence an appeal from that judgment, retaining the right to appeal any later fee award. Alternatively, an appellant may treat the merits judgment as interlocutory and may wait until the court issues an order quantifying the fee award before appealing one or both rulings. *See Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005; *Trujillo v. Hilton of Santa Fe*, 1993-NMSC-017. New Mexico's approach favors "practical choice" over the "procedural danger" of a bright-line rule, *see Trujillo*, 1993-NMSC-017, ¶ 5, in determining when to appeal in such cases.



Handling a Hybrid Appeal Involving Original and Appellate Jurisdiction Issues

By Larry J. Montaño

The district court, sitting in both its original and appellate capacity, just ruled against your client. The court affirmed the administrative agency's decision after rubber-stamping, *I mean* deferring to its completely unsupported fact-findings. And the court dismissed your original constitutional claims because, well, it apparently does not understand either the U.S. or the New Mexico constitutions. What do you file? Where? And when? Surely, you will never find yourself in this unenviable position. But if you do, catch your breath and consider three practice pointers:

1. **File Notice of Appeal and *Certiorari* Petition.** If you want to appeal the district court's original-jurisdiction decision and you want to seek review of its appellate-jurisdiction decision, you "should file a notice of appeal as to the issues to be reviewed as of right and a petition as to those issues that are reviewed in [the Court of Appeals'] discretion." *Bransford-Wakefield v. State Tax'n & Rev. Dep't Motor Vehicle Div.*, 2012-NMCA-025, ¶ 14, *see Mascarenas v. City of Albuquerque*, 2012-NMCA-031 (holding that Court of Appeals lacked jurisdiction over appeal from order affirming administrative decision because no *certiorari* petition was timely filed). If you are uncertain about whether the Court of Appeals' review is of right or discretionary, you should err on the side of filing both a notice and a petition. *See Bransford-Wakefield*, 2012-NMCA-025, ¶ 14.

What do you file? Where? And when?

2. **File Notice in the District Court and Petition in the Court of Appeals.** You must file your notice of appeal in the district court and your petition for writ of *certiorari* in the Court of Appeals. *See* Rule 12-202(A) (2009) NMRA (notice of appeal; how to appeal as of right); Rule 12-505(C) (2009) NMRA (*certiorari* petition; review of administrative agency decisions). Similarly, if you wish to seek additional time to file either one of those documents, file your request in the court empowered to grant the extension. *See Cassidy-Baca v. Bd. of County Comm'rs of Sandoval*, 2004-NMCA-108, ¶ 5 (stating that a "party should request an extension to file a document of the same court in which the party files that document."). If you obtain an extension from the wrong court, you have no extension. *See Id.* (rejecting as untimely *certiorari* petition filed in reliance on district court's futile extension).

3. **File Your Notice and Your Petition within 30 Days—Sooner if You Can.** You must file your notice within 30 days after the aggrieved judgment or order is filed in the district court and your petition within 30 days after entry of the district court's final action. *See* Rule 12-201(A)(2) (2013); Rule 12-505(C) (2009). If you fail to file a petition, but file a docketing statement by the petition deadline that substantially complies with a petition's content requirements, the Court of Appeals will accept it as a non-conforming petition. *See Audette v. City of Truth or Consequences*, 2012-NMCA-011, ¶ 5 (accepting as non-conforming petition a docketing statement that "contains information sufficient to determine whether the issues . . . raise[d] meet the requirements for granting a petition"). But the Court of Appeals has its limits, and neither a notice of appeal alone nor an "untimely" docketing statement is sufficient to invoke the Court of Appeals' discretionary review. *See Wakeland v. N.M. Dep't of Workforce Solutions*, 2012-NMCA-021, ¶¶ 13-20.

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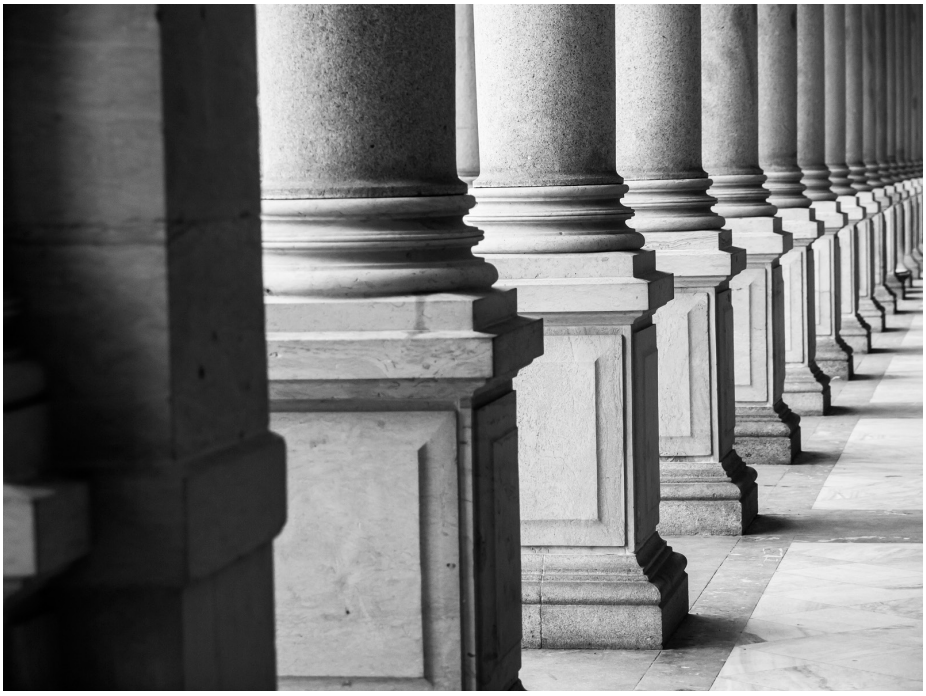
Un*Moore*d: A New Harmless Error Era

By Caren I. Friedman



The harmless error doctrine, which courts invoke to affirm a judgment in spite of trial error, is one that often confounds criminal defense attorneys. In a landmark decision, *State v. Tollardo*, 2012-NMSC-008, our Supreme Court revamped New Mexico's harmless error jurisprudence by overruling *State v. Moore*, 1980-NMSC-073. This article examines the new standard and how it has been applied.

The harmless error doctrine emerged as a reaction to the former practice of automatically reversing a judgment for any procedural defect. The doctrine originally required appellate courts to affirm the judgment of a lower court "notwithstanding technical errors, defects, or exceptions [that] did not affect the substantial rights of the parties." *Tollardo*, 2012-NMSC-008, ¶ 26 (citation omitted).

In the seminal case of *Chapman v. California*, the U.S. Supreme Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 368 U.S. 18, 24 (1967). New Mexico appellate courts soon began applying that standard. *E.g.*, *State v. Jones*, 1969-NMCA-103; *State v. Spearman*, 1972-NMCA-150.

By 1980, however, New Mexico had departed significantly from *Chapman*. In *Moore*, the Court held that for trial error to be considered harmless, "there must be: (1) substantial evidence to support the conviction without reference to the improperly admitted evidence, (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear so minuscule that it could not have contributed to the conviction, and (3) no substantial conflicting evidence to discredit the State's testimony." 1980-NMSC-073, ¶ 4.

Before *Moore*, New Mexico courts had evaluated a claim of error by asking how severely a defendant was affected. *Tollardo*, 2012-NMSC-008, ¶ 27. *Moore* "shifted the harmless error inquiry away from an assessment of an error's impact on the verdict, and toward a more mechanical approach," in which courts weigh the error against the evidence presented. *Id.* ¶ 33. In *Tollardo*, the Supreme Court stated that the *Moore* test distorted the proper focus of harmless error review away from the question whether the error had an impact on the verdict to the question whether the right result was nevertheless reached. *Id.* ¶ 42.

By overruling *Moore*, the Supreme Court continued to adhere to the distinction between non-constitutional and constitutional error. Non-constitutional errors are harmless "when there is no reasonable *probability* [that] the error affected the verdict." *Id.* ¶ 36. Constitutional error is harmless only "when there is no reasonable *possibility* [that] it affected the verdict." *Id.* Once a constitutional error is established, the State bears the burden of demonstrating that the error was harmless. *Id.* ¶ 41.

In *Tollardo*, the Supreme Court acknowledged that "there are no scientific answers to the ultimate question of whether the trier of fact was influenced by an error." *Id.* ¶ 43 (citation omitted). The Court offered the following guidance: "[I]n reaching a judgment as to the likely effect of the error, courts should evaluate all of the circumstances surrounding the error," including the error itself, as well as its source and the emphasis placed upon it. *Id.* The Court emphasized that "constitutional error must not be deemed harmless solely based on overwhelming evidence of the defendant's guilt." *Id.* ¶ 40.

Under the old harmless error standard, seeking reversal of a judgment—even for constitutional error—was a steep, uphill battle. Under the new standard, however,

Practice Pointer:

Docketing Statement Filing Tip

Rule 12-208 NMRA sets forth docketing statement requirements for an appeal pending in the New Mexico Court of Appeals. The text of the rule indicates that you must serve the district court clerk, among others. In judicial districts that have adopted electronic filing, service on the district court clerk is accomplished by electronically filing the docketing statement, which is not apparent from the rule.

our appellate courts have already reversed several judgments.

In *Tollardo* itself, the district court had instructed the jury that it had to accept as true the fact that the defendant's co-defendants had been convicted of conspiracy to commit second-degree murder. *Id.* ¶ 49. The Supreme Court noted that all of the substantive crimes with which the defendant had been charged were based on accessory liability. *Id.* ¶ 54. The Court found the instruction violated the defendant's Sixth Amendment Confrontation Clause rights and that it would be unreasonable to assume that the jurors separated the concepts of conspiracy and accessory liability by considering the improperly admitted evidence only when deliberating on the conspiracy charges. *Id.* ¶¶ 45, 55. The Court cautioned that "the fact that other evidence apart from the error supports conviction, even if that evidence is overwhelming, cannot be the determinant of whether the error is harmless." *Id.* ¶ 56. Because there was a reasonable possibility that admission of the co-defendants' convictions contributed to the defendant's convictions, the district court's error was not harmless. *Id.* ¶ 57.

Within weeks of the *Tollardo* decision, the Court of Appeals decided *State v. Moncayo*. There, the defendant was convicted of possession with intent to distribute a controlled substance. 2012-NMCA-066, ¶ 1. He argued that his Confrontation Clause rights were violated by the admission of a chemical forensic report where the analyst who prepared the report did not testify. *Id.* The Court of Appeals noted that the defendant had had no opportunity to cross-examine the analyst, and the State had not argued that the analyst was unavailable. *Id.* ¶ 9. Under those circumstances, the Court held that admission of the report violated the defendant's right to confrontation. *Id.* Applying the guidance from *Tollardo*, the Court of Appeals concluded that the report's admission was not harmless because there was otherwise no evidence that the substance at issue was cocaine. *Id.* ¶ 17.

... our appellate courts have already reversed several judgments.

Several months later, the Court of Appeals reversed a judgment based on a non-constitutional error. In *State v. Armijo*, the Court agreed with the defendant that a law enforcement officer's testimony about the amount of alcohol that he had consumed was inadmissible opinion testimony for which no foundation had been laid. 2014-NMCA-013, ¶ 7 (filed 2013), *cert. granted*, 2013-NMCERT-012, ___ P.3d ____. The Court reasoned that the admissible evidence could have supported either a conviction or an acquittal and that, under *Tollardo*, the task was not to determine whether there was sufficient evidence to support a conviction. *Id.* ¶ 16. The Court of Appeals concluded that there was a reasonable probability that the inadmissible testimony influenced the jury's verdict. *Id.* ¶ 18.

Shortly thereafter, the Supreme Court followed suit, reversing a judgment under the lower non-constitutional standard. In *State v. Leyba*, the Court reversed convictions for first-degree murder, felony murder, and aggravated burglary based on the admission into evidence of the decedent's diary, which contained inadmissible hearsay. 2012-NMSC-037, ¶ 1. The Court stated that the crux of the case was the defendant's state of mind, the diary was a centerpiece of the State's evidence, and there was otherwise scant evidence of deliberate intent. *Id.* ¶¶ 25, 27, 36.

U.S. District Judge Santiago Campos once quipped that judges "should not flop into the 'harmless error' foxhole" that sometimes beckons when "they hear bullets singing about their ears but are unable to tell from where those missiles are launched."[1] As the recent string of precedents demonstrates, with the overruling of *Moore*, the Supreme Court has made it considerably more difficult for judges to flop into the harmless error foxhole.

Endnotes

[1] *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1127 (10th Cir. 1995) (Campos, D.J., sitting by designation, dissenting in part).

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