# CHAPTER 38
# Trials

# ARTICLE 1
# Process

## 38-1-1. Rules of pleading, practice and procedure.

A. The supreme court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico for the purpose of simplifying and promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant.

B. The supreme court shall cause all rules to be printed and distributed to all members of the bar of the state and to all applicants, and no rule shall become effective until thirty days after it has been so printed and distributed.

**History:** Laws 1933, ch. 84, § 1; 1941 Comp., § 19-301; 1953 Comp., § 21-3-1; Laws 1966, ch. 28, § 31.

**ANNOTATIONS**

**Abrogation of common law jurisdiction to correct illegal sentences.** — Paragraph A of Rule 5-801 NMRA, which abrogated the common law jurisdiction of the district court to correct illegal sentences, does not violate the separation of powers doctrine. State v. Torres, 2012-NMCA-026, 272 P.3d 689, cert. granted, 2012-NMCERT-003.

**Constitutionality.** — When the legislature enacted this chapter, it did not delegate to the court a function exclusively legislative, contrary to N.M. const., art. III, § 1. The trial court rules promulgated by the supreme court, though promulgated subsequent to and consequent upon the enactment of this chapter, were promulgated, nevertheless, by the court in the exercise of an inherent power lodged in the court to prescribe such rules of practice, pleading, and procedure as will facilitate the administration of justice. State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

**Unquestioned power rests in supreme court to promulgate rules** of pleading, practice and procedure. State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947).

**Unquestioned power rests in supreme court to promulgate rules.** — Although 38-1-2 NMSA 1978 refers to statutes existing in 1933, it is fair to attribute to the legislature, in view of the delegation in this section, the intent that statutes relating to pleading, practice and procedure enacted after 1933 would remain in effect "unless and until

modified or suspended by rules" promulgated pursuant to this section. Lovelace Med. Ctr. v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991).

**Purpose of rules.** — This section provides for promulgation by the supreme court of rules to regulate pleading, practice and procedure for the purpose, among others, of "promoting the speedy determination of litigation upon its merits." This indicates the end to be sought by the rules to be no different from that of the federal rules. Fort v. Neal, 79 N.M. 479, 444 P.2d 990 (1968).

**Section prohibits the promulgation of a rule that abridges, enlarges or modifies the substantive rights** of any litigant. Johnson v. Terry, 48 N.M. 253, 149 P.2d 795 (1944).

**Modification of legislative rules.** — Legislative rules relating to pleading, practice and procedure in the courts, particularly where those rules relate to court management or housekeeping functions, may be modified by a subsequent rule promulgated by the supreme court. Lovelace Med. Ctr. v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991).

**Substantive law is the positive law which creates, defines and regulates the rights and duties of the parties** and which may give rise to a cause for action, as distinguished from adjective law which pertains to and prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective. Honaker v. Ralph Pool's Albuquerque Auto Sales, Inc., 74 N.M. 458, 394 P.2d 978 (1964).

**Creation of the right of appeal is a matter of substantive law** and not within the rule-making power of the supreme court. State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947).

**Regulation of manner and time for taking appeal procedural matter.** — It is within the rule-making power of the supreme court to reduce the time for taking an appeal from six to three months (now 30 days) once the legislature has authorized appeal, since the regulation of the manner and time for taking appeal are procedural matters. State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947).

**Rules liberally construed.** — In order that causes coming on for appeal may be reviewed on the merits, supreme court rules are to be construed liberally with that end in view. Fairchild v. United Serv. Corp., 52 N.M. 289, 197 P.2d 875 (1948).

**Law reviews.** — For article, "Survey of New Mexico Law, 1982-83: Civil Procedure," see 14 N.M.L. Rev. 17 (1984).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

For survey of 1990-91 appellate procedure, see 22 N.M.L. Rev. 623 (1992).

For article, "New Mexico's Accountant-Client Privilege," see 37 N.M.L. Rev. 387 (2007).

For article, "Jurisdiction as May be Provided by Law: Some Issues of Appellate Jurisdiction in New Mexico," see 36 N.M.L. Rev. 215 (2006).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 20 Am. Jur. 2d Courts § 48 et seq.

Power of court to prescribe rules of pleading, practice or procedure, 110 A.L.R. 22, 158 A.L.R. 705.

21 C.J.S. Courts §§ 124 to 134.

## 38-1-2. [Practice statutes may be modified or suspended by rules.]

All statutes relating to pleading, practice and procedure, now existing, shall, from and after the passage of this act [38-1-1, 38-1-2 NMSA 1978], have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant hereto.

**History:** Laws 1933, ch. 84, § 2; 1941 Comp., § 19-302; 1953 Comp., § 21-3-2.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Constitutionality.** — When the legislature enacted this chapter, it did not delegate to the court a function exclusively legislative, contrary to N.M. const., art. III, § 1. The trial court rules promulgated by the supreme court, though promulgated subsequent to and consequent upon the enactment of this chapter, were promulgated, nevertheless, by the court in the exercise of an inherent power lodged in the court to prescribe such rules of practice, pleading, and procedure as will facilitate the administration of justice. State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

**Modification of legislative rules.** — Legislative rules relating to pleading, practice and procedure in the courts, particularly where those rules relate to court management or housekeeping functions, may be modified by a subsequent rule promulgated by the supreme court. Lovelace Med. Ctr. v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991).

**Law reviews.** — For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

## 38-1-3. [Common law is rule of practice and decision.]

In all the courts in this state the common law as recognized in the United States of America, shall be the rule of practice and decision.

**History:** Laws 1875-1876, ch. 2, § 2; C.L. 1884, § 1823; C.L. 1897, § 2871; Code 1915, § 1354; C.S. 1929, § 34-101; 1941 Comp., § 19-303; 1953 Comp., § 21-3-3.

## ANNOTATIONS

**Bracketed material. —** The bracketed material was inserted by the compiler and is not part of the law.

**Cross references. —** For applicability of common law in criminal cases, *see* 30-1-3 NMSA 1978.

## I. GENERAL CONSIDERATION.

**The legislature intended to adopt the common law,** or lex non scripta, and such British statutes of a general nature not local to that kingdom, nor in conflict with the constitution or laws of the United States, nor of this territory, which are applicable to our conditions and circumstances, and which were in force at the time of the American separation from the mother country. Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (1929); Browning v. Estate of Browning, 3 N.M. (Gild.) 659, 9 P. 677 (1886); Territory ex rel. Wade v. Ashenfelter, 4 N.M. (Gild.) 93, 12 P. 879 (1887), appeal dismissed, 154 U.S. 493, 14 S. Ct. 1141, 38 L. Ed. 1079 (1893); Bent v. Thompson, 5 N.M. 408, 23 P. 234 (1890), aff'd, 138 U.S. 114, 11 S. Ct. 238, 34 L. Ed. 902 (1891); Gurule v. Duran, 20 N.M. 348, 149 P. 302, 1915F L.R.A. 648 (1915); Plomteaux v. Solano, 25 N.M. 24, 176 P. 77 (1918); Blake v. Hoover Motor Co., 28 N.M. 371, 212 P. 738 (1923).

New Mexico adopted the common law or lex non scripta and such British statutes of a general nature not local to that kingdom nor in conflict with the state constitution or specific contrary statutes, which are applicable to conditions and circumstances which were in force at the time of American separation from England, and made it binding as the rule of practice and decision in the courts of this state. Boddy v. Boddy, 77 N.M. 149, 420 P.2d 301 (1966).

New Mexico has adopted the common law. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231 (1972), cert. denied, 83 N.M. 741, 497 P.2d 743; and cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

**By the adoption of the common law in New Mexico, the civil law was completely supplanted,** except as incorporated in the statutes of the territory. Field v. Otero, 35 N.M. 68, 290 P. 1015 (1930); Beals v. Ares, 25 N.M. 459, 185 P. 780 (1919).

**Common law as the rule of practice and decision prevails where there is no special statutory provision** in respect to a matter. Walker v. N.M. & S.Pac. R.R., 7 N.M. 282, 34 P. 43 (1893), aff'd, 165 U.S. 593, 17 S. Ct. 421, 41 L. Ed. 837 (1897).

The common law is the rule of practice and decision. This rule does not obtain, however, when the subject matter of any procedural right is fully covered by statute or

rule. Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957), overruled on other grounds, Safeco Ins. Co. v. U.S. Fid. & Guar. Co., 101 N.M. 148, 679 P.2d 616 (1984).

**Where common law applicable to conditions in state. —** The New Mexico supreme court has the power to do away with common-law principles since the common law is not the rule of practice and decision if inapplicable to conditions in New Mexico, and if it is not applicable to the condition and circumstances it is not to be given effect. Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975).

The common law is not the rule of practice and decision if not applicable to conditions in New Mexico. Rodgers v. Ferguson, 89 N.M. 688, 556 P.2d 844 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

**Common law is only abrogated or repealed by statute when directly and irreconcilably opposed** to the common law. S. Union Gas Co. v. City of Artesia, 81 N.M. 654, 472 P.2d 368 (1970).

**Common law inapplicable to procedural right otherwise covered. —** The common law does not apply when the subject matter of any procedural right is fully covered by the constitution, statutes or rules. State ex rel. Attorney Gen. v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981).

**Common-law doctrines not invulnerable. —** Because a common-law doctrine is judicially created, it is within the court's province to change a common-law doctrine if it is unwise. Merely because a common-law doctrine has been in effect for many years, it is not rendered invulnerable to judicial attack once it has reached a point of obsolescence. Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982).

**Revision of an outmoded common law doctrine is within the competence of the judiciary.** Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982).

## II. PARTICULAR MATTERS.

**Statute of frauds. —** Letters from decedent to his surviving brother contained all elements of a written memoranda of an oral agreement by the decedent to devise the family farm to the surviving brother to satisfy the statute of frauds where the letters identified the parties to the agreement, because they were written by the decedent to the surviving brother; the letters sufficiently identified the property, because they described the property as "our property in Rio Arriba County", there was no other property that the brothers owned jointly except the family farm in Rio Arriba County, and the family had a long history and was intimately familiar with the property; and the letters stated the terms and condition of all the promises constituting the agreement and by whom and to whom the promises were made because the letters stated that the surviving brother would convey title to the property to the decedent to allow the decedent to take advantage of the veteran’s tax exemption and stated that the decedent

would devise the property to the surviving brother if the surviving brother survived the decedent. Varoz v. Varoz, 2008-NMSC-027, 144 N.M. 7, 183 P.3d 151.

Where sellers verbally agreed to sell a tract of land to buyers for a home site; in reliance on the agreement, buyers cashed IRA and 401-K retirement plans at a substantial penalty; with the consent of the sellers, buyers went into possession of the land, purchased a double-wide mobile home and moved the home onto the land, erected valuable temporary and permanent improvements on the land, and landscaped the property; and buyers spent approximately $85,000 in purchasing the home and making improvements, the buyers' actions were sufficient part performance in reliance on the oral agreement to take the contract outside the statute of frauds. Beaver v. Brumlow, 2010-NMCA-033, 148 N.M. 172, 231 P.3d 628.

**Change of venue by court upon own motion.** — A trial court, in a proper case and in the exercise of its discretion, has the power to order a change of venue sua sponte. This power existed at common law and the common law is the rule of practice and decision in New Mexico. Valdez v. State, 83 N.M. 720, 497 P.2d 231, aff'g, 83 N.M. 741, 497 P.2d 743 (1972), cert. denied, 83 N.M. 741, 497 P.2d 743; and cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

**Citizen's arrest.** — Because in New Mexico there is no statute covering citizen's arrest, the common law controls; thus, a citizen's arrest may be made for felonies or the misdemeanors of breach of the peace or shoplifting; the person making the arrest must inform the arrested person of the offense for which he was under arrest, and the force used must be reasonable. Downs v. Garay, 106 N.M. 321, 742 P.2d 533 (Ct. App. 1987).

**Damages for waste.** — An ancient statute giving a landlord treble damages for waste committed by the tenant is a harsh rule and not in harmony with our conditions and circumstances. Blake v. Hoover Motor Co., 28 N.M. 371, 212 P. 738 (1923).

**Dower and curtesy.** — Common-law rights of dower and curtesy have never obtained in New Mexico as to the interests of the wife and husband, respectively, in the community estate. Hernandez v. Becker, 54 F.2d 542 (10th Cir. 1931).

**Doctrine of destructibility of contingent remainders is not applicable in this state.** Abo Petroleum Corp. v. Amstutz, 93 N.M. 332, 600 P.2d 278 (1979).

**Marriage.** — This section did not introduce the common-law marriage into New Mexico. In re Gabaldon's Estate, 38 N.M. 392, 34 P.2d 672 (1934).

**Probate.** — This section did not affect statute laws in relation to probate courts. Bent v. Thompson, 5 N.M. 408, 23 P. 234 (1890), aff'd, 138 U.S. 114, 11 S. Ct. 238, 34 L. Ed. 902 (1891).

**Quo warranto.** — In the absence of a statute to try the title to an office in a private corporation, the right to a writ of quo warranto will be left to common-law principles and the interpretation of the statute of 9th Anne, ch. 20. State ex rel. Nw. Colonization & Imp. Co. v. Huller, 23 N.M. 306, 168 P. 528 (1917), cert. denied, 246 U.S. 667, 38 S. Ct. 336, 62 L. Ed. 929 (1918), appeal dismissed, 247 U.S. 503, 38 S. Ct. 426, 62 L. Ed. 1239 (1918).

**Right to hold public office.** — There being no statute either denying or conferring the right of holding office upon a woman, the common law adopted hereby will prevail, and under it a woman could hold a purely ministerial office if she were capable of performing the duties thereof. State v. De Armijo, 18 N.M. 646, 140 P. 1123 (1914)See now N.M. Const., art. VII, § 2.

**Statute of frauds.** — The English statute of frauds [29 Car. II, c. 3 (1677)] is in force in New Mexico by virtue of the adoption of the common law of England. Maljamar Oil & Gas Corp. v. Malco Refineries, Inc., 155 F.2d 673 (10th Cir. 1946).

The English statute of frauds is in force in New Mexico as part of the common law. Coseboom v. Margaret S. Marshall's Trust, 64 N.M. 170, 326 P.2d 368 (1958), rev'd on other grounds, 67 N.M. 405, 356 P.2d 117 (1960).

The English statute of frauds is part of our common law. Alvarez v. Alvarez, 72 N.M. 336, 383 P.2d 581 (1963); Ades v. Supreme Lodge Order of Ahepa, 51 N.M. 164, 181 P.2d 161 (1947); Pitek v. McGuire, 51 N.M. 364, 184 P.2d 647 (1947); Pederson v. Lothman, 63 N.M. 364, 320 P.2d 378 (1958); Ray v. Jones, 64 N.M. 223, 327 P.2d 301 (1958); Boswell v. Rio De Oro Uranium Mines, Inc., 68 N.M. 457, 362 P.2d 991 (1961).

The statute of frauds is part of the common law. Boddy v. Boddy, 77 N.M. 149, 420 P.2d 301 (1966).

**Survival of actions.** — The rule in common law that no cause of action for personal injury resulting in death survived in favor of the personal representative of the deceased, nor against the personal representative of the wrongdoer, remains the rule of practice and decision in New Mexico, except as superseded or abrogated by statute or constitution, or held to be inapplicable to conditions in New Mexico. Ickes v. Brimhall, 42 N.M. 412, 79 P.2d 942 (1938) (see now Sections 41-2-1 to 41-2-4 NMSA 1978).

The common law rule that a claim for personal injury not resulting in death does not survive the death of the victim is not applicable to conditions in New Mexico because the tort of negligence did not exist when the rule developed and because there is no reason for such a rule in connection with compensatory damages. Rodgers v. Ferguson, 89 N.M. 688, 556 P.2d 844 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

**Water law.** — New Mexico has never followed the common law in connection with its waters, but, on the contrary, have followed the Mexican or civil law, and what is called

the Colorado doctrine of prior appropriation and beneficial use, Martinez v. Cook, 56 N.M. 343, 244 P.2d 134 (1952), aff'd, 57 N.M. 263, 258 P.2d 375 (1953); see also 1939-40 Op. Att'y Gen. No. 39-3152.

**Privileges in rules of evidence.** — Rule 11-501 is very different from Rule 501 of the Federal Rules of Evidence which states that privileges are "governed by the privileges or the common law." The fact that New Mexico did not follow the approach of congress but instead limited the privileges available to those recognized by the constitution, the rules of evidence, or other rules of the supreme court manifests the abrogation and inapplicability of the common law evidentiary privileges. State ex rel. Attorney Gen. v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981) (decided on basis of prior federal rules, now Cf. Fed. Rule 501).

**Law reviews.** — For article, "Judicial Adoption of Comparative Fault in New Mexico: The Time Is at Hand," see 10 N.M.L. Rev. 3 (1979-80).

For note, "Contingent Remainders; Rule of Destructibility Abolished in New Mexico," see 10 N.M.L. Rev. 471 (1980).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

For comment, "Contracts – The Supreme Court Speaks Where the Legislature Was Silent: Torrrance County Mental Health Program, Inc. v. New Mexico Health & Environment Department," see 23 N.M.L. Rev. 291 (1993).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 15A Am. Jur. 2d Common Law §§ 13, 14.

Applicability of statute of frauds to promise to pay for legal services furnished to another, 84 A.L.R.4th 994.

15A C.J.S. Common Law § 11.

## 38-1-4. [Equity rules prevail over common law.]

Generally in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail.

**History:** Laws 1897, ch. 73, § 178; C.L. 1897, § 2685 (178); Code 1915, § 4259; C.S. 1929, § 105-1006; 1941 Comp., § 19-304; 1953 Comp., § 21-3-4.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Express contract.** — An express contract is to be enforced as written in regard to contractual obligations of the parties unless the court has determined that equity should override the express contract because of fraud, real hardship, oppression, mistake, unconscionable results, and the other grounds of righteousness, justice and morality. Arena Res., Inc. v. OBO, Inc., 2010-NMCA-061, 148 N.M. 483, 238 P.3d 357.

**Judgment granting equitable relief in action based on express contract.** — Where plaintiff, who was the operating-interest owner, redeveloped an oilfield unit and sought reimbursement from defendant, who was a working-interest owner; plaintiff unilaterally redeveloped the unit without obtaining the consent of defendant as was required by the operating agreement of the parties; the redevelopment project increased oil and gas production, enhanced the unit, and netted favorable revenue consequences for defendant; although the district court concluded that plaintiff had breached the operating agreement, the court granted judgment for plaintiff based on unjust enrichment; plaintiff's action was for breach of contract and to enforce a contractual lien; plaintiff never asserted a claim for unjust enrichment, the case was not tried on the theory of unjust enrichment, and plaintiff did not request findings of fact and conclusions of law on unjust enrichment; and the court never mentioned the existence of any evidence or entered any findings of fact that supported its conclusion of unjust enrichment or otherwise provided any basis for invoking the unjust enrichment theory in the face of the parties' express contract, the court was not permitted to exercise its equitable powers to grant plaintiff relief under the equitable unjust enrichment theory of recovery. Arena Res., Inc. v. OBO, Inc., 2010-NMCA-061, 148 N.M. 483, 238 P.3d 357.

**Enforcement of contract unenforceable under statute of frauds.** — Even where a contract relating to the transfer of real estate is verbally changed as to the time of payment, a court of equity will intervene and order performance, when the refusal to intervene on account of the statute of frauds would permit a fraud to be committed. Kingston v. Walters, 14 N.M. 368, 93 P. 700 (1908), aff'd, 16 N.M. 59, 113 P. 594 (1911).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 15A Am. Jur. 2d Common Law § 15.

15A C.J.S. Common Law § 9.

## 38-1-5. Service of process; failure to report.

A. In case any domestic corporation or any foreign corporation authorized to transact business in this state fails to file a report within the time required, or, in case the agent of any corporation, designated by the corporation as the agent upon whom process against the corporation may be served, dies, resigns or leaves the state, or the agent cannot with due diligence be found, it is lawful, while the default continues, to serve process against the corporation upon the secretary of state, and the service shall

be as effective to all intents and purposes as if made upon an officer, director or the registered agent of the corporation. The plaintiff shall include an affidavit that the registered agent has died, resigned, left the state or cannot be found. The plaintiff shall provide, if known, the name upon whom the summons and complaint is to be served and the last known address and include two copies of every paper, including the summons, complaint, attachments and affidavits.

B. Within two days after service upon the secretary of state, the secretary shall notify the corporation of service of process by certified or registered mail directed to the corporation at its registered office and enclose a copy of the process or other paper served.

C. It is the duty of the plaintiff in any action in which the process is issued to pay to the secretary of state the sum of twenty-five dollars ($25.00), which sum shall be taxed as a part of the taxable costs in the suit if the plaintiff prevails in the suit.

D. The secretary of state shall keep a record of all summonses that have been presented for service to the secretary of state, along with a summary of all that occurred in regard to the service of each summons.

**History:** Laws 1905, ch. 79, § 48 (2); Code 1915, § 933; C.S. 1929, § 32-150; 1941 Comp., § 19-305; 1953 Comp., § 21-3-5; 1993, ch. 184, § 1.

## ANNOTATIONS

**Compiler's notes.** — This section contained only the first paragraph of Code 1915, § 933, Comp. Stat. 1929, § 32-150, the second paragraph being compiled as 51-2-37 1953 Comp. (since repealed).

Insofar as this section relates to foreign corporations, it may be partially superseded by 38-1-6 NMSA 1978. *See also* 53-17-11 NMSA 1978.

The report referred to in this section was the annual report required by 51-2-36 1953 Comp. (since repealed). For present provisions, see 53-5-1 NMSA 1978 et seq.

**Cross references.** — For corporate reports generally, *see* 53-5-1 NMSA 1978 et seq.

For service of process upon registered agent of domestic corporation, *see* 53-11-14 NMSA 1978.

For service of process upon registered agent of foreign corporation, *see* 53-17-11 NMSA 1978.

**The 1993 amendment,** effective June 18, 1993, added the section catchline; added the subsection designations; in Subsection A, deleted "by this article" following "required" and substituted "an officer, director or the registered agent" for "the president or head

officers" in the first sentence and added the last two sentences; substituted "certified or registered mail" for "letter" in Subsection B; substituted "twenty-five dollars ($25.00)" for "three dollars" in Subsection C; rewrote Subsection D; and made stylistic changes throughout.

**Failure of secretary of state to notify foreign corporation of service of process does not deny corporation due process of law.** — Under this section, service of process on the secretary of state, in the absence of an agent of a foreign corporation, gives the court jurisdiction, although the secretary of state does not notify the foreign corporation. This does not deny the corporation due process of law. Silva v. Crombie & Co., 39 N.M. 240, 44 P.2d 719 (1935).

**State highway commission [state transportation commission] does not have to pay the service of process fee** provided for in this section. 1964 Op. Att'y Gen. No. 64-11.

**Law reviews.** — For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

For note, "The Entry and Regulation of Foreign Corporations Under New Mexico Law and Under the Model Business Corporation Act," see 6 Nat. Resources J. 617 (1966).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 19 Am. Jur. 2d Corporations §§ 2194, 2212.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant, 20 A.L.R.2d 1179.

"Managing agent" of domestic corporation within statute providing for service of summons or process thereon, 71 A.L.R.2d 178.

19 C.J.S. Corporations §§ 721 to 735.

## 38-1-5.1. Service of process on limited liability companies; death or removal of registered agent.

A. In case the agent of any limited liability company or foreign limited liability company registered to transact business in this state, designated by such company as the agent upon whom process against the company may be served, dies, resigns or leaves the state or the agent cannot with due diligence be found, it is lawful, while the circumstances continue, to serve process against the company upon the secretary of state, and the service shall be as effective to all intents and purposes as if made upon any manager of the company.

B. Within two days after service upon the secretary of state, the secretary shall notify the company of service of process by certified or registered mail directed to the

company at its registered office and enclose a copy of the process or other paper served. It is the duty of the plaintiff in any action in which the process is issued to pay to the secretary of state the sum of twenty-five dollars ($25.00), which shall be taxed as part of the taxable costs in the suit if the plaintiff prevails therein.

C. The secretary of state shall keep a record of all summons that have been presented for service to the secretary of state along with a summary of all occurrences with regard to the service of summons. The address of a foreign limited liability company's registered agent, as set forth in its application for registration or most recent amendment thereto, shall constitute such company's registered office for purposes of this section.

**History:** Laws 1993, ch. 280, § 75.

## 38-1-6. Process against foreign corporations.

A. In all personal actions brought in any court of this state against any foreign corporation, process may be served upon any officer, director or statutory agent of the corporation, either personally or by leaving a copy of the process at his residence or by leaving a copy at the office or usual place of business of the foreign corporation.

B. If no person has been designated by a foreign corporation doing business in this state as its statutory agent upon whom service of process can be made, or, if, upon diligent search, neither the agent so designated nor any of the officers or directors of the foreign corporation can be found in the state, then, upon the filing of an affidavit by the plaintiff to that effect, together with service upon the secretary of state of two copies of the process in the cause, the secretary of state shall accept service of process as the agent of the foreign corporation, but the service is not complete until a fee of twenty-five dollars ($25.00) is paid to the secretary of state by the plaintiff in the action. The plaintiff shall provide, if known, the name of the person upon whom summons and complaint is to be served and the last known address.

C. Within two days after receipt of the process and fee, the secretary of state shall give notice by certified or registered mail to the foreign corporation at its principal place of business outside the state of the service of the process. Where the secretary of state has no record of the principal office of the foreign corporation outside the state, he shall forward the copy of the process to the place designated as its principal office in an affidavit filed with the secretary of state by the plaintiff in the suit or by his attorney.

D. The foreign corporation served as provided in this section shall appear and answer within thirty days after the secretary of state gives the notice. The certificate of service shall not be issued by the secretary of state until the defendant is served with the summons and complaint.

E. The secretary of state shall keep a record of all process served on him as provided for in this section, and of the time of the service and of his action in respect to the service.

F. Any foreign corporation engaging in business in this state, either in its corporate name or in the name of an agent, without having first procured a certificate of authority or otherwise become qualified to engage in business in this state shall be deemed to have consented to the provisions of this section.

**History:** Laws 1905, ch. 79, § 94; Code 1915, § 978; C.S. 1929, § 32-196; Laws 1935, ch. 113, § 1; 1941 Comp., § 19-306; 1953 Comp., § 21-3-6; Laws 1967, ch. 87, § 1; 1993, ch. 184, § 2.

## ANNOTATIONS

**Cross references.** — For personal service of process outside state, *see* 38-1-16 NMSA 1978.

For service of process upon registered agent of foreign corporation, *see* 53-17-11 NMSA 1978.

**The 1993 amendment,** effective June 18, 1993, substituted "residence" for "dwelling house or usual place of abode" in Subsection A; in Subsection B, substituted "by the plaintiff to that effect," for "to that effect, by the person to whom the process has been delivered for service in the office of the secretary of state", "two copies" for "a duplicate copy", and "twenty-five dollars ($25.00)" for "five dollars ($5.00)" in the first sentence, and added the last sentence; in Subsection C, in the first sentence, substituted "Within two days after" for "Upon" and "certified or registered mail" for "telegraph, charges prepaid", and deleted "and shall forward to that office by registered or certified mail a copy of the process" from the end, and substituted "place" for "places" in the second sentence; rewrote the second sentence of Subsection D, which read "The certificate of the secretary of state under his official seal, of the service is competent and sufficient proof thereof"; and made stylistic changes throughout.

**Due process requires proper service.** — Fundamental due process requires service reasonably calculated to give parties notice, and the lack of such notice cannot be cured by an entry of a general appearance after entry of default judgment. Abarca v. Hanson, 106 N.M. 25, 738 P.2d 519 (Ct. App), cert. denied, 106 N.M. 7, 738 P.2d 125 (1987).

The secretary of state's failure to give nonresident defendant notice of a products liability suit against it under this section, resulting in a default judgment, constitutes a denial of due process. Abarca v. Hanson, 106 N.M. 25, 738 P.2d 519 (Ct. App), cert. denied, 106 N.M. 7, 738 P.2d 125 (1987).

**Section does not extend to causes of action not arising out of corporations' New Mexico business.** Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033 (10th Cir. 1975).

**Service of failure of process upon qualified subsidiary sufficient to confer jurisdiction upon foreign subsidiary and parent corporation.** — Where parent foreign corporation was doing business in state through the agency of one of its two subsidiaries, and all three had common directors and secretary and same basic name, service of process on one qualified to do business in state was sufficient to bring before the court by amendment the other two corporations. State ex rel. Grinnell Co v. MacPherson, 62 N.M. 308, 309 P.2d 981, cert. denied, 355 U.S. 825, 78 S. Ct. 32, 2 L. Ed. 2d 39 (1957).

**Effect of failure of process server to return original summons with proof of service after personal service on statutory agent.** — Where default judgment was entered upon nonappearance, after personal service had been made upon defendant's statutory resident agent, the execution could not be recalled and judgment vacated for failure of the process server to return the original summons with proof of service. Bourgeious v. Santa Fe Trail Stages, Inc., 43 N.M. 453, 95 P.2d 204 (1939).

**Effect of failure of secretary of state to notify corporation of service of process.** — Under 38-1-5 NMSA 1978, service of process on the secretary of state in the absence of an agent of a foreign corporation gave the court jurisdiction, although the secretary of state did not notify the foreign corporation. Silva v. Crombie & Co., 39 N.M. 240, 44 P.2d 719 (1935).

**Service of process upon resident director valid.** — Where foreign corporation has no place of business in New Mexico, but does have directors resident in the state, service of process upon such director is good. 1915-16 Op. Att'y Gen. No. 15-1557.

**Law reviews.** — For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

For note, "The Entry and Regulation of Foreign Corporations Under New Mexico Law and Under the Model Business Corporation Act," see 6 Nat. Resources J. 617 (1966).

For survey, "Civil Procedure in New Mexico in 1975," see 6 N.M. L. Rev. 367 (1976).

For annual survey of New Mexico law of civil procedure, 19 N.M.L. Rev. 627 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 36 Am. Jur. 2d Foreign Corporations §§ 526 to 582.

Revocation of designation of person to receive process by alien enemy corporation, 156 A.L.R. 1448, 157 A.L.R. 1449.

What amounts to presence of foreign corporation in state, so as to render liable to action therein to recover unemployment compensation tax, 161 A.L.R. 1068.

Rescission or annulment of forfeiture of license of foreign corporation to do business in the state as affecting previous contract or transactions of corporation, 172 A.L.R. 493.

Effect of execution of foreign corporation's contract while executory, was unenforceable because of noncompliance with condition of doing business in state, 7 A.L.R.2d 256.

Shipping goods: foreign corporation's purchase within state of goods to be shipped into other state or country as doing business within state for purposes of jurisdiction, 12 A.L.R.2d 1439.

Ownership or control by foreign corporation of stock of other corporation as constituting doing business within state, 18 A.L.R.2d 187.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant, 20 A.L.R.2d 1179.

Power of state to subject foreign corporation to jurisdiction of its courts on sole ground that corporation committed tort within state, 25 A.L.R.2d 1202.

Federal diversity of citizenship jurisdiction where one of the states in which multistate corporation party litigant is alleged to be incorporated is also state of citizenship of opponent, 27 A.L.R.2d 745.

Publishing corporation: what constitutes doing business within state by a foreign magazine, newspaper, or other publishing corporation, for purposes other than taxation, 38 A.L.R.2d 747.

Insurance: foreign insurance company as subject to service of process in action on policy, 44 A.L.R.2d 416.

Leasing of real estate by foreign corporation, as lessor or lessee, as doing business within state within statutes prescribing conditions of right to do business, 59 A.L.R.2d 1131.

Meetings: holding directors', officers', or stockholders' or sales meetings or conventions in a state by foreign corporation as doing business within the state, 84 A.L.R.2d 412.

Manner of service of process upon foreign corporation which has withdrawn from state, 86 A.L.R.2d 1000.

Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings, 9 A.L.R.3d 738.

"General" or "managing" agent of foreign corporation under statute authorizing service of process on such agent, 17 A.L.R.3d 625.

Validity, construction, and application of statute making a foreign corporation subject to action arising out of contract made within the state although such corporation was not doing business therein, 27 A.L.R.3d 397.

Validity, construction, and application of "fiduciary shield" doctrine - modern cases, 79 A.L.R.5th 587.

19 C.J.S. Corporations §§ 952 to 961.

## 38-1-6.1. Process against foreign limited liability companies.

A. In all personal actions brought in any court of this state against any foreign limited liability company, process may be served upon any manager or statutory agent of the company, either personally or by leaving a copy of the process at his residence, or by leaving a copy at the registered office of the foreign limited liability company in this state.

B. If no person has been designated by a foreign limited liability company doing business in this state as its statutory agent upon whom service of process can be made, or if upon diligent search neither the agent so designated nor any of the managers of the company can be found in this state, then, upon the filing of an affidavit by the plaintiff to that effect, together with service upon the secretary of state of two copies of the process in the cause, the secretary of state shall accept service of process as the agent of the foreign limited liability company, but the service is not complete until a fee of twenty-five dollars ($25.00) is paid to the secretary of state by the plaintiff in the action. The plaintiff shall provide the name of the person upon whom the summons and complaint is to be served and the last known address.

C. Within two days after receipt of the process and fee, the secretary of state shall give notice by certified or registered mail, to the foreign limited liability company at its principal place of business outside this state of the service of the process. Where the secretary of state has no record of the principal place of business of the foreign limited liability company outside this state, he shall forward the copy of the process to the place designated as such company's principal office or as the office required to be maintained in the state or other jurisdiction of its organization in its application for registration to transact business in this state, or the most recent amendment of such application, but if no such application for registration has been filed in this state, to the place designated as such company's principal office in an affidavit filed with the secretary of state by the plaintiff in the suit or by his attorney.

D. A foreign limited liability company served as provided in this section shall appear and answer within thirty days after the secretary of state gives the notice. The certificate of service shall not be issued by the secretary of state until the defendant is served with the summons and complaint.

E. The secretary of state shall keep a record of all process served on him as provided for in this section, and of the time of the service and of his action in respect to the service.

F. Any foreign limited liability company engaging in business in this state, either in its own name or in the name of an agent, without having first applied for registration or otherwise having become qualified to engage in business in this state shall be deemed to have consented to the provisions of this section.

**History:** Laws 1993, ch. 280, § 76.

## 38-1-7. Purpose of act.

The purpose of this act [38-1-7 through 38-1-11 NMSA 1978] is to subject certain insurers to the jurisdiction of courts of this state in suits by or on behalf of insureds or beneficiaries under insurance contracts.

The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies. In furtherance of such state interest, the legislature herein provides a method of substituted service of process upon such insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this statute, what constitutes doing business in this state, and also exercises powers and privileges available to the state by virtue of Public Law 15, 79th Congress of the United States, Chapter 20, 1st Session, S. 340 [59 Stat. 33], which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.

**History:** 1941 Comp., § 19-311, enacted by Laws 1951, ch. 172, § 1; 1953 Comp., § 21-3-7.

**ANNOTATIONS**

**Bracketed material. —** The bracketed material was inserted by the compiler and is not part of the law.

**Cross references. —** For Public Law 15, 79th Congress, referred to in this section, *see* 15 U.S.C. §§ 1011 to 1015.

## 38-1-8. Service of process upon unauthorized insurer.

A. Any of the following acts in this state, effected by mail or otherwise, by an unauthorized foreign or alien insurer: (1) the issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein;

(2) the solicitation of applications for such contracts; (3) the collection of premiums, membership fees, assessments or other considerations for such contracts; or (4) any other transaction of insurance business, is equivalent to and shall constitute an irrevocable appointment by such insurer, binding upon him, his executor or administrator or successor in interest if a corporation, of the secretary of state to be the true and lawful attorney of such insurer upon whom may be served all lawful process in any action, suit or proceeding in any court by the superintendent of insurance, through the attorney general, and upon whom may be served any notice, order, pleading or process in any proceeding before the superintendent of insurance and which arises out of transacting an insurance business in this state by such insurer, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this state upon such insurer.

B. Such service of process shall be made by delivering to and leaving with the secretary of state, or some person in charge of his office, two copies thereof and the payment to him of a fee of two dollars ($2.00). The secretary of state shall forthwith mail by registered mail one of the copies of such process to the defendant at his last known principal place of business, and shall keep a record of all process so served upon him. Such service of process is sufficient, provided notice of such service and a copy of the process are sent within ten days thereafter by registered mail by the superintendent of insurance or the attorney general in the court proceeding or by the superintendent of insurance in the administrative proceeding to the defendant at his last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the superintendent of insurance or the attorney general showing a compliance herewith are filed with the clerk of the court in which such action is pending, or with the superintendent in administrative proceedings, on or before the date the defendant is required to appear, or within such further time as the court may allow.

C. Service of process in any such action, suit or proceeding shall, in addition to the manner provided in Subsection B of this section, be valid if served upon any person within this state, who, in this state on behalf of such insurer, is (1) soliciting insurance; (2) making, issuing or delivering any contract of insurance; or (3) collecting or receiving any premium, membership fee, assessment or other consideration for insurance, and a copy of such process is sent within ten days thereafter by registered mail by the superintendent of insurance or the attorney general to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the superintendent of insurance or the attorney general showing a compliance herewith are filed with the clerk of the court in which such action is pending, or with the superintendent of insurance in administrative proceedings, on or before the date the defendant is required to appear, or within such further time as the court may allow in the case of court proceedings.

D. The superintendent of insurance or the attorney general shall not be entitled to a judgment by default in any court or administrative proceeding under this section until the expiration of thirty days from the date of the filing of the affidavit of compliance.

E. Nothing in this section shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

**History:** 1941 Comp., § 19-312, enacted by Laws 1951, ch. 172, § 2; 1953 Comp., § 21-3-8; Laws 1973, ch. 177, § 1.

**ANNOTATIONS**

**Cross references. —** For appointment of superintendent of insurance as attorney for service of process upon insurance companies, *see* 59A-5-31 NMSA 1978.

For appointment of secretary of state as agent for service of process upon nonresident owners and operators of motor vehicles, *see* 66-5-103 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Foreign insurance company as subject to service of process in action on policy, 44 A.L.R.2d 416.

44 C.J.S. Insurance § 82.

## 38-1-9. Defense of action by unauthorized insurer.

A. Before any unauthorized foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, such unauthorized insurer shall [(1)] deposit with the clerk of the court in which such action, suit or proceeding is pending cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action; or (2) procure a certificate of authority to transact the business of insurance in this state.

B. The court in any action, suit or proceeding, in which service is made in the manner provided in Subsections [Subsection] B or C of Section 2 [38-1-8 NMSA 1978] may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of Subsection A of this section and to defend such action.

C. Nothing in Subsection A of this section is to be construed to prevent an unauthorized foreign or alien insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in Subsections [Subsection] B or C of Section 2 [38-1-8 NMSA 1978] hereof on the ground either (1) that such unauthorized insurer has not done any of the acts enumerated in Subsection A of Section 2 [38-1-8 NMSA 1978], or (2) that the person on whom service was made pursuant to Subsection C of Section 2 [38-1-8 NMSA 1978] was not doing any of the acts therein enumerated.

**History:** 1941 Comp., § 19-313, enacted by Laws 1951, ch. 172, § 3; 1953 Comp., § 21-3-9.

**ANNOTATIONS**

**Bracketed material. —** The bracketed material was inserted by the compiler and is not part of the law.

## 38-1-10. Attorney fees.

In any action against an unauthorized foreign or alien insurer upon a contract of insurance issued or delivered in this state to a resident thereof or to a corporation authorized to do business therein, if the insurer has failed for thirty days after demand prior to the commencement of the action to make payment in accordance with the terms of the contract, and it appears to the court that such refusal was vexatious and without reasonable cause, the court may allow to the plaintiff a reasonable attorney fee and include such fee in any judgment that may be rendered in such action. Such fee shall not exceed twelve and one-half percent of the amount which the court or jury finds the plaintiff is entitled to recover against the insurer, but in no event shall such fee be less than twenty-five dollars [($25.00)]. Failure of an insurer to defend any such action shall be deemed prima facie evidence that its failure to make payment was vexatious and without reasonable cause.

**History:** 1941 Comp., § 19-314, enacted by Laws 1951, ch. 172, § 4; 1953 Comp., § 21-3-10.

**ANNOTATIONS**

**Bracketed material. —** The bracketed material was inserted by the compiler and is not part of the law.

## 38-1-11. Short title.

This act [38-1-7 through 38-1-11 NMSA 1978] may be cited as the Unauthorized Insurers Process Act.

**History:** 1941 Comp., § 19-315, enacted by Laws 1951, ch. 172, § 6; 1953 Comp., § 21-3-11.

## 38-1-12. Service against incapacitated.

Whenever there is a guardian of the estate or a guardian of the person of an incapacitated person, duly appointed by a court of competent jurisdiction of this state, every process against the incapacitated person shall be served upon either of the guardians in the manner as may be provided by law for service of process, including service by publication. Service of process so made shall be considered as proper

service upon the protected person. In all other cases, process shall be served upon the protected person in the same manner as upon competent or sane persons.

History: Laws 1935, ch. 60, § 10; 1939, ch. 40, § 1; 1941 Comp., § 19-307; 1953 Comp., § 21-3-12; 2009, ch. 159, § 12.

**ANNOTATIONS**

**Compiler's notes.** — This section was carried forward under Rule 1-004F(8) NMRA.

**Cross references.** — For guardians ad litem generally, *see* 38-4-14 to 38-4-17 NMSA 1978.

For suits against insane or incompetent persons, *see* 38-4-14 to 38-4-17 NMSA 1978.

For incompetent persons as parties, *see* Rule 1-017C NMRA.

**The 2009 amendment,** effective June 19, 2009, changed "insane or incompetent" to "incapacitated" and changed "ward" to "protected person".

## 38-1-13. [Notice of proceedings occurring prior to service of summons or appearance.]

Whenever any proceeding is to be had prior to service of summons or appearance, at least five days' notice thereof shall be given, unless otherwise ordered by the court, and it shall be served on the party himself, and proof thereof made in the manner provided for service and return of summons.

**History:** Laws 1897, ch. 73, § 102; C.L. 1897, § 2685 (102); Code 1915, § 4184; C.S. 1929, § 105-706; 1941 Comp., § 19-308; 1953 Comp., § 21-3-13.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 38-1-14. Notice of lis pendens; contents; recording; effect.

In all actions in the district court of this state or in the United States district court for the district of New Mexico affecting the title to real estate in this state, the plaintiff, at the time of filing his petition or complaint, or at any time thereafter before judgment or decree, may record with the county clerk of each county in which the property may be situate a notice of the pendency of the suit containing the names of the parties thereto, the object of the action and the description of the property so affected and concerned, and, if the action is to foreclose a mortgage, the notice shall contain, in addition, the date of the mortgage, the parties thereto and the time and place of recording, and must

be recorded five days before judgment, and the pendency of such action shall be only from the time of recording the notice, and shall be constructive notice to a purchaser or encumbrancer of the property concerned; and any person whose conveyance is subsequently recorded shall be considered a subsequent purchaser or encumbrancer and shall be bound by all the proceedings taken after the recording of the notice to the same extent as if he were made a party to the said action.

The lis pendens notice need not be acknowledged to entitle it to be recorded.

**History:** Laws 1873-1874, ch. 19, § 1; C.L. 1884, § 1853; C.L. 1897, § 2902; Code 1915, § 4261; C.S. 1929, § 105-1101; 1941 Comp., § 19-309; 1953 Comp., § 21-3-14; Laws 1959, ch. 160, § 1; 1965, ch. 95, § 1.

## ANNOTATIONS

**Party filing notice of lis pendens need not have an interest in the property.** — Where a party has standing to file a lawsuit in district court affecting the title to real property, Section 38-1-14 NMSA 1978 allows for the filing of a notice of lis pendens in connection with the lawsuit. Filing a notice of lis pendens is not limited to those cases in which the adverse party claims a beneficial interest in the title to the property. High Mesa Gen. P'ship v. Patterson, 2010-NMCA-072, 148 N.M. 863, 242 P.3d 430, cert. quashed, 2011-NMCERT-002, 150 N.M. 617, 264 P.3d 129.

**Party filing lis pendens must have a present claim to the property.** — To be eligible to record a lis pendens notice on a piece of real property, the party recording the notice must assert a present claim to the property's title or have some other present interest in the property. U.S. v. Jarvis, 499 F.3d 1196 (10th Cir. 2007).

**Subdivision affects title to property.** — The subdivision of property and the approval of a subdivision plat affect the title to the property being subdivided. High Mesa Gen. P'ship v. Patterson, 2010-NMCA-072, 148 N.M. 863, 242 P.3d 430, cert. quashed, 2011-NMCERT-002, 150 N.M. 617, 264 P.3d 129.

**Notice of lis pendens filed by a party who did not have an interest in the property.** — Where the county approved plaintiff’s application for a preliminary subdivision plat of plaintiff’s property; defendant filed an administrative appeal of the county’s decision pursuant to Rule 1-074 NMRA and a notice of lis pendens; and defendant had no interest in the property, the notice of lis pendens was properly filed, and defendant did not have an obligation to obtain a stay under Rule 1-074 NMRA prior to filing the notice of lis pendens. High Mesa Gen. P'ship v. Patterson, 2010-NMCA-072, 148 N.M. 863, 242 P.3d 430, cert. quashed, 2011-NMCERT-002, 150 N.M. 617, 264 P.3d 129.

**Effect of voluntary release of notice of lis pendens.** — Where a party chooses not to exercise the right to give notice to subsequent purchasers through a notice of lis pendens, either by not recording a notice during litigation or by releasing the notice prior to the conclusion of the litigation, further purchasers are deemed to be without

constructive notice of the pending claims involving the property. Kokoricha v. Estate of Donald I. Keiner, 2010-NMCA-053, 148 N.M. 322, 236 P.3d 41.

**Effect of voluntary release of notice of lis pendens.** — Where plaintiffs purchased property that was the subject of ongoing probate litigation in which the decedent's estate sought to set aside a deed from the decedent to the decedent's nephew; the estate did not file a notice of lis pendens when the litigation was commenced; after two years of litigation, the estate filed a notice of lis pendens; prior to the conclusion of the litigation, the estate voluntarily released the lis pendens; and plaintiffs purchased the property after the lis pendens had been released, but prior to the conclusion of the litigation, there was no active notice on record providing plaintiffs with constructive notice of the pending probate litigation involving title to the property. Kokoricha v. Estate of Donald I. Keiner, 2010-NMCA-053, 148 N.M. 322, 236 P.3d 41.

**Rights relate to date of filing notice.** — If judgment is in favor of the one filing the lis pendens notice, the rights of that party relate back to the date of the notice. Title Guar. & Ins. Co. v. Campbell, 106 N.M. 272, 742 P.2d 8 (Ct. App. 1987).

**Duration of lis pendens.** — A lis pendens continues until expiration of the time to appeal or until final disposition of the case by the appellate court. Salas v. Bolagh, 106 N.M. 613, 747 P.2d 259 (Ct. App. 1987).

**Where purchaser of real estate withheld his deed from registration and recordation until after suit** was filed to cancel the conveyance to his vendor for fraud and notice of lis pendens is filed, the purchaser was a subsequent purchaser and charged with notice of the fact that his grantor's title was attacked in the suit. Wilson v. Robinson, 21 N.M. 422, 155 P. 732 (1916).

**Vendor's implied lien was properly held paramount to the mortgage lien of an intervener** where vendor had filed (now recorded) notice of lis pendens in county clerk's office in July, 1942, without actual knowledge of the intervener's claim to an equitable lien dating back to Jan., 1942, intervener's mortgage not having been executed until Oct., 1942, and filed for record in Dec., 1942. Logan v. Emro Chem. Corp., 48 N.M. 368, 151 P.2d 329 (1944).

**Notice held ineffective.** — Contractor filed suit to enforce lien on apparatus, equipment and plants of mining company and to recover balance due under contract. On same day that suit was filed, he endeavored to file (now record) a notice of the pendency of such suit under this section. About ten months later, on the mining company being adjudicated bankrupt, the contractor's claim was allowed against the estate of the bankrupt mining company, but his lien was denied on the ground that since his suit in the state court did not affect title to real estate, the lis pendens was not properly filed (now recorded) and did not constitute constructive notice to trustee in bankruptcy of the alleged lien. Sweeney v. Medler, 78 F.2d 148 (10th Cir. 1935).

**Filing in anticipation of money judgment is prohibited.** — The filing of a notice of lis pendens in anticipation of a money judgment is prohibited. Hill v. Department of Air Force, 884 F.2d 1321 (10th Cir. 1989).

**Filing of lis pendens cannot support slander of title action.** — The filing of a lis pendens is absolutely privileged and cannot support an action for slander of title. Superior Constr., Inc. v. Linnerooth, 103 N.M. 716, 712 P.2d 1378 (1986).

**Law reviews.** — For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 51 Am. Jur. 2d Lis Pendens §§ 11, 23.

Statute requiring filing of formal notice of lis pendens in certain classes of cases as affecting common-law doctrine of lis pendens in other cases, 10 A.L.R. 306.

Lis pendens; protection during time allowed for appeal, writ of error, or motion for new trial, 10 A.L.R. 415.

Sufficiency of notice or knowledge of pendency of action against covenantee or his privy in order to bind the covenantor by judgment, 34 A.L.R. 1429.

Title of stranger to litigation who purchased at judicial sale before appeal or pending appeal without supersedeas as affected by reversal of decree directing sale, 155 A.L.R. 1252.

Will contest, necessity of filing notice of lis pendens in, 159 A.L.R. 386.

Original notice of lis pendens as defective upon renewal of litigation within permissive period after dismissal, reversal or nonsuit, 164 A.L.R. 515.

Duration of operation of lis pendens as ground upon diligent prosecution of suit, 8 A.L.R.2d 986.

New or successive notice of lis pendens in same or new action after loss or cancellation of original notice, 52 A.L.R.2d 1308.

Lis pendens in suit to compel stock transfer, 48 A.L.R.4th 731.

Lis pendens as applicable to suit for separation or dissolution of marriage, 65 A.L.R.4th 522.

54 C.J.S. Lis Pendens §§ 18, 35.

## 38-1-15. [Pendency of suit; time within which process must be served; cancellation of lis pendens notice.]

For the purpose of the preceding section [38-1-14 NMSA 1978], it is considered that an action is pending from the time of filing such notice; provided, that such notice shall be of no value, unless it is followed by the service of such citations or process of citation, or by notice by publication to the defendant, as provided by law, within sixty days after such filing. And the court in which said action was commenced, may in its discretion, at any time after the action shall be settled, discontinue or revoke on application of any person injured, and for good cause shown, and under such notice as may be directed or approved by the court, order the notice authorized by the preceding section to be canceled by the county clerk of any county in whose office the same may have been filed, and such cancellation shall be made by an indorsement to that effect upon the filed notice which shall refer to the order.

**History:** Laws 1873-1874, ch. 19, § 2; C.L. 1884, § 1854; C.L. 1897, § 2903; Code 1915, § 4262; C.S. 1929, § 105-1102; 1941 Comp., § 19-310; 1953 Comp., § 21-3-15.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Compiler's notes.** — Although this section speaks of filing a lis pendens notice, the 1959 amendment to 38-1-14 NMSA 1978 substituted references to recording for references to filing.

**Continuation of lis pendens after cancellation.** — Regardless of the validity of a cancellation of a lis pendens established by a suit, the lis pendens continues until expiration of the time for appeal of the cancellation or until final disposition of the case by the appellate court. Salas v. Bolagh, 106 N.M. 613, 747 P.2d 259 (Ct. App. 1987).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** New or successive notice of lis pendens in same or new action after loss or cancellation of original notice, 52 A.L.R.2d 1308.

Lis pendens: grounds for cancellation prior to termination of underlying action, absent claim of delay, 49 A.L.R.4th 242.

## 38-1-16. Personal service of process outside state.

A. Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this subsection thereby submits himself or his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from:

(1) the transaction of any business within this state;

(2) the operation of a motor vehicle upon the highways of this state;

(3) the commission of a tortious act within this state;

(4) the contracting to insure any person, property or risk located within this state at the time of contracting;

(5) with respect to actions for divorce, separate maintenance or annulment, the circumstance of living in the marital relationship within the state, notwithstanding subsequent departure from the state, as to all obligations arising from alimony, child support or real or personal property settlements under Chapter 40, Article 4 NMSA 1978 if one party to the marital relationship continues to reside in the state.

B. Service of process may be made upon any person subject to the jurisdiction of the courts of this state under this section by personally serving the summons upon the defendant outside this state and such service has the same force and effect as though service had been personally made within this state.

C. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction is based upon this section.

D. Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereafter provided by law.

**History:** 1953 Comp., § 21-3-16, enacted by Laws 1959, ch. 153, § 1; 1971, ch. 103, § 1.

## ANNOTATIONS

**Cross references.** — For substituted service of process upon corporations generally, *see* 38-1-5 NMSA 1978.

For service of process upon foreign corporations generally, *see* 38-1-6 NMSA 1978.

For service of process upon unauthorized insurers, *see* 38-1-8 NMSA 1978.

For service of process upon registered agent of domestic corporation, *see* 53-11-14 NMSA 1978.

For service of process upon registered agent of foreign corporation, *see* 53-17-11 NMSA 1978.

For appointment of superintendent of insurance as attorney for service of process upon insurance companies, *see* 59A-5-31 NMSA 1978.

For appointment of secretary of state as agent for service of process upon nonresident owners and operators of motor vehicles, *see* 66-5-103 NMSA 1978.

For service of process in civil actions in district courts generally, *see* Rule 1-004 NMRA.

## I. GENERAL CONSIDERATION.

**Engaging in non-jurisdictional discovery was not a waiver of the jurisdictional defense.** — Where defendant was a New York corporation that owned and operated a hotel in Texas pursuant to a franchise agreement with a franchisor which owned the hotel's brand; plaintiff, who was a guest at defendant's hotel in Texas, was injured while using equipment in the hotel's exercise facility; plaintiff sued defendant in New Mexico for personal injuries; and defendant filed an answer together with a motion to dismiss for lack of personal jurisdiction and sent plaintiff interrogatories, a request for production of documents, and requested authorizations to obtain records relating to plaintiff, defendant did not waive its jurisdictional defense by engaging in non-jurisdictional discovery. Trei v. AMTX Hotel Corp., 2014-NMCA-104.

**Unauthorized credit reports.** — Personal jurisdiction can be found to exist in a forum where a non-resident defendant obtains credit reports without the permission of the resident plaintiff. Smith v. Cutler, 504 F. Supp. 2d 1162 (D.N.M. 2007).

**Constitutionality of section generally.** — This section does not violate the due process clause of the fourteenth amendment to the constitution of the United States. Melfi v. Goodman, 69 N.M. 488, 368 P.2d 582 (1962).

**Separation of powers.** — This section is not an unconstitutional invasion of the judicial branch in violation of the separation of powers provision of the constitution. Gray v. Armijo, 70 N.M. 245, 372 P.2d 821 (1962). See also Clews v. Stiles, 303 F.2d 290 (10th Cir. 1960).

**Retroactive application.** — In adopting this section, the New Mexico legislature adopted the construction of the Illinois courts that the section has retroactive effect. Clews v. Stiles, 303 F.2d 290 (10th Cir. 1960).

Section is procedural in nature, and retrospective application does not affect substantial rights in violation of the constitution. Gray v. Armijo, 70 N.M. 245, 372 P.2d 821 (1962).

**Construction of section.** — This section is a statute in derogation of the common law and must be strictly construed. Worland v. Worland, 89 N.M. 291, 551 P.2d 981 (1976).

Because this section was adopted from the Illinois statutes, it is presumed that the New Mexico legislature also adopted the prior construction of the statute by the highest courts of Illinois, and while this presumption is not conclusive, it is persuasive. Melfi v. Goodman, 69 N.M. 488, 368 P.2d 582 (1962).

New Mexico's long-arm statute was taken from Illinois, and the interpretations by the Illinois courts of the Illinois statute are persuasive. Telephonic, Inc. v. Rosenblum, 88 N.M. 532, 543 P.2d 825 (1975).

**Jurisdictional test.** — In order to satisfy the requirements of this section, and invest the courts of New Mexico with jurisdiction, the act complained of must meet a three-prong test: (1) defendant must do one of the acts enumerated in Subsection A; (2) plaintiff's cause of action must arise from the specified act; and (3) defendant must have minimum contacts sufficient to satisfy due process. Visarraga v. Gates Rubber Co., 104 N.M. 143, 717 P.2d 596 (Ct. App.), cert. quashed sub nom. Vissarraga v. Littlejohn's Equip. Co., Inc., 104 N.M. 137, 717 P.2d 590 (1986); Sanchez v. Church of Scientology, 115 N.M. 660, 857 P.2d 771 (1993).

Section establishes two requirements for the assertion of jurisdiction over a nonresident not within the state. First, the defendant must have done one of the acts enumerated in the section; and second, the plaintiff's cause of action must arise from defendant's doing the act. Winward v. Holly Creek Mills, Inc., 83 N.M. 469, 493 P.2d 954 (1972); Benally v. Hundred Arrows Press, Inc., 614 F. Supp. 969 (D.N.M. 1985), rev'd on other grounds sub nom. Benally v. Amon Carter Museum of W. Art, 858 F.2d 618 (10th Cir. 1988).

In personam jurisdiction in New Mexico over nonresident defendants has three elements: the court must first determine whether the defendant has committed one of the acts enumerated in this section as a basis for exercising extra-territorial jurisdiction. If the court so finds, it must then determine whether the cause of action arises from the acts enumerated. The court must then analyze whether the defendant has had "minimum contacts" with the state of New Mexico sufficient to satisfy the requirements of the due process clause of the United States constitution. Beh v. Ostergard, 657 F. Supp. 173 (D.N.M. 1987).

**Specific jurisdiction based on stream of commerce theory.** — A manufacturer of an allegedly defective component part that has placed the component part into a distribution channel with the expectation that it will be sold in the national market cannot be insulated from liability simply because the manufacturer does not specifically target or know that its products are being marketed in New Mexico. Sproul v. Rob & Charlie’s Inc., 2013-NMCA-072.

Where plaintiff was thrown off a bicycle because the front wheel, which had a quick-release mechanism that was manufactured by appellee, separated from the bicycle’s front fork assembly; appellee had its principal place of business in China and Taiwan and its manufacturing facilities were located in China; appellee sold its products internationally to bicycle manufacturers, had no distributors or clients in New Mexico, and did not know where the bicycles that incorporated its quick-release mechanism were sold; appellee had a full-time marketing and sales employee in California who sold appellee’s products and provided customer services and support to appellee’s clients in the United States; appellee did business with six bicycle manufacturers in the United States, including the third-party defendant who was a nation-wide distributor of bicycle parts located in Florida and who served the New Mexico market; plaintiff purchased the bicycle from defendant who was a retailer located in New Mexico, appellee had sufficient minimum contacts with New Mexico through appellee’s distribution system to

subject it to personal jurisdiction in New Mexico. Sproul v. Rob & Charlie's Inc., 2013-NMCA-072.

**Burden of proof of jurisdictional allegations.** — Generally, where jurisdiction is based on process served under this section, the plaintiff has the burden to prove the jurisdictional allegations at the hearing on defendant's motion to dismiss, but where defendant challenges all but one ground of alleged jurisdiction, the trial court did not err in failing to put the plaintiff to its jurisdictional proof in advance of trial. Plumbers Specialty Supply Co. v. Enter. Prod. Co., 96 N.M. 517, 632 P.2d 752 (Ct. App. 1981).

**Burden of proof.** — The least quantity of contacts possible in a given case upholds the maintenance of an action in the state forum. When such contacts are established, the burden shifts to the nonresident defendant to present facts that will convince the forum court that it would offend traditional notions of fair play and substantial justice. Moore v. Graves, 99 N.M. 129, 654 P.2d 582 (Ct. App. 1982).

A plaintiff must show that a defendant did an act included in the long-arm statute. Sublett v. Wallin, 2004-NMCA-089, 136 N.M. 102, 94 P.3d 845.

**In order to determine personal jurisdiction based on a website**, an approach that, at a minimum, requires a degree of interactivity on the site is adopted. Sublett v. Wallin, 2004-NMCA-089, 136 N.M. 102, 94 P.3d 845.

**Physical presence of defendant within state not required.** — Personal jurisdiction over a nonresident does not depend upon the physical presence of the defendant within the state. Moore v. Graves, 99 N.M. 129, 654 P.2d 582 (Ct. App. 1982).

**Case by case determinations.** — In order to subject a defendant to a judgment in personam, if he not be present within the territory of the forum, he must have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice," and what determines whether the defendant has sufficient contact to satisfy this test must be decided case by case. Hunter-Hayes Elevator Co. v. Petroleum Club Inn Co., 77 N.M. 92, 419 P.2d 465 (1966).

**Mere mailings not enough contact.** — Ordinarily, use of the mails, telephone, or other international communications simply does not qualify as purposeful activity invoking the benefits and protection of the forum state. Sanchez v. Church of Scientology, 115 N.M. 660, 857 P.2d 771 (1993).

**Nonresident guarantying note insufficient for in personam jurisdiction.** — Signing of a guaranty by a nonresident of a debt owed to a New Mexico creditor does not in and of itself constitute a sufficient contact upon which to base in personam jurisdiction over a nonresident. Rather, the circumstances surrounding the signing of such obligations must be closely examined in each case to determine whether the quality and nature of

defendant's contacts with New Mexico justify the assertion of personal jurisdiction over him in an action on the obligation. FDIC v. Hiatt, 117 N.M. 461, 872 P.2d 879 (1994).

**No personal jurisdiction over defendants who send bills to residents.** — New Mexico lacks personal jurisdiction over out-of-state defendants who send statements for payment of medical services rendered, which statements are received by plaintiffs in New Mexico. Tarango v. Pastrana, 94 N.M. 727, 616 P.2d 440 (Ct. App. 1980).

**No personal jurisdiction over doctors where plaintiff claims out-of-state treatment.** — New Mexico lacks personal jurisdiction over defendant doctors who have never conducted activities within New Mexico, where the basis of plaintiff's claim is her unilateral activity (medical treatment) in defendants' state of residence. Tarango v. Pastrana, 94 N.M. 727, 616 P.2d 440 (Ct. App. 1980).

**Mailing of collection letters sufficient for jurisdiction.** — District court properly exercised personal jurisdiction over California debt collection agency which sent one or more collection letters to a New Mexico resident when the cause of action was based upon that contact. Russey v. Rankin, 837 F. Supp. 1103 (D.N.M. 1993).

**Assertion of lien insufficient.** — Giving notice by mail and assertion of an attorney's charging lien by a nonresident attorney upon the proceeds of a settlement obtained by a New Mexico lawyer did not subject the nonresident to personal jurisdiction of a New Mexico court under the long-arm statute. Robinson-Vargo v. Funyak, 1997-NMCA-095, 123 N.M. 822, 945 P.2d 1040.

**Allegations of conspiracy not sufficient.** — Mere allegations of conspiracy, without some sort of prima facie factual showing of a conspiracy, cannot be the basis of personal jurisdiction of co-conspirators outside the territorial limits of the court. Sanchez v. Church of Scientology, 115 N.M. 660, 857 P.2d 771 (1993).

**No jurisdiction based on actions subsequent to claim.** — As a general rule, the existence of personal jurisdiction may not be established by events which have occurred after the acts which gave rise to the plaintiff's claims. Doe v. Roman Catholic Diocese of Boise, Inc., 1996-NMCA-057, 121 N.M. 738, 918 P.2d 17, cert. denied, 121 N.M. 693, 917 P.2d 962 (1996).

**Facts showed sufficient minimum contacts conferring in personam jurisdiction.** Barker v. Barker, 94 N.M. 162, 608 P.2d 138 (1980).

**Personal jurisdiction to award attorney's fees, costs and travel costs cannot be based on this section.** Worland v. Worland, 89 N.M. 291, 551 P.2d 981 (1976).

**Question whether claims arise from activities subjecting defendant to jurisdiction of state must be decided on case-by-case basis.** Winward v. Holly Creek Mills, Inc., 83 N.M. 469, 493 P.2d 954 (1972).

**Cause of action held to arise from acts subjecting defendant to jurisdiction of state.** — Where cause of action is based on sale of a majority stock ownership in a New Mexico corporation, in violation of an agreement made in New Mexico with a citizen of New Mexico, this would satisfy the requirements of this section. Pope v. Lydick Roofing Co., 81 N.M. 661, 472 P.2d 375 (1970).

**Manner of service of process.** — Although substituted service is not explicitly provided for in this section, the legislature's purpose in adopting the statute was to permit service of process on out-of-state persons in the same manner as process may be served upon residents of the state. The procedure for service of process in New Mexico, outlined in the rules of civil procedure, applies to actions which are brought under this section. Vann Tool Co. v. Grace, 90 N.M. 544, 566 P.2d 93 (1977).

Substituted service was insufficient to grant jurisdiction where defendants testified that they no longer lived at the residence where service was posted, and where there was no return of service indicating that the questioned address was defendants' "usual place of abode" to rebut that testimony. Vann Tool Co. v. Grace, 90 N.M. 544, 566 P.2d 93 (1977).

Service of process on New Mexico driver by serving a copy of the summons, complaint and court order upon the driver by an Arizona sheriff was valid under this section. Crawford v. Refiners Coop. Ass'n, 71 N.M. 1, 375 P.2d 212 (1962).

**Preemption by federal law.** — District court jurisdiction in ex-wife's case seeking declaration of her interest in husband's military retirement pay could not be predicated on this section since it was preempted by federal law. Sparks v. Caldwell, 104 N.M. 475, 723 P.2d 244 (1986).

## II. TRANSACTIONS OF BUSINESS.

### A. IN GENERAL.

**Passive website.** — A passive website, which merely provides information and offers no opportunity for interaction, will ordinarily not be enough to support personal jurisdiction. Sublett v. Wallin, 2004-NMCA-089, 136 N.M. 102, 94 P.3d 845.

**Long-arm jurisdiction more than technical "transaction" or "commission".** — The question of personal jurisdiction over out-of-state residents involves more than a technical "transaction of any business" or the technical "commission of a tortious act" within New Mexico: the meaning of those terms, in this section, is to be equated with the minimum contacts sufficient to satisfy due process. Tarango v. Pastrana, 94 N.M. 727, 616 P.2d 440 (Ct. App. 1980).

**"Transaction of business" requires certain minimal contracts by the defendant or his agent within the forum.** Hunter-Hayes Elevator Co. v. Petroleum Club Inn Co., 77 N.M. 92, 419 P.2d 465 (1966).

To subject a defendant to in personam jurisdiction if he is not within the state, there must be certain "minimum contacts" with the state, so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Winward v. Holly Creek Mills, Inc., 83 N.M. 469, 493 P.2d 954 (1972).

Test to meet federal due process in order to subject a defendant to a judgment in personam when he is not present in the forum is that defendant must have certain minimum contacts with forum such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." McIntosh v. Navaro Seed Co., 81 N.M. 302, 466 P.2d 868 (1970).

This section relates to the "minimum contacts" with New Mexico which are required to constitute the transaction of business within this state, and it is the transaction of such business within the state which makes the exercise of in personam jurisdiction under this section consistent with "traditional notions of fair play and substantial justice" and secures unto the defendant his constitutional right to due process. Telephonic, Inc. v. Rosenblum, 88 N.M. 532, 543 P.2d 825 (1975).

Insofar as the acquisition of long-arm jurisdiction under this section is concerned, the "transaction of business" is equated with the due process standard of "minimum contacts" sufficient to satisfy the "traditional conception of fair play and substantial justice" announced in International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Telephonic, Inc. v. Rosenblum, 88 N.M. 532, 543 P.2d 825 (1975).

**Doing or transacting business is doing a series of similar acts** for the purpose of thereby realizing pecuniary benefit, or otherwise accomplishing an object, or doing a single act for such purpose with the intention of thereby initiating a series of such acts. Telephonic, Inc. v. Rosenblum, 88 N.M. 532, 543 P.2d 825 (1975); Plumbers Specialty Supply Co. v. Enter. Prod. Co., 96 N.M. 517, 632 P.2d 752 (Ct. App. 1981).

**Single act as minimum contact.** — This section refers to "any transaction of business" and a single transaction negotiated, or to be performed, within the forum can be sufficient contact. McIntosh v. Navaro Seed Co., 81 N.M. 302, 466 P.2d 868 (1970).

**Whether or not party did transact business within the contemplation of this section must be determined by the facts** in each case. Telephonic, Inc. v. Rosenblum, 88 N.M. 532, 543 P.2d 825 (1975).

**Factors determining "transaction of any business".** — Various factors are relevant in determining whether a nonresident defendant transacted any business within the state, including, the voluntariness of the defendant's contact with the state, the nature of the transaction, the applicability of New Mexico law, the contemplation of the parties, and the location of likely witnesses. Kathrein v. Parkview Meadows, Inc., 102 N.M. 75, 691 P.2d 462 (1984).

Neither defendant's placement of an advertisement in a nationally distributed trade magazine nor its delivery of allegedly counterfeit jewelry to plaintiff's New Mexico office was sufficient to establish personal jurisdiction, as these acts did not indicate that defendant had purposefully availed itself of the benefits and protections of New Mexico law. Sunwest Silver, Inc. v. Int'l Connection, Inc., 4 F. Supp. 2d 1284 (D.N.M. 1998).

**Franchising agreement insufficient.** — While entering into a franchise agreement with a New Mexico resident requiring payment of royalties outside the state may be the "transaction of any business" contemplated by this section, that fact alone is insufficient to establish personal jurisdiction; claims must arise from that transaction of business. Campos Enters., Inc. v. Edwin K. Williams & Co., 1998-NMCA-131, 125 N.M. 691, 964 P.2d 855, cert. denied, 126 N.M. 107, 967 P.2d 447 (1998).

**Presence of subsidiary not enough for jurisdiction over foreign corporation.** — A foreign corporation is not subject to the jurisdiction of a forum state merely because its subsidiary is present or doing business there, where subsidiary was separately controlled and could not be considered the alter ego or agent of the foreign corporation. Allen v. Toshiba Corp., 599 F. Supp. 381 (D.N.M. 1984).

The defendant properly and adequately challenged the prima facie jurisdictional allegations by submitting an affidavit that established the separateness of the corporate entities between the church and the New Mexico subsidiary, the lack of an employee or agency relationship between the church and the subsidiary, and the denial of a conspiracy. Therefore, the plaintiffs had the burden of proving the jurisdictional allegations, and the record does not reveal proof of the jurisdictional allegations contained in the complaint. Sanchez v. Church of Scientology, 115 N.M. 660, 857 P.2d 771 (1993).

The mere existence of a parent-subsidiary corporate relationship is generally not sufficient to warrant jurisdiction over the foreign parent. However, acts of the subsidiaries may be used to predicate jurisdiction in two situations: first, if the parent's control of the subsidiary goes beyond that normally exercised by a majority shareholder, and is so complete as to render the subsidiary an instrumentality of the parent, the subsidiary may be the alter ego of the parent and thus a court may pierce the corporate veil; or second, if the subsidiary does an act at the direction of the parent, or in the course of the parent's business, a court may characterize the subsidiary as an agent of the parent and thereby hold the parent answerable as a principal. Jemez Agency, Inc. v. CIGNA Corp., 866 F. Supp. 1340 (D.N.M. 1994).

**Successor liability.** — The plaintiffs have not shown sufficient minimum contacts to satisfy the defendant parent corporation's right to due process. Not only was the successor subsidiary dissolved prior to the cause of action arising, but also the predecessor company in effect was sold, in conjunction with the dissolution, to another company. Thus, since the defendant corporation had no reason to anticipate defending a lawsuit more than three years later in New Mexico and had no significant opportunity either to improve the product or benefit from past sales, the policies behind successor

liability are outweighed by the corporate law policies against imposition of liability. Smith v. Halliburton Co., 118 N.M. 179, 879 P.2d 1198 (Ct. App. 1994).

**Out-of-state advertiser establishes "minimum contact".** — A nonresident defendant who solicits business for his benefit by advertising in a trade magazine in the forum state as a result of which he sells his merchandise to be used in the forum state establishes a "minimum contact." Moore v. Graves, 99 N.M. 129, 654 P.2d 582 (Ct. App. 1982).

**Place of execution of contract factor in making determination.** — The place of execution of the contract, although a circumstance to be considered in determining whether or not a person is transacting business in this state within the contemplation of this section, is not a controlling, an essential or even a highly significant fact in making this determination. Telephonic, Inc. v. Rosenblum, 88 N.M. 532, 543 P.2d 825 (1975).

**Solicitation of orders factor in making determination.** — The statutory language of 53-17-1 NMSA 1978, dealing with the solicitation of orders as not constituting transaction of business within New Mexico, is for "purposes of the Business Corporation Act," and not for testing jurisdiction under this section. Winward v. Holly Creek Mills, Inc., 83 N.M. 469, 493 P.2d 954 (1972).

**Cause of action held to arise from acts subjecting defendant to jurisdiction of state.** — Any dispute arising out of payment to the agent for services in representing the defendant's business transactions in New Mexico would be within the wake of defendant's commercial activity. Plaintiff's claim, therefore, was one arising from the transaction of business within New Mexico. Winward v. Holly Creek Mills, Inc., 83 N.M. 469, 493 P.2d 954 (1972).

### B. PARENT CORPORATION AND SUBSIDIARY RELATIONSHIP.

**Alter ego issues.** — New Mexico's test for alter ego is a matter of substantive corporate law. Where the parent corporation did not simply own its subsidiary; but it completely controlled it to the point where the subsidiary existed as little more than an instrument to serve the parent corporation’s real estate interests, there are sufficient minimum contacts. The true test for any assertion of personal jurisdiction is minimum contacts. New Mexico case law does not set a higher standard when the out-of-state defendant is a corporation. Alto Eldorado P’ship v. Amrep Corp, 2005-NMCA-131, 138 N.M. 607, 124 P.3d 585.

### C. ACTS CONSTITUTING TRANSACTION OF BUSINESS.

**Acts held to constitute transaction of business.** — Where the defendant, which was a foreign corporation that had never qualified to do business in New Mexico, assumed the operation of an oil and gas well in New Mexico, employed personnel in New Mexico for the purpose of operating an oil and gas lease, held itself out as the operator of the oil and gas well, failed to pay net proceeds to other parties to the oil and gas lease, ignored

the demands of the other parties for an accounting, and failed to market production and protect against drainage with respect to the oil and gas well, the defendant had the minimum contacts with New Mexico to confer jurisdiction over the defendant. Capco Acquisub, Inc. v. Greka Energy Corp., 2008-NMCA-153, 145 N.M. 328, 198 P.3d 354, cert. denied, 2008-NMCERT-010, 145 N.M. 524, 201 P.3d 855.

**Acts held to constitute transaction of business.** — Where defendant agreed in New Mexico to sell a judgment against a New Mexico corporation, received the initial payment in state and was assigned a mortgage to secure the deferred payments, he transacted business within the meaning of this section. Melfi v. Goodman, 69 N.M. 488, 368 P.2d 582 (1962).

Where nonresident defendants transacted business in New Mexico by executing promissory notes secured by a mortgage deed executed in Oklahoma, which created a lien upon land located in New Mexico, the proceeds from which notes were to be used for the construction of a building in New Mexico, and defendants were physically present in New Mexico from time to time in negotiating these notes, the defendants were subject to the jurisdiction of New Mexico courts, although served with process outside the state of New Mexico, in accordance with this section as the facts were sufficient contacts with New Mexico to constitute the transaction of business therein. Hunter-Hayes Elevator Co. v. Petroleum Club Inn Co., 77 N.M. 92, 419 P.2d 465 (1966).

The regular distribution plan of nonresident magazine publisher with the commercial benefit to the nonresident defendant which he derived from the sale of magazines was sufficient contact to satisfy the requirements of due process and subject the defendants to the jurisdiction of New Mexico courts. Blount v. TD Pub. Corp., 77 N.M. 384, 423 P.2d 421 (1966).

Where Texas corporation's agent contacted plaintiff by telephone about buying grain and then came into New Mexico and took grain samples and returned them to Texas for testing, sent a truck into New Mexico for a load of the grain, and the agent who had negotiated the deal for the Texas corporation operated one of the trucks in returning the grain from New Mexico to the corporation's place of business in Texas, Texas corporation was subject to personal jurisdiction of New Mexico courts. McIntosh v. Navaro Seed Co., 81 N.M. 302, 466 P.2d 868 (1970).

The actions of defendant in having plaintiff solicit orders, make delivery to purchasers, advertise its products through plaintiff and pay plaintiff wages and commissions within the state of New Mexico constituted the transaction of business within the meaning of this section. Winward v. Holly Creek Mills, Inc., 83 N.M. 469, 493 P.2d 954 (1972).

Where evidence shows that California corporate manufacturer solicited a New Mexico corporate dealer's business and carried on an ongoing business relationship with that dealer by supplying goods bearing dealer's private label on a regular basis, the "doing business" ground for jurisdiction of New Mexico courts over the manufacturer is met.

Plumbers Specialty Supply Co. v. Enter. Prod. Co., 96 N.M. 517, 632 P.2d 752 (Ct. App. 1981).

A nonresident alcoholism treatment center's general solicitation of referrals and advertising in phone directory in New Mexico and its invitation to New Mexican plaintiff to attend center's "Family Week" where plaintiff's husband was attending treatment program as a result of an earlier solicitation in New Mexico were sufficient to constitute "transaction of any business" for New Mexican courts to exercise jurisdiction over defendant in personal injury action against defendant resulting from plaintiff's visit to defendant's facilities. Kathrein v. Parkview Meadows, Inc., 102 N.M. 75, 691 P.2d 462 (1984).

Texas museum's activities in New Mexico - soliciting the devise of a photography collection, negotiating the terms of the collection's maintenance and exhibition, traveling to New Mexico to take possession of the collection, and invoking the benefits of New Mexico's laws of testamentary disposition manifested a purposeful intent to conduct business in New Mexico. Benally v. Amon Carter Museum of W. Art, 858 F.2d 618 (10th Cir. 1988).

Insureds' purchase of an insurance policy in New Mexico constituted a transaction of business in New Mexico, for purposes of a declaratory judgment action to determine uninsured motorist coverage. State Farm Mut. Ins. Co. v. Conyers, 109 N.M. 243, 784 P.2d 986 (1989).

Hospital transacted business in New Mexico when it placed advertisements in several New Mexico telephone directories, produced television commercials that could be, and were, viewed by New Mexico customers, and previously performed health care services for other New Mexico customers. Cronin v. Sierra Med. Ctr., 2000-NMCA-082, 129 N.M. 521, 10 P.3d 845, cert. denied, 129 N.M. 519, 10 P.3d 843 (2000), cert. denied, 532 U.S. 921, 121 S. Ct. 1357, 149 L. Ed. 2d 287 (2001).

### D. ACTS NOT CONSTITUTING TRANSACTION OF BUSINESS.

**Minimum contacts.** — An ad in a New Mexico newspaper, which solicits applicants for nursing jobs in a hospital in Lubbock, Texas, stating that the defendant offers "comprehensive health care services to our patients in West Texas and Eastern New Mexico, does not constitute the type of "purposeful availment" of the benefits and protections of New Mexico's law that would satisfy the minimum contacts required by due process. Pelton v. Methodist Hosp., 989 F. Supp. 1392 (D.N.M. 1997).

**Mortgage and note.** — Where defendant, a Texas corporation, acquired a promissory note that was secured by a lien on New Mexico property and mortgages on property in Arizona, California and New York, defendant acquired the note in Missouri and did not participate in the negotiation for or execution of the note in New Mexico, the New Mexico long-arm statute did not confer personal jurisdiction over defendant in the plaintiff's action to contest whether defendant could foreclose on the New York

mortgage. The court found that defendant did not purposefully decide to participate in the economy of New Mexico and to avail itself of the benefits of New Mexico law in acquiring and foreclosing on the New York mortgage. Defendant did not establish minimum contacts with New Mexico such that it could reasonably anticipate being hauled into New Mexico court, and the court could not exercise personal jurisdiction over defendant on the basis of the New York mortgage. Rogers v. 5-Star Mgmt., Inc, 946 F. Supp. 907 (D.N.M. 1996).

**Lien.** — Where defendant has not attempted to foreclose a New Mexico lien, nor has it attempted to participate in the management of the New Mexico real property, or ever met with plaintiffs in New Mexico regarding the New Mexico lien, there is no close relationship between the claimed transaction of business in New Mexico and the cause of action. Rogers v. 5-Star Mgmt., Inc, 946 F. Supp. 907 (D.N.M. 1996).

**No continuous and systematic contacts.** — A Texas hospital did not have the requisite minimum contacts with New Mexico to satisfy due process where the Texas hospital generated seven percent of its income from treatment of New Mexico patients; the Texas hospital and a New Mexico hospital entered into an agreement related to the transfer of patients between the hospitals; the Texas hospital maintained a website that was accessible in New Mexico; the Texas hospital was registered as a Medicaid provider in New Mexico; the Texas hospital was an accredited regional trauma center for a part of New Mexico; and the Texas hospital was located in the border region with a part of New Mexico. Zavala v. El Paso Cnty. Hosp. Dist., 2007-NMCA-149, 143 N.M. 36, 172 P.3d 173.

**Contacts insufficient to support general personal jurisdiction.** — In a medical malpractice action, where Texas surgeon performed surgeries on plaintiffs, New Mexico residents, in Texas and in a Texas hospital, evidence that the surgeon maintained a passive website that did not specifically target New Mexicans, possessed an inactive medical license, owned real property in New Mexico, and authored a book that was available in New Mexico, was insufficient to demonstrate that the nonresident surgeon had continuous and systematic contact with New Mexico to support general personal jurisdiction. Gallegos v. Frezza, 2015-NMCA-101.

**Evidence insufficient to determine whether personal jurisdiction exists.** — Where defendant, a Texas surgeon, treated New Mexico residents referred to him by Presbyterian Healthcare (Presbyterian), a New Mexico corporation, for bariatric procedures under an agreement between Presbyterian and a Texas organization established by defendant's employer to handle managed care contracting, the district court erred in finding that the fact that defendant was not a party to the agreement was dispositive of whether defendant had a relationship with Presbyterian sufficient for the state to assert personal jurisdiction over him, when it was unclear to what extent defendant benefited from the agreement, whether the agreement required defendant to accept Presbyterian patients, to what extent defendant himself sought to become credentialed with Presbyterian, and whether and how defendant became the sole provider of bariatric surgery services to Presbyterian members. Remand to the district

court was necessary to determine the parameters of the relationship between defendant and Presbyterian and whether such agreement or arrangement was a contact sufficient for general jurisdiction and whether there was a relationship sufficient for specific jurisdiction. Gallegos v. Frezza, 2015-NMCA-101.

**National advertising.** — Where defendant was a New York corporation that owned and operated a hotel in Texas pursuant to a franchise agreement with a franchisor which owned the hotel brand; plaintiff, who was a guest at defendant's hotel in Texas, was injured while using equipment in the hotel's exercise facility; plaintiff sued defendant in New Mexico for personal injuries; defendant had no facilities, hotels, offices, employees or agent in New Mexico and did not conduct any business in New Mexico; plaintiff claimed that defendant had sufficient contacts with New Mexico to establish jurisdiction because defendant's franchisor engaged in advertising and marketing activities of the franchisor's brand in New Mexico through national television and radio, the out-of state franchisor's national advertising did not provide a basis to establish personal jurisdiction in New Mexico over defendant. Trei v. AMTX Hotel Corp., 2014-NMCA-104.

**No contacts in New Mexico.** — Where the state sued defendant to force defendant to contribute money to the tobacco escrow fund; defendant manufactured tobacco products, was incorporated in and had its principal place of business in Canada, operated exclusively on the Six Nation Indian Reserve in Canada, was not registered to do business in New Mexico, did not have an agent for service of process in New Mexico, and did not directly engage in business activity in New Mexico; in 2005, a retail tobacco store in New Mexico sold 19,540 cigarettes that were manufactured by defendant; the retail store purchased the cigarettes from a wholesale distributor located in Nevada; defendant did not have any contact or contractual arrangement with either the retail store or the wholesale distributor regarding sales of the cigarettes in New Mexico; and the state mailed a copy of the summons and complaint to defendant by certified mail, the district court lacked personal jurisdiction. State ex rel. Att'y Gen. v. Grand River Enters. Six Nations, Ltd., 2014-NMCA-073.

**Acts held not to constitute transaction of business.** — Where the decedent died in a car accident in Utah; plaintiffs contacted an Ohio shipping company to prepare the decedent's body for shipping to New Mexico; the shipping company contacted a Utah funeral home to prepare the decedent's body in Utah for shipping by the shipping company; the Utah funeral home prepared the decedent's body for shipment and billed the shipping company for its services; the Utah funeral home was a Utah limited liability company, licensed only in Utah and did not advertise its services in New Mexico or solicit business in New Mexico; an employee of the Utah funeral home had a telephone conversation with one of decedent's relatives who initiated the telephone call in Utah; after the decedent's body was delivered to New Mexico, an employee of the New Mexico funeral home delivered a bag to plaintiffs containing the decedent's personal effect; the bag contained the decedent's brain; and plaintiff's sued the Utah funeral home for tortious conduct in handling the decedent's body, the Utah funeral home did not have sufficient contacts with New Mexico to satisfy the requirement of due process.

M.R. v. Serenicare Funeral Home, L.L.C., 2013-NMCA-022, 296 P.3d 492, cert. denied, 2013-NMCERT-001.

A resident of California, who allegedly executed an "authorization to obtain loan" contract with plaintiff, New Mexico mortgage investment broker, and who had not even been in New Mexico for the past 10 years, did not transact business within New Mexico and thereby submit himself to the jurisdiction of the New Mexico courts under the provisions of this section. Telephonic, Inc. v. Rosenblum, 88 N.M. 532, 543 P.2d 825 (1975).

It would be neither fair nor just to subject defendant to a judgment in personam on the basis of three payments owed on a business account which were mailed into this state, as these contacts are not the requisite minimum contacts to satisfy due process requirements. Diamond A Cattle Co. v. Broadbent, 84 N.M. 469, 505 P.2d 64 (1973).

Where Ohio auto dealer, doing no business in New Mexico, sold car to Ohio resident who later moved to New Mexico, and dealer assigned the sales contract to a national financing company with a New Mexico division, insufficient minimum contacts existed for New Mexico to exercise personal jurisdiction over Ohio dealer. Swindle v. GMAC, 101 N.M. 126, 679 P.2d 268 (Ct. App.), cert. denied, 101 N.M. 77, 678 P.2d 705 (1984).

Defendant's contacts in New Mexico were insufficient to constitute a transaction of business within the state where the only contact made by the defendant, a construction company incorporated in Nevada and awarded a contract to build a large house in Nevada, consisted of its mailing of a purchase order to plaintiff in New Mexico pursuant to a prearranged agreement between the plaintiff and other parties. Customwood Mfg., Inc. v. Downey Constr. Co., 102 N.M. 56, 691 P.2d 57 (1984).

Nonresident parent's support of resident minor children is not transacting business within the meaning of the long-arm statute. Fox v. Fox, 103 N.M. 155, 703 P.2d 932 (Ct. App. 1985).

Where the research and development by nonresident defendants of radioactive seeds for the treatment of cancer was not in any way connected to the state, the fact that some companies within the state received some financial assistance from the defendants and that information disseminated by the defendants fortuitously found its way into the state could not form the basis for the assertion of personal jurisdiction over the defendants. Jones v. 3M Co., 107 F.R.D. 202 (D.N.M. 1984).

The record failed to establish that a Colorado petroleum equipment company had sufficient minimum contacts with New Mexico to invest the state with in personam jurisdiction over it, either on the basis of its transaction of business or the commission of a tortious act, where the company was a secondary distributor, had not pursued a policy of purposeful business activity in the state and its contacts were minimal, did not purposefully cause an allegedly defective hose to be shipped into New Mexico, did not engage in a nationwide sales or distribution scheme, maintained no property or agents

in the state, did not engage in business in New Mexico, and solicited no business nor made any direct sales in New Mexico. Visarraga v. Gates Rubber Co., 104 N.M. 143, 717 P.2d 596 (Ct. App.), cert. quashed, sub nom. Visarraga v. Littlejohn's Equip. Co., Inc., 104 N.M. 137, 717 P.2d 590 (1986).

A Colorado doctor did not purposefully initiate activity in this state, thus invoking the benefits and protections of New Mexico laws, where he did return plaintiff's telephone call concerning plaintiff's daughter to a telephone number in New Mexico, but only after a doctor-patient relationship had been established in Colorado, and after plaintiff had left a message and request with the doctor's answering service. This single telephone call lacked the purposefulness of defendant's contact which is demanded by due process in order to invest a court in New Mexico with personal jurisdiction over the Colorado doctor's clinic. Valley Wide Health Servs., Inc. v. Graham, 106 N.M. 71, 738 P.2d 1316 (1987).

It would offend fair play and substantial justice to subject an out-of-state nonresident defendant to suit in New Mexico where the defendant's only contact with New Mexico was mailing two documents and making a telephone call into the state, and where these contacts arose in the context of an essentially out-of-state transaction. Salas v. Homestake Enters., Inc., 106 N.M. 344, 742 P.2d 1049 (1987).

Connecticut defendant's use of the mails and telephone in contacting New Mexico plaintiff, in response to plaintiffs' solicitations of business in Connecticut, and in subsequently purchasing a computer system from plaintiffs, were not sufficient "minimum contacts" to constitute the required jurisdictional nexus. Wesley v. H & D Wireless Ltd. P'ship, 678 F. Supp. 1540 (D.N.M. 1987).

California and British banks were not subject to personal jurisdiction in an action involving letters of credit, since the banks were not authorized to transact business in the state and did not commit acts in the state in any way related to the letters of credit. Martin v. First Interstate Bank, 914 F. Supp. 473 (D.N.M. 1995).

Acts of defendants in retaining a New Mexico attorney to contest plaintiff's appointment as personal representative in New Mexico probate action, following defendants' receipt of estate assets, did not constitute a sufficient basis to find that defendants transacted business in New Mexico. Harrell v. Hayes, 1998-NMCA-122, 125 N.M. 814, 965 P.2d 933.

An out-of-state company that arranged, essentially by telephone, fax and mail correspondence, to retain software program services from a New Mexico corporation did not transact business in New Mexico within the meaning of this section. Caba Ltd. Liab. Co. v. Mustang Software, Inc., 1999-NMCA-089, 127 N.M. 556, 984 P.2d 803.

Plaintiff failed to carry its burden of establishing that a nonresident purposely availed itself of the benefits and protections of New Mexico law, because, while the nonresident must have recognized selling its products through another company's web page and

catalog could result in nationwide, if not worldwide, sales, up to the date of the action it had resulted in no contact with New Mexico other than plaintiff's one purchase over an internet web site. Origins Natural Res., Inc. v. Kotler, 133 F. Supp. 2d 1232 (D.N.M. 2001).

Personal jurisdiction does not exist over Connecticut diocese that sent priest to New Mexico for pedophilia treatment as the Connecticut diocese neither transacted business there nor committed a tortious act in New Mexico. Tercero v. Roman Catholic Diocese, 2002-NMSC-018, 132 N.M. 312, 48 P.3d 50.

## III. TORTIOUS ACTS.

**Franchisor must be connected to franchisee's tortious act.** — For this section to be satisfied, plaintiff must establish a relationship, agency or otherwise, between a franchisor and franchisee that connects the franchisor to the alleged tortious act of franchisee; thus, where franchisee was independent contractor, not agent, there was no personal jurisdiction over the franchisor based on the actions of the franchisee. Campos Enters., Inc. v. Edwin K. Williams & Co., 1998-NMCA-131, 125 N.M. 691, 964 P.2d 855, cert. denied, 126 N.M. 107, 967 P.2d 447 (1998).

**Mere mailings not enough contact.** — The defendant non-resident law firm was not subject to personal jurisdiction in New Mexico since the law firm's alleged tortious acts were committed through the sending of fraudulent letters and the act of deceitful communications via telephone with the plaintiffs, who were New Mexico residents; the letters and telephone calls were merely ancillary to the primary function of providing legal services to the plaintiffs in the pursuit of rights and claims in California on behalf of the plaintiffs. DeVenzeio v. Rucker, Clarkson & McCashin, 1996-NMCA-064, 121 N.M. 807, 918 P.2d 723, cert. denied, 121 N.M. 783, 918 P.2d 369 (1996).

**"Tortious conduct."** — The acts of defendants in passively receiving distribution of funds or property in Texas, pursuant to the action of decedent's personal representative in New Mexico, were insufficient to establish the commission of a tort in New Mexico. Harrell v. Hayes, 1998-NMCA-122, 125 N.M. 814, 965 P.2d 933.

**Voluntary intercourse is not "tortious act" for jurisdictional purposes.** — Voluntary intercourse between two consenting adults is not a "tortious act," within Subsection A(3), so as to give a court jurisdiction over a nonresident putative father in a paternity action. State ex rel. Garcia v. Dayton, 102 N.M. 327, 695 P.2d 477 (1985).

**Act outside state causing injury within state.** — When negligent acts occur outside New Mexico which cause injury within New Mexico, a "tortious act" has been committed within this state. Roberts v. Piper Aircraft Corp., 100 N.M. 363, 670 P.2d 974 (Ct. App. 1983).

**Tort completed in New Mexico.** — Where plaintiff and defendants formed a joint venture to bid on a federal contract; plaintiff was a New Mexico corporation and

defendants were foreign corporations; some of defendants' employees were paid their salaries by plaintiff and were enrolled in plaintiff's insurance and plans; defendants decided to acquire another New Mexico corporation to replace plaintiff in the business venture; and plaintiff was excluded from the federal contract bid and suffered damages, the district court had personal jurisdiction over defendants in plaintiff's action for tortious interference with a business opportunity because plaintiff suffered economic loss which completed sue tort. Santa Fe Technologies, Inc. v. Argus Networks, Inc., 2002-NMCA-030, 131 N.M. 772, 42 P.3d 1221, cert. denied, 131 N.M. 737, 42 P.3d 842 (2002).

**Situs of tortious act.** — Where, although the negligent implantation of an intrauterine contraceptive device occurred in California, plaintiff developed complications in New Mexico, because a tort is not complete until the injury occurs, the place of injury determines where the tort occurs, and thus, the tortious act was committed in New Mexico, and the patient's negligence and battery causes of action against the physician, and the respondeat superior and negligent supervision claims against his employer, the board of regents of the University of California, arose from the alleged commission of a "tortious act" in New Mexico. Beh v. Ostergard, 657 F. Supp. 173 (D.N.M. 1987).

**No jurisdiction for out-of-state injury.** — This section could not be used to assert personal jurisdiction over the defendant, a Delaware department store corporation registered and doing business in New Mexico, since the plaintiff's negligence action, for an injury which incurred in Georgia, did not arise from the defendant's transaction of business in New Mexico, nor from its commission of a tortious act within the state. Werner v. Wal-Mart Stores, Inc., 116 N.M. 229, 861 P.2d 270 (Ct. App. 1993).

## IV. DOMESTIC RELATIONS.

**Subsection A(5) is inapplicable in paternity action against nonresident putative father** because New Mexico does not recognize a common-law marriage. State ex rel. Garcia v. Dayton, 102 N.M. 327, 695 P.2d 477 (1985).

**Section gives jurisdiction to grant a divorce, but does not mention child custody,** nor is child custody implied as an incident of divorce. Worland v. Worland, 89 N.M. 291, 551 P.2d 981 (1976).

**Law reviews.** — For comment on Melfi v. Goodman, 69 N.M. 488, 368 P.2d 582 (1962), see 3 Nat. Resources J. 348 (1963).

For note, "The Entry and Regulation of Foreign Corporations Under New Mexico Law and Under the Model Business Corporation Act," see 6 Nat. Resources J. 617 (1966).

For comment on Blount v. TD Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966), see 8 Nat. Resources J. 348 (1968).

For survey, "Civil Procedure in New Mexico in 1975," see 6 N.M. L. Rev. 367 (1976).

For article, "Survey of New Mexico Law, 1979-80: Civil Procedure," see 11 N.M.L. Rev. 53 (1981).

For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

For article, "Survey of New Mexico Law, 1982-83: Civil Procedure," see 14 N.M.L. Rev. 17 (1984).

For annual survey of New Mexico corporate law, see 17 N.M.L. Rev. 253 (1987).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

For note, "Civil Procedure - The New Mexico Long-Arm Statute and Due Process: Beh v. Ostergard, and the Regents of the University of California," see 19 N.M.L. Rev. 547 (1989).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 62B Am. Jur. 2d Process § 175 et seq.

Watercraft: validity of service of process on nonresident owner of watercraft under state "long-arm" statutes, 99 A.L.R.2d 287.

Products liability: in personam jurisdiction over nonresident manufacturer or seller under "long-arm" statutes, 19 A.L.R.3d 13.

Applicability, to actions not based on products liability, of state statutes or rules of court predicating in personam jurisdiction over foreign manufacturers or distributors upon use of their goods within state, 20 A.L.R.3d 957.

Contracts: construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state, 23 A.L.R.3d 551.

Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporation on the commission of a tort within the state, 24 A.L.R.3d 532.

Nonresidential parent: obtaining jurisdiction over nonresident parent in filiation or support proceedings, 76 A.L.R.3d 708.

In personam jurisdiction over nonresident director of forum corporation under long-arm statutes, 100 A.L.R.3d 1108.

In personam jurisdiction over nonresident based on ownership, use, possession, or sale of real property, 4 A.L.R.4th 955.

In personam jurisdiction under long-arm statute of nonresident banking institution, 9 A.L.R.4th 661.

In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor, or other party whose acts were performed outside the state, 16 A.L.R.4th 1318.

In personam jurisdiction, under long-arm statute, over nonresident attorney in legal malpractice action, 23 A.L.R.4th 1044.

In personam jurisdiction, under long-arm statute, over nonresident physician, dentist, or hospital in medical malpractice action, 25 A.L.R.4th 706.

Religious activities as doing or transaction of business under "long-arm" statutes or rules of court, 26 A.L.R.4th 1176.

Products liability: personal jurisdiction over nonresident manufacturer of component incorporated in another product, 69 A.L.R.4th 14.

In personam jurisdiction, in libel and slander action, over nonresident who mailed allegedly defamatory letter from outside state, 83 A.L.R.4th 1006.

Execution, outside of forum, of guaranty of obligations under contract to be performed within forum state as conferring jurisdiction over nonresident guarantors under "long-arm" statute or rule of forum, 28 A.L.R.5th 664.

Validity, construction, and application of "fiduciary shield" doctrine - modern cases, 79 A.L.R.5th 587.

Effect, on jurisdiction of state court, of 28 USCS § 1446(e), relating to removal of civil case to federal court, 38 A.L.R. Fed. 824.

Service of process by mail in international civil action as permissible under Hague Convention, 112 A.L.R. Fed. 241.

Effect of use, or alleged use, of Internet on personal jurisdiction in, or venue of, federal court case, 155 A.L.R. Fed. 535.

72 C.J.S. Process § 40.

## 38-1-17. Service of process.

A. In any action in which the state of New Mexico is named as a party defendant, service of process shall be made by serving a copy of the summons and complaint on the governor and on the attorney general.

B. In any action in which a branch, agency, bureau, department, commission or institution of the state not specifically authorized by law to be sued is named as a party defendant, service of process shall be made by serving a copy of the summons and complaint on the attorney general and on the head of the branch, agency, bureau, department, commission or institution.

C. In any action in which a branch, agency, bureau, department, commission or institution of the state specifically authorized by law to be sued is named a party defendant, service of process shall be made on the head of the branch, agency, bureau, department, commission or institution and on the attorney general.

D. In any action in which an officer, official or employee of the state or one of its branches, agencies, bureaus, departments, commissions or institutions is named a party defendant, service of process shall be made on the officer, official or employee and on the attorney general.

E. For the purpose of this section:

(1) the governor shall be considered as the head of the state and the head of the executive branch of the state;

(2) the speaker of the house of representatives or the president pro tempore of the senate shall be considered as the head of the legislative branch of the state; and

(3) the chief justice of the supreme court shall be considered as the head of the judicial branch of the state.

F. Nothing contained in this section shall be construed as waiving any immunity or as authorizing any action against the state not otherwise specifically authorized by law.

G. In garnishment actions, service of writs of garnishment shall be made on the department of finance and administration, on the attorney general and on the head of the branch, agency, bureau, department, commission or institution. A copy of the writ of garnishment shall be delivered by registered or certified mail to the defendant employee.

H. Service of process on the governor, attorney general, agency, bureau, department, commission or institution or head thereof shall be made either by handing a copy of the summons and complaint to the head or to his receptionist. Where an executive secretary is employed, he shall be considered as the head.

**History:** 1953 Comp., § 5-6-22, enacted by Laws 1969, ch. 62, § 1; 1970, ch. 23, § 1.

**ANNOTATIONS**

**Repeals and reenactments.** — Laws 1969, ch. 62, § 1, repealed former 5-6-22 1953 Comp., relating to service of process in certain actions against state, counties, cities, school districts, state institutions, public agencies, public corporations or officers, deputies, assistants, agents or employees thereof, and enacted a new 5-6-22, 1953 Comp.

**Cross references.** — For the procedure governing service upon the state and political subdivisions, *see* Rule 1-004 NMRA.

**Service separately provided for by statute.** — In an appeal from an adverse decision in a proceeding before the state engineer, a corporation that published notice in compliance with 72-7-1 NMSA 1978 was not required to serve the attorney general pursuant to this section and Rule 1-004 NMRA, and the district court thus had jurisdiction. El Dorado Utils., Inc. v. Galisteo Domestic Water Users Ass'n, 120 N.M. 165, 899 P.2d 608 (Ct. App. 1995).

**Mailing petition to department head is insufficient under this section and Rule 1-004 NMRA.** Trujillo v. Goodwin, 2005-NMCA-095, 138 N.M. 48, 116 P.3d 839.

**Law reviews.** — For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M. L. Rev. 249 (1976).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 81A C.J.S. States § 321.

## 38-1-18. Agent for service of process.

Any foreign corporation, foreign bank or foreign real estate trust without being admitted to do business in this state, may loan money in this state only on real estate mortgages, deeds of trust and notes in connection therewith, and take, acquire, hold and enforce the notes, mortgages or deeds of trust given to represent or secure money so loaned or for other lawful consideration. All such notes, mortgages or deeds of trust taken, acquired or held are enforceable as though the foreign corporation, foreign bank or foreign real estate trust were an individual, including the right to acquire the mortgaged property upon foreclosure or under other provisions of the mortgage or deed of trust, and to dispose of the same. Any such corporation, bank or trust except banks and institutions whose shares, certificates or deposit accounts are insured by an agency or corporation of the United States government shall first file with the secretary of state a statement, signed by its president, secretary, treasurer or general manager, that it constitutes the secretary of state its agent for the service of process for cases limited to, and arising out of, such financial transactions, including therein the address of its principal place of business. Upon such service of process, the secretary of state shall forthwith forward all documents by registered or certified mail to the principal place of

business of the corporation, bank or trust. Nothing in this section authorizes any such corporation, bank or trust to transact the business of a bank or trust company in this state.

**History:** 1953 Comp., § 48-23-1, enacted by Laws 1967, ch. 87, § 2; 1969, ch. 98, § 1; 1973, ch. 390, § 7.

**ANNOTATIONS**

**Cross references. —** For substituted service of process upon corporations generally, *see* 38-1-5 NMSA 1978.

For service of process upon foreign corporations generally, *see* 38-1-6 NMSA 1978.

For service of process upon unauthorized insurers, *see* 38-1-8 NMSA 1978.

For service of process upon registered agent of foreign corporation, *see* 53-17-11 NMSA 1978.

For appointment of superintendent of insurance as attorney for service of process upon insurance companies, *see* 59A-5-31 NMSA 1978.

For service of process in civil actions in district courts generally, *see* Rule 1-004 NMRA.

**Necessity for compliance with other provisions of law by corporations complying with section.** — This section contains the authority for all foreign corporations, which would include foreign insurance corporations, to do business of the nature described without being licensed under the laws of this state. Foreign insurance corporations acting as described therein need not comply with the provisions of the insurance laws requiring licensing. 1968 Op. Att'y Gen. No. 68-43.

A foreign savings and loan association wishing only to make real estate loans as set forth in this section and not doing any other business of a savings and loan association within this state would have to comply only with the requirements set forth in this section and would not have to comply with the requirements for "transacting business of an association" as enumerated in 58-10-101 NMSA 1978. 1969 Op. Att'y Gen. No. 69-13.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** In personam jurisdiction under long-arm statute of nonresident banking institution, 9 A.L.R.4th 661.

# ARTICLE 2
# Pleadings and Motions

## 38-2-1 to 38-2-5. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1981, ch. 115, § 1, repealed 38-2-1 through 38-2-5 NMSA 1978, relating to the definition of "pleadings," stating evidence, presumptions of law or matters judicially noted in pleadings, depositing money in court and parties to written instruments, effective March 21, 1981.

## 38-2-6. [Name of defendant unknown.]

When the plaintiff shall be ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name or description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state in his complaint that he could not ascertain the true name, and the summons must contain the words, "real name unknown".

**History:** Laws 1897, ch. 73, § 84; C.L. 1897, § 2685 (84); Code 1915, § 4166; C.S. 1929, § 105-609; 1941 Comp., § 19-406; 1953 Comp., § 21-4-6.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For amendment of pleadings generally, *see* Rule 1-015 NMRA

## 38-2-7, 38-2-8. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1981, ch. 115, § 1, repealed 38-2-7 and 38-2-8 NMSA 1978, relating to the loss or destruction of a written instrument and actions for libel or slander, respectively, effective March 21, 1981.

## 38-2-9. [Truth and mitigating circumstances in action for libel or slander.]

In the actions mentioned in the last preceding section [repealed], the defendant may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances admissible in evidence, to reduce the amount of damages, and whether he prove the justification or not, he may give mitigating circumstances in evidence.

**History:** Laws 1897, ch. 73, § 75; C.L. 1897, § 2685 (75); Code 1915, § 4155; C.S. 1929, § 105-531; 1941 Comp., § 19-409; 1953 Comp., § 21-4-9.

## ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Compiler's notes.** — The phrase "last preceding section" refers to Laws 1897, ch. 73, § 75, which was codified as 32-2-8 NMSA 1978 before its repeal by Laws 1981, ch. 115, § 1.

**Cross references.** — For presentation of defenses and objections generally, *see* Rule 1-012 NMRA.

**Absolute-privilege defense applied to statements to the press.** — In the context of class action or mass-tort litigation, when the attorney has an actual or identifiable prospective client, as a general rule the absolute-privilege defense should apply to communications with the press, because additional prospective clients constitute a large, diverse class of individuals who will be difficult to identify and educate about the need for and availability of legal services. In the context of class action or mass-tort litigation, the most economical and feasible method of informing potential litigants of prospective litigation affecting their interests may be through the press. The use of the press as a conduit to communicate with additional potential class action or mass-tort litigants may be reasonably related to the object of the completed judicial proceeding. Helena Chem. Co. v. Uribe, 2012-NMSC-021, 281 P.3d 237, rev'g 2011-NMCA-060, 149 N.M. 789, 255 P.3d 367.

**Absolute-privilege defense applies to pre-litigation statements to the press.** — The absolute privilege doctrine applies to pre-litigation statements made by attorneys in the presence of the press, if (1) the speaker is seriously and in good faith contemplating class action or mass-tort litigation at the time the statement is made, (2) the statement is reasonably related to the proposed litigation, (3) the attorney has a client or identifiable prospective client at the time the statement is made, and (4) the statement is made while the attorney is acting in the capacity of counsel or prospective counsel. Helena Chem. Co. v. Uribe, 2012-NMSC-021, 281 P.3d 237, rev'g 2011-NMCA-060, 149 N.M. 789, 255 P.3d 367.

Where the residents of a community, who were concerned about environmental and health hazards caused by toxic chemicals emanating from plaintiff's plant, invited attorneys, who were experienced environmental attorneys and who had previously filed a toxic tort action against plaintiff for similar environmental and health hazards, to discuss community concerns and possible litigation against plaintiff; the residents also invited a political blogger to attend the meeting in the capacity of a news reporter to inform the public about the resident's environmental and health concerns and that litigations was contemplated; and at the meeting, one of the attorneys made statements, which the blogger reported on the blogger's website, about children playing outside the meeting and ingesting the toxic chemicals and about plaintiff's egregious actions, the statements made by the attorney were absolutely privileged because the statements

were made when a mass-tort lawsuit was seriously and in good faith contemplated, and with the objective of investigating the merits of potential litigation and identifying for the community those members who may have had a good-faith basis for pursuing the litigation and the statements were made when the attorney had identifiable prospective clients and while the attorney was acting in the capacity of prospective counsel. Helena Chem. Co. v. Uribe, 2012-NMSC-021, 281 P.3d 237, rev'g 2011-NMCA-060, 149 N.M. 789, 255 P.3d 367.

Statements made by litigants or their attorneys to the press after a lawsuit has been filed are absolutely privileged if the statements are a repetition or an explanation of the allegations in the pleadings. Helena Chem. Co. v. Uribe, 2012-NMSC-021, 281 P.3d 237, rev'g 2011-NMCA-060, 149 N.M. 789, 255 P.3d 367.

Where the residents of a community filed a mass-tort lawsuit against plaintiff for personal injuries and property damage suffered by the residents as a result of their exposure to toxic chemicals emanating from plaintiff's chemical plant; after the complaint was filed, the community's attorney held a press conference; one of the community residents spoke about the medical issues faced by the resident's children and the attorney for the community stated that the underground water had been contaminated; the statement of the resident was an explanation of the damages portion of the complaint as it related to the children; and the statement by the attorney repeated the allegations of the complaint, the absolute privilege doctrine applied to both statements. Helena Chem. Co. v. Uribe, 2012-NMSC-021, 281 P.3d 237, rev'g 2011-NMCA-060, 149 N.M. 789, 255 P.3d 367.

**Absolute-privilege defense applies to statements to the press during litigation.** — Statements made by litigants or their attorneys to the press after a lawsuit has been filed are absolutely privileged if the statements are a repetition or an explanation of the allegations in the pleadings. Helena Chem. Co. v. Uribe, 2012-NMSC-021, 281 P.3d 237, rev'g 2011-NMCA-060, 149 N.M. 789, 255 P.3d 367.

Where the residents of a community filed a mass-tort lawsuit against plaintiff for personal injuries and property damage suffered by the residents as a result of their exposure to toxic chemicals emanating from plaintiff's chemical plant; after the complaint was filed, the community's attorney held a press conference; one of the community residents spoke about the medical issues faced by the resident's children and the attorney for the community stated that the underground water had been contaminated; the statement of the resident was an explanation of the damages portion of the complaint as it related to the children; and the statement by the attorney repeated the allegations of the complaint, the absolute privilege doctrine applied to both statements. Helena Chem. Co. v. Uribe, 2012-NMSC-021, 281 P.3d 237, rev'g 2011-NMCA-060, 149 N.M. 789, 255 P.3d 367.

**Absolute-privilege defense general rule.** — The absolute-privilege defense is available when an alleged defamatory statement is made to achieve the objects of litigation and is reasonably related to the subject matter of the judicial proceeding. As

part of the absolute-privilege analysis, the court will consider the extent to which the recipient of the statement had an interest in the judicial proceeding. When the statement precedes litigation of the judicial proceeding, the privilege is available only if the proceeding in question is contemplated in good faith and under serious consideration at the time the statement is made. Helena Chem. Co. v. Uribe, 2011-NMCA-060, 149 N.M. 789, 255 P.3d 367, rev'd, 2012-NMSC-021, 281 P.3d 237

**Absolute-privilege defense does not apply to statements to news reporters.** — Statements made to news media recipients who are wholly unrelated to and have no interest in a judicial proceeding are not protected by absolute privilege. Helena Chem. Co. v. Uribe, 2011-NMCA-060, 149 N.M. 789, 255 P.3d 367, rev'd, 2012-NMSC-021, 281 P.3d 237.

Where community residents held a public meeting to discuss litigation against plaintiff for a toxic tort and a press conference was held after the toxic tort action was filed; news reporters were invited and attended both the public meeting and the new conference; and an attorney who represented the plaintiffs in the toxic tort action and a plaintiff to the toxic tort action made defamatory statements about plaintiff at the public meeting and at the new conference, the defamatory statements were not entitled to absolute-privilege protection, because the statements were made to news reporters who had been invited to hear the statements but who had no relation to or interest in the judicial proceeding. Helena Chem. Co. v. Uribe, 2011-NMCA-060, 149 N.M. 789, 255 P.3d 367, rev'd, 2012-NMSC-021, 281 P.3d 237.

**Law reviews.** — For article, "Defamation in New Mexico," see 14 N.M.L. Rev. 321 (1984).

Note, "Defamation Law - The Private Figure Plaintiff Must Establish a New Element to Make a Prima Facie Showing: Philadelphia Newspaper, Inc. v. Hepps," see 17 N.M.L. Rev. 363 (1987).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 50 Am. Jur. 2d Libel and Slander § 267 et seq.

Libel by newspaper headlines, 95 A.L.R.3d 660.

False light invasion of privacy - neutral or laudatory depiction of subject, 59 A.L.R.4th 502.

53 C.J.S. Libel and Slander § 152.

## 38-2-9.1. Special motion to dismiss unwarranted or specious lawsuits; procedures; sanctions; severability.

A. Any action seeking money damages against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting in a quasi-

judicial proceeding before a tribunal or decision-making body of any political subdivision of the state is subject to a special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment that shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation.

B. If the rights afforded by this section are raised as an affirmative defense and if a court grants a motion to dismiss, a motion for judgment on the pleadings or a motion for summary judgment filed within ninety days of the filing of the moving party's answer, the court shall award reasonable attorney fees and costs incurred by the moving party in defending the action. If the court finds that a special motion to dismiss or motion for summary judgment is frivolous or solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney fees to the party prevailing on the motion.

C. Any party shall have the right to an expedited appeal from a trial court order on the special motions described in Subsection B of this section or from a trial court's failure to rule on the motion on an expedited basis.

D. As used in this section, a "public meeting in a quasi-judicial proceeding" means and includes any meeting established and held by a state or local governmental entity, including without limitations, meetings or presentations before state, city, town or village councils, planning commissions, review boards or commissions.

E. Nothing in this section limits or prohibits the exercise of a right or remedy of a party granted pursuant to another constitutional, statutory, common law or administrative provision, including civil actions for defamation or malicious abuse of process.

F. If any provision of this section or the application of any provision of this section to a person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this section that can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

**History:** Laws 2001, ch. 218, § 2.

## ANNOTATIONS

**Effective dates.** — Laws 2001, ch. 218 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2001, 90 days after adjournment of the legislature.

**Application to recall petitions.** — The anti-SLAPP statute [Section 38-2-9.1 NMSA 1978] does not apply to a sufficiency hearing before a district court to determine the sufficiency of the allegations in a recall petition pursuant to Section 22-7-9.1 NMSA 1978, because a sufficiency hearing before the district court is a judicial proceeding, not

a public meeting or a quasi-judicial proceeding as defined in the anti-SLAPP statute. Cordova v. Cline, 2013-NMCA-083, cert. granted, 2013-NMCERT-007.

Where defendants filed a petition with the county clerk to recall plaintiff who was a member and officer of a municipal school board; the county clerk filed an application for a district court hearing on the sufficiency of the recall allegations pursuant to Section 22-7-9.1 NMSA 1978; at the hearing, before the district court determined the sufficiency of the petition, defendants dismissed the petition; plaintiff filed suit against defendants for damages; and the district court dismissed plaintiff's complaint under the anti-SLAPP statute [Section 38-2-9.1 NMSA 1978], the district court improperly dismissed plaintiff's suit because the anti-SLAPP statute did not apply to a judicial proceeding to determine the sufficiency of the recall petition. Cordova v. Cline, 2013-NMCA-083, cert. granted, 2013-NMCERT-007.

**Law reviews.** — For comment , "Resolving Land-use Disputes by Intimidation: SLAPP Suits in New Mexico," see 32 N.M.L. Rev. 217 (2002).

## 38-2-9.2. Findings and purpose.

The legislature declares that it is the public policy of New Mexico to protect the rights of its citizens to participate in quasi-judicial proceedings before local and state governmental tribunals. Baseless civil lawsuits seeking or claiming millions of dollars have been filed against persons for exercising their right to petition and to participate in quasi-judicial proceedings before governmental tribunals. Such lawsuits can be an abuse of the legal process and can impose an undue financial burden on those having to respond to and defend such lawsuits and may chill and punish participation in public affairs and the institutions of democratic government. These lawsuits should be subject to prompt dismissal or judgment to prevent the abuse of the legal process and avoid the burden imposed by such baseless lawsuits.

**History:** Laws 2001, ch. 218, § 1.

### ANNOTATIONS

**Effective dates.** — Laws 2001, ch. 218 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2001, 90 days after adjournment of the legislature.

**Law reviews.** — For comment, "Resolving Land-use Disputes by Intimidation: SLAPP Suits in New Mexico," see 32 N.M.L. Rev. 217 (2002).

## 38-2-10 to 38-2-22. Repealed.

### ANNOTATIONS

**Repeals.** — Laws 1981, ch. 115, § 1, repealed 38-2-10 through 38-2-22 NMSA 1978, relating to pleadings and motions, effective March 21, 1981.

# ARTICLE 3
# Venue; Change of Judge

## 38-3-1. County in which civil action in district court may be commenced.

All civil actions commenced in the district courts shall be brought and shall be commenced in counties as follows and not otherwise:

A. First, except as provided in Subsection F of this section relating to foreign corporations, all transitory actions shall be brought in the county where either the plaintiff or defendant, or any one of them in case there is more than one of either, resides; or second, in the county where the contract sued on was made or is to be performed or where the cause of action originated or indebtedness sued on was incurred; or third, in any county in which the defendant or either of them may be found in the judicial district where the defendant resides.

B. When the defendant has rendered himself liable to a civil action by any criminal act, suit may be instituted against the defendant in the county in which the offense was committed or in which the defendant may be found or in the county where the plaintiff resides.

C. When suit is brought for the recovery of personal property other than money, it may be brought as provided in this section or in the county where the property may be found.

D. (1) When lands or any interest in lands are the object of any suit in whole or in part, the suit shall be brought in the county where the land or any portion of the land is situate.

(2) Provided that where such lands are located in more than one county and are contiguous, that suit may be brought as to all of the lands in any county in which a portion of the lands is situate, with the same force and effect as though the suit had been prosecuted in each county in which any of the lands are situate. In all such cases in which suit is prosecuted in one county as to contiguous lands in more than one county, notice of lis pendens shall be filed pursuant to Sections 38-1-14 and 38-1-15 NMSA 1978 in each county. For purposes of service of process pursuant to Rule 4 [Rule 1-004 NMRA] of the Rules of Civil Procedure for the District Courts, any such suit involving contiguous lands located in more than one county shall be deemed pending in each county in which any portion of the land is located from the date of filing of the lis pendens notice.

E. Suits for trespass on land shall be brought as provided in Subsection A of this section or in the county where the land or any portion of the land is situate.

F. Suits may be brought against transient persons or non-residents in any county of this state, except that suits against foreign corporations admitted to do business and which designate and maintain a statutory agent in this state upon whom service of process may be had shall only be brought in the county where the plaintiff, or any one of them in case there is more than one, resides or in the county where the contract sued on was made or is to be performed or where the cause of action originated or indebtedness sued on was incurred or in the county where the statutory agent designated by the foreign corporation resides.

G. Suits against any state officers as such shall be brought in the court of the county in which their offices are located, at the capital or in the county where a plaintiff, or any one of them in case there is more than one, resides, except that suits against the officers or employees of a state educational institution as defined in Article 12, Section 11 of the constitution of New Mexico, as such, shall be brought in the district court of the county in which the principal office of the state educational institution is located or the district court of the county where the plaintiff resides.

**History:** Laws 1875-1876, ch. 2, § 1; C.L. 1884, § 1893; C.L. 1897, § 2950; Laws 1899, ch. 80, § 16; Code 1915, § 5567; C.S. 1929, § 147-101; 1941 Comp., § 19-501; Laws 1951, ch. 121, § 1; 1953 Comp., § 21-5-1; Laws 1955, ch. 258, § 1; 1957, ch. 124, § 1; 1981, ch. 70, § 1; 1988, ch. 8, § 1.

## ANNOTATIONS

**Cross references.** — For service of process outside of state, *see* 38-1-16 NMSA 1978.

For secretary of state as agent for service of process, *see* 13-4-22 NMSA 1978.

For ability to serve civil process as prerequisite to transfer of lands between United States and New Mexico, *see* 19-2-3 NMSA 1978.

For venue in criminal cases, *see* 30-1-14 NMSA 1978.

For magistrate court jurisdiction, *see* 35-3-6 NMSA 1978.

For venue of actions for specific performance of contracts for sale of real estate, *see* 42-7-1 NMSA 1978.

For jurisdiction under Uniform Owner-Resident Relations Act, *see* 47-8-10 NMSA 1978.

For effect of Rules of Civil Procedure for District Courts upon venue of actions, *see* Rule 1-082 NMRA.

For civil process in the district court, *see* Rule 1-004 NMRA.

**The 1988 amendment,** effective February 18, 1988, made minor stylistic changes throughout the section; substituted "Rule 4" for "Rule 4(g)" in Subsection D(2); and substituted "or in the county where a plaintiff, or any one of them in case there is more than one, resides" for "and not elsewhere" in Subsection G.

## I. GENERAL CONSIDERATION.

**A domestic corporation does not reside in a county for venue purposes** solely because its registered agent for service of process is located therein. Blancett v. Dial Oil Company, 2008-NMSC-011, 143 N.M. 368, 176 P.3d 1100.

**Classification of foreign corporations not violative of equal protection.** — The classification of foreign corporations in this section is not so arbitrary or unreasonable as to constitute a denial of equal protection. Aetna Fin. Co. v. Gutierrez, 96 N.M. 538, 632 P.2d 1176 (1981), overruled on other grounds, Cooper v. Chevron USA, 2002-NMSC-020, 132 N.M. 382, 49 P.3d 61.

**Application of amended section to "pending" cases.** — Section 34 of article IV of the New Mexico Constitution, which prohibits the legislature from changing the rules of procedure applicable to any pending case, requires that venue in a suit filed prior to 1990 be governed by the pre-1990 version of 38-3-1 NMSA 1978, notwithstanding the fact that the jurisdiction of the state court was suspended while the case was removed to federal court and subsequently remanded back to the state court. Appellant's argument that as a result of the case's removal from state court to federal district court the case was not "pending" when the venue statute was amended was erroneous. Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ., 115 N.M. 229, 849 P.2d 372 (Ct. App. 1993).

**Effect of supreme court decision after venue ruling.** — Unsuccessful plaintiff, who had opposed defendant's motion for transfer of venue on grounds of forum non conveniens, was not entitled to Rule 1-060 NMRA relief based on a case decided subsequent to the ruling on the venue motion. Stein v. Alpine Sports, 1998-NMSC-040, 126 N.M. 258, 968 P.2d 769.

**Venue defined.** — The venue of an action is its place of trial. Peisker v. Chavez, 46 N.M. 159, 123 P.2d 726 (1942).

**This venue statute is not to be equated with jurisdiction.** Jones v. N.M. State Hwy. Dep't, 92 N.M. 671, 593 P.2d 1074 (1979).

**Jurisdiction and venue distinguished.** — Venue in the technical meaning of the term, means the place where a case is to be tried, whereas jurisdiction does not refer to the place of trial, but to the power of the court to hear and determine the case. Kalosha v. Novick, 84 N.M. 502, 505 P.2d 845 (1973).

**Section does not provide for the venue of cross-claims.** Hughes v. Joe G. Maloof & Co., 84 N.M. 516, 505 P.2d 859 (Ct. App. 1973).

**Dismissal without prejudice for improper venue is a final, appealable order.** Sunwest Bank v. Nelson, 1998-NMSC-012, 125 N.M. 170, 958 P.2d 740.

**Applicability of section to condemnation proceedings.** — In the absence of statute, there is no right to change the venue in a condemnation proceedings, even if such a proceeding is an action at law, and even though a change of venue is authorized by statute, a party is not entitled to such change if no good reason therefor is shown. Under a statute authorizing a change of venue in a civil action, according to some authorities, a change of venue may be had in a condemnation proceeding, on a timely application therefor, and the court to which the case is transmitted obtains jurisdiction to dispose of the condemnation proceeding. On the other hand, according to other authorities, a change of venue of the proceeding cannot be had under such statute, since a condemnation proceeding is a special proceeding. City of Tucumcari v. Magnolia Petroleum Co., 57 N.M. 392, 259 P.2d 351 (1953).

**Waiver of venue.** — This section and its various subsections deal merely with venue as distinguished from jurisdiction, and the rights conferred by such section and its subsections may be waived. Kalosha v. Novick, 84 N.M. 502, 505 P.2d 845 (1973).

Lack or want of jurisdiction of a court over the parties which is dependent upon plaintiff's residence is waived by the defendant by failure to properly present the issue prior to answering to the merits. Romero v. Hopewell, 28 N.M. 259, 210 P. 231 (1922).

**Forum non conveniens.** — The doctrine of forum non conveniens is inapplicable to motions to transfer a lawsuit intrastate from one county to another. First Fin. Trust Co. v. Scott, 1996-NMSC-065, 122 N.M. 572, 929 P.2d 263.

## II. TRANSITORY ACTIONS GENERALLY.

**Compiler's notes.** — The 1915 Code compilers deleted from the end of Subsection A: "Provided, That if suit is brought against any defendant out of the county but within the judicial district in which he resides, process shall be personally served on such defendant not less than fifteen days before the first day of the term to which the process shall be returnable, and if brought in any judicial district other than that in which the defendant or either of them resides, process shall be served on such defendant or defendants not less than thirty days before the first day of the term to which said process may be returnable."

**Residency of national banking association.** — A national banking association with a principal place of business in a county in New Mexico is a resident of New Mexico and of that county for purposes of venue selection under Subsection A. Sunwest Bank v. Nelson, 1998-NMSC-012, 125 N.M. 170, 958 P.2d 740.

**When there are two plaintiffs in a lawsuit action may be brought in the county in which either of them resides.** Torres v. Gamble, 75 N.M. 741, 410 P.2d 959 (1966).

**Where transitory action is brought against more than one defendant, the residence of one of these defendants will determine** the venue of an action against all if such party is essential to the action and has not been joined merely for the purpose of bringing the action in the county of his abode. Teaver v. Miller, 53 N.M. 345, 208 P.2d 156 (1949).

**Venue of a transitory action in the nature of quo warranto** may be in the county of residence of either plaintiff or defendant. State ex rel. Parsons Mining Co. v. McClure, 17 N.M. 694, 133 P. 1063 (1913).

Action in the nature of quo warranto in intrusion into office proceeding is governed by this section and must be brought in the county where the intrusion took place. State ex rel. Hannett v. District Court, 30 N.M. 300, 233 P. 1002 (1925).

**Action by nonresident.** — Where, at the time of the filing of a medical malpractice action, plaintiff no longer resided in New Mexico, under Subsection A she was required to file suit either in the county where the defendant actually resided, or where the cause of action originated, or in some other county of the judicial district wherein defendant could be actually served with a copy of the complaint and summons. Hamby v. Gonzales, 105 N.M. 778, 737 P.2d 559 (Ct. App.), cert. denied, 105 N.M. 720, 737 P.2d 79 (1987).

The term "transitory", as used in Subsection A, does not evidence an intent by the legislature to permit a nonresident plaintiff, in her discretion, to select any county within the same judicial district in which to properly file her cause of action against the defendant. Hamby v. Gonzales, 105 N.M. 778, 737 P.2d 559 (Ct. App.), cert. denied, 105 N.M. 720, 737 P.2d 79 (1987).

**Action by environmental improvement division.** — An action by which the environmental improvement division sought an administrative warrant for inspection under the Hazardous Waste Act, Chapter 74, Article 4 NMSA 1978, is a transitory action and venue is controlled by Subsection A of this section, which allows an action to be brought in a county where the plaintiff resides. N.M. Envtl. Improvement Div. v. Climax Chem. Co., 105 N.M. 439, 733 P.2d 1322 (Ct. App.), cert. denied, 105 N.M. 421, 733 P.2d 869 (1987).

**Tortious injury to land.** — Actions seeking damages or injunctive relief for tortious injury to land are transitory actions subject to the venue rules of Subsection A. Cooper v. Amerada Hess Corp., 2000-NMCA-100, 129 N.M. 710, 13 P.3d 68, aff'd sub nom. Cooper v. Chevron U.S.A., 132 N.M. 382, 49 P.3d 61 (2002).

**Venue held proper.** — Where civil suit was filed in one county of the judicial district in which defendant resided, but defendant resided in adjoining county, defendant was

properly "found in the county" within the meaning of this subsection when, after being informed by sheriff of county where suit was filed that he was to be served with "papers," he drove into that county and picked up the papers. Empire Fire & Marine Ins. Co. v. Lee, 86 N.M. 739, 527 P.2d 502 (Ct. App. 1974).

**Venue held improper.** — Where suit is between two parties resident in the same county, and arises out of a contract for the sale of real estate made and executed and to be performed in that county, venue is improper when the suit is brought in the county in which the real estate is located. Rito Cebolla Invs., Ltd. v. Golden W. Land Corp., 94 N.M. 121, 607 P.2d 659 (Ct. App. 1980).

## III. ACTIONS UPON LIABILITIES ARISING FROM CRIMINAL ACTS.

**Venue in wrongful death action between nonresidents.** — The mere fact that the wrongful act complained of may have been criminal in character can have no bearing on the transitory nature of an action to recover damages therefor. The action is transitory, and being transitory it falls squarely within the permissive effect of this section, authorizing suit against a nonresident in any county in the state and as well within the language of Section 41-2-3 NMSA 1978, authorizing a plaintiff in an action against a nonresident growing out of an accident or a collision in which the latter's automobile is involved, to file his complaint in any one of the district courts of the state. State ex rel. Appelby v. District Court, 46 N.M. 376, 129 P.2d 338 (1942).

## IV. ACTIONS INVOLVING LAND OR INTERESTS IN LAND GENERALLY.

**Suit for foreclosure of mortgage on real estate.** — Venue of suit for the foreclosure of a mortgage on real estate is determined by this section as the county in which the land is situated. Riverside Irrigation Co. v. Cadwell, 21 N.M. 666, 158 P. 644 (1916).

**Suit to redeem lands from sale under decree** of court must be brought in the county where the lands are situate. Catron v. Gallup Fire Brick Co., 34 N.M. 45, 277 P. 32 (1929), overruled on other grounds Kalosha v. Novick, 84 N.M. 502, 505 P.2d 845 (1973).

**Action to compel execution of conveyance by grantees of land.** — Subsection D applies to a suit to compel grantees of land to execute conveyances vesting title in judgment debtor so as to permit plaintiff to obtain execution on judgment. Atler v. Stolz, 38 N.M. 529, 37 P.2d 243 (1934), overruled on other grounds Kalosha v. Novick, 84 N.M. 502, 505 P.2d 845 (1973).

**Venue similar to quiet title venue.** — Subsection D(1) is similar to the special venue provision contained in the statute authorizing an action to quiet title, 42-6-1 NMSA 1978. Both permit an action concerning land to be brought in the county in which the land or any portion of it is located. Gonzales v. Gonzales, 116 N.M. 838, 867 P.2d 1220 (Ct. App. 1993).

**Injunction to prohibit issuance of deed.** — Venue is in the county in which the real estate involved is located when a party seeks an injunction to prohibit another from obtaining a special warranty deed, and also seeks recision of the real estate contract. Naumburg v. Cummins, 98 N.M. 274, 648 P.2d 313 (1982).

**Where land involved in suit was originally a part of one county,** but, by various legislative enactments changing the boundaries of counties and creating new counties, it had come to be within the limits of another county, the suit was properly brought within that other county. Bent v. Maxwell Land Grant & Ry., 3 N.M. (Gild.) 227, 3 P. 721 (1884).

**Contiguous parcels in different counties.** — Subsection D(2) requires that tracts located in different counties be contiguous to one another at the time the dispute arises before an exception to the general venue provision is available. Gonzales v. Gonzales, 116 N.M. 838, 867 P.2d 1220 (Ct. App. 1993).

**Where petition for intervention asserted entitlement to 1/8th interest in oil and gas lease,** the suit was one in which an interest in lands was the object within the meaning of this section. Heath v. Gray, 58 N.M. 665, 274 P.2d 620 (1954).

**Action for damages for and injunction restraining further cutting of trees on land.** — While suit for damages for cutting trees on land would be maintainable in county other than that in which the land was situate, where the complaint also sought injunction against further cutting of trees, and to restrain defendant from claiming any interest in the land, it involved an interest in the land, and was maintainable only in the county in which the land was situate. Jemez Land Co. v. Garcia, 15 N.M. 316, 107 P. 683 (1910), overruled on other grounds Kalosha v. Novick, 84 N.M. 502, 505 P.2d 845 (1973).

**Action for damages only.** — An action against an oil and gas operation alleging property damage and personal injury, but not requesting injunctive relief, does not have land or an interest in land as its object and is not controlled by Subsection D, requiring the suit to be brought in the county where the land is situated. Cooper v. Chevron U.S.A., Inc., 2002-NMSC-020, 132 N.M. 382, 49 P.3d 61.

**Declaratory action by city against village to determine authority over subdivision, platting and zoning of certain lands.** — Venue in a declaratory suit by the city of Albuquerque against the village of Corrales and its mayor, to secure a determination of the city's authority over the subdivision, platting and zoning of lands lying within Bernalillo county within five miles of the city's boundary, should have been laid in adjoining Sandoval county where Corrales maintained all of its municipal offices and wherein all the territory it encompassed lay, except for lands which it had purportedly annexed, in Bernalillo county; the subdivision, platting and zoning authority of Albuquerque over the land in question was not an interest in land within the contemplation of Subsection D(1) of this section and the applicable venue statute was 38-3-2 NMSA 1978. City of Albuquerque v. Village of Corrales, 88 N.M. 185, 539 P.2d 205 (1975).

**Water rights suit involving state official.** — Venue for a suit governing the adjudication of water rights was properly brought in the county having jurisdiction over the stream system pursuant to Subsection D(1) as opposed to the county wherein the state engineer had his offices pursuant to Subsection (G). Because the county district court wherein the stream system was located properly had venue over the water rights adjudication, 72-4-17 NMSA 1978 required that that court have exclusive jurisdiction over all questions relating to the water rights involved, including those against the state engineer. Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ., 115 N.M. 229, 849 P.2d 372 (Ct. App. 1993).

**Waiver of venue.** — See Kalosha v. Novick, 84 N.M. 502, 505 P.2d 845 (1973).

## V. ACTIONS FOR TRESPASS UPON LAND.

**Waiver of venue.** — The county in which an action shall be tried may be agreed upon by the parties. Or if the county in which the action is brought is not the proper one for the trial thereof, the action may nevertheless be tried therein unless the defendant by proper objection demand that it be tried in the county prescribed by law. But the objection must be raised prior to trial or it will be deemed waived. And any conduct on the part of the defendant manifesting satisfaction with the venue until after the trial, or defendant's abiding by it until the matter has proceeded to a hearing will be sufficient to constitute a waiver. Heron v. Gaylor, 53 N.M. 44, 201 P.2d 366 (1948).

## VI. ACTIONS AGAINST TRANSIENTS OR NONRESIDENTS.

**Foreign corporations with statutory agents in different counties.** — Venue that is proper for one foreign corporation defendant with a statutory agent cannot establish venue for another foreign corporation defendant where the other foreign corporation maintains a statutory agent in a separate county. Bank of America v. Apache Corporation, 2008-NMCA-054, 144 N.M. 123, 184 P.3d 435, cert. denied, 2008-NMCERT-003, 143 N.M. 681, 180 P.3d 1180.

**Foreign corporation and New Mexico corporation with statutory agents in different counties.** — Venue that is proper for one foreign corporation defendant with a statutory agent may establish venue for a New Mexico corporation defendant even if the New Mexico corporation maintains a statutory agent and a principal place of business in another county. Bank of America v. Apache Corporation, 2008-NMCA-054, 144 N.M. 123, 184 P.3d 435, cert. denied, 2008-NMCERT-003, 143 N.M. 681, 180 P.3d 1180.

**Venue for a resident defendant** is proper in the county where a defendant foreign corporation’s statutory agent resides. Gardiner v. Galles Chevrolet Company, 2007-NMSC-052, 142 N.M. 544, 168 P.3d 116.

**Appointment of statutory agents.** — Pursuant to 53-17-9 NMSA 1978, a foreign corporation may appoint a non-resident statutory agent which gives the corporation the

benefit offered by the venue exceptions of Subsection F. Cooper v. Chevron U.S.A., Inc., 2002-NMSC-020, 132 N.M. 382, 49 P.3d 61.

**Foreign corporation with statutory agent.** — Subsection F of this section limits the proper venue in an action against a foreign corporation with a statutory agent. Baker v. BP American Prod. Co., 2005-NMSC-011, 137 N.M. 334, 110 P.3d 1071.

**Multiple non-resident defendants.** — In actions with multiple defendants, venue for a non-resident defendant cannot determine venue for a foreign corporation with a statutory agent. Baker v. BP America Prod. Co., 2005-NMSC-011, 137 N.M. 334, 110 P.3d 1071.

**Foreign corporations are nonresidents.** — Under the plain and unambiguous language of this section, foreign corporations are considered nonresidents of this state for the purpose of venue. Thus, suits against such corporations fall under the terms of Subsection F, but suits by such corporations are governed by the provisions of Subsection A. Aetna Fin. Co. v. Gutierrez, 96 N.M. 538, 632 P.2d 1176 (1981), overruled on other grounds, Cooper v. Chevron USA, 2002-NMSC-020, 132 N.M. 382, 49 P.3d 61.

**Wrongful death action between nonresidents.** — An action for wrongful death, due to an automobile accident, being transitory in character, may be brought anywhere in the state when both plaintiff and defendant are nonresidents. State ex rel. Appelby v. District Court, 46 N.M. 376, 129 P.2d 338 (1942).

**Action upon contract against nonresident.** — Although this section provides that suit can be brought where a contract was made or to be performed, the section also provides that a suit can be brought against a nonresident in any county of the state. Valley Country Club, Inc. v. Mender, 64 N.M. 59, 323 P.2d 1099 (1958).

When venue is based on where a contract is to be performed, the court should determine whether the venue chosen by the plaintiff is one where a primary or principal activity of the contract is to take place. Team Bank v. Meridian Oil, Inc., 118 N.M. 147, 879 P.2d 779 (1994).

## VII. ACTIONS AGAINST STATE OFFICERS.

**The legislature has expressly localized suits against state officers by virtue of this section.** Tudesque v. N.M. State Bd. of Barber Exam'rs, 65 N.M. 42, 331 P.2d 1104 (1958).

**Localized suits against state officers.** — The legislature intended that actions against state officers be brought in Santa Fe county and not elsewhere. State ex rel. State Hwy. Comm'n v. Quesenberry, 74 N.M. 30, 390 P.2d 273 (1964).

**The words "state officers"** as used in Subsection G of this section does not mean merely the executive department heads elected by the people and as recognized under the constitution, but includes incumbents of offices created by the legislature. Pollack v. Montoya, 55 N.M. 390, 234 P.2d 336 (1951)See also; Lacy v. Silva, 84 N.M. 43, 499 P.2d 361, cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

**Persons and bodies deemed state officers.** — The bureau of revenue (now taxation and revenue department) is a state officer since it is charged with the administration and enforcement of the revenue laws through its commissioner of revenue (now secretary of taxation and revenue). State ex rel. Bureau of Revenue v. MacPherson, 79 N.M. 272, 442 P.2d 584 (1968), overruled on other grounds N.M. Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

The board of barber examiners (now board of barbers and cosmetologists), with statutory situs in Santa Fe, has been clothed by the legislature with powers and duties of statewide scope, the exercise of which involves some portion of the governmental power. Hence the board itself, as well as its component members, is a state officer as such within the meaning of Subsection G of this section. Tudesque v. N.M. State Bd. of Barber Exam'rs, 65 N.M. 42, 331 P.2d 1104 (1958).

The commissioner of revenue (now secretary of taxation and revenue) is a state officer. State ex rel. Bureau of Revenue v. MacPherson, 79 N.M. 272, 442 P.2d 584 (1968), overruled on other grounds N.M. Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

Sovereign power is clearly vested in the office of the commissioner of revenue (now secretary of taxation and revenue) and this office is therefore a state office. Lacy v. Silva, 84 N.M. 43, 499 P.2d 361 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

A district director (now division director) of revenue is not autonomous and is not independent, therefore, sovereign power has not been vested with the district director either by the legislature or by the commissioner pursuant to legislative authority and absent a vesting of sovereign power in the district director, he is not an "officer" within the meaning of Subsection G of this section. Lacy v. Silva, 84 N.M. 43, 499 P.2d 361 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

Chief of division of liquor control (now director of department of alcoholic beverage control) is a state officer within terms of Subsection G of this section requiring civil actions brought against state officers to be brought in the county where the office is located. Pollack v. Montoya, 55 N.M. 390, 234 P.2d 336 (1951).

**State highway commissioners are state officers** within the meaning of this statute. Jones v. N.M. State Hwy. Dep't, 92 N.M. 671, 593 P.2d 1074 (1979).

**Section applicable to actions against state officers for acts committed while purporting to act within scope of official authority or capacity.** — Statutes which prescribe venue for suits against state officers, for acts done by virtue of their office, control suits for acts done by them while purporting to act within the scope of authority or official capacity. Allen v. McClellan, 77 N.M. 801, 427 P.2d 677 (1967), overruled on other grounds N.M. Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

**Acts committed while purporting to act within scope of official authority or capacity.** — Where it was not asserted that alleged wrongful acts were committed by defendants while purporting to act within the scope of their official authority or capacity, the provisions of this section were not applicable. Allen v. McClellan, 77 N.M. 801, 427 P.2d 677 (1967), overruled on other grounds N.M. Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

Where plaintiff's claim was that the conduct of the district director (now division director) of revenue which gave rise to the filing of the criminal complaint was entirely outside the scope of his employment with the state of New Mexico and plaintiff sought damages only against the district director and on the basis of acts outside the scope of his employment, this section was not applicable. Lacy v. Silva, 84 N.M. 43, 499 P.2d 361 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

**Injunctive proceedings against state officers.** — Statutes which prescribe venue for suits against state officers, for acts done by virtue of their office, control suits for acts done by them while purporting to act within the scope of authority or official capacity. These same rules apply to suits for injunction against such officers. Allen v. McClellan, 77 N.M. 801, 427 P.2d 677 (1967), overruled on other grounds N.M. Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

**Mandamus proceedings against state officers.** — This section cannot be considered as a means of ousting a court of jurisdiction once that jurisdiction has attached; and this is particularly true where the state commission originally sought the aid of the court in another county by seeking relief, such as, in the condemnation of property. Therefore, Subsection G is not controlling, and it was within the jurisdiction of the trial court to issue, in the primary case, its writ of mandamus against appellant, which had initially applied to that same court for relief. State ex rel. State Hwy. Comm'n v. Quesenberry, 74 N.M. 30, 390 P.2d 273 (1964).

**Section inapplicable to action for release of funds held by department.** — An action for the release of funds held by the human services department pursuant to a court order is not a "suit against a state officer" but is an exercise by a court of its continuing jurisdiction; thus, this section is inapplicable. Guerra v. N.M. Human Servs. Dep't, 96 N.M. 608, 633 P.2d 716 (Ct. App. 1981).

**Section requires only venue be proper when action is commenced.** Valdez v. Ballenger, 91 N.M. 785, 581 P.2d 1280 (1978).

**Suits against state officers may be brought in Santa Fe county,** where the capital is located. Jacobs v. Stratton, 94 N.M. 665, 615 P.2d 982 (1980).

**Subsection G is not jurisdictional;** prior cases so holding are overruled. N.M. Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

**Venue should not be equated with jurisdiction in suits against state,** its officers or employees. N.M. Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

**Applicability of Subsection G to state educational institutions.** — This section, not 41-4-18 NMSA 1978, the venue provision of the Tort Claims Act, applies to all tort actions brought against state educational institutions or employees thereof. Clothier v. Lopez, 103 N.M. 593, 711 P.2d 870 (1985).

**Law reviews.** — For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

For article, "Survey of New Mexico Law, 1979-80: Civil Procedure," see 11 N.M.L. Rev. 53 (1981).

For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

For 1984-88 survey of New Mexico administrative law, 19 N.M.L. Rev. 575 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 77 Am. Jur. 2d Venue §§ 1 to 8.

Liability or indemnity insurance as regards accident as "accident insurance" within meaning of statute as to venue, 77 A.L.R. 1416.

Constitutionality of statute which permits action against trucking or bus company for injury to person or property to be brought in any county through or into which the route passes, 81 A.L.R. 777.

Aeroplane passenger, venue of action for injury to, 83 A.L.R. 376, 99 A.L.R. 173, 155 A.L.R. 1026.

Venue of actions for declaratory judgments, 87 A.L.R. 1245.

Plaintiff's bona fide belief in cause of action against defendant whose presence in action is necessary to justify venue as against another defendant, as sustaining venue against latter notwithstanding failure to establish cause of action or dismissal of action, against former, 93 A.L.R. 949.

Growing crops, venue of action for damages to, 103 A.L.R. 374.

Mortgages securing same debt or portions thereof, upon real property in different counties, right to maintain single suit to foreclose, 110 A.L.R. 1477.

Guardianship of incompetent or infant as affecting venue of action, 111 A.L.R. 167.

Joining cause of action or prayer for personal relief as affecting venue of action relating to real property, 120 A.L.R. 790.

Fraud in the sale of real property, location of land as governing venue of action for damages for, 163 A.L.R. 1312.

Timber contract, venue in action arising out of, after delay in performance, 164 A.L.R. 465.

Presumption or inference as to place of forgery, arising from unexplained possession or uttering of forged paper, 164 A.L.R. 649.

Venue of action involving real estate situated in two or more counties or districts, 169 A.L.R. 1245.

Designation of place of business of corporation papers, conclusiveness of, as regards venue, 175 A.L.R. 1092.

Lien as estate or interest in land within venue statute, 2 A.L.R.2d 1261.

Nuisance, suit to enjoin, 7 A.L.R.2d 481.

Remedy and procedure to avoid release or satisfaction of judgment, 9 A.L.R.2d 553.

Effect of nonsuit, dismissal or discontinuance of action on previous orders, 11 A.L.R.2d 1407.

Relationship between "residence" and "domicil" under venue statutes, 12 A.L.R.2d 757.

Personal property: what is an action for damages to personal property within venue statute, 29 A.L.R.2d 1270.

Applicability, to annulment actions, of residence requirements of divorce statutes, 32 A.L.R.2d 734.

Partnership dissolution, settlement, or accounting, 33 A.L.R.2d 914.

Wrongful death action, 36 A.L.R.2d 1146.

Fraudulent conveyance, setting aside of, 37 A.L.R.2d 568.

Nonresident motorist served constructively under statute, venue of action against, 38 A.L.R.2d 1198.

Divorce: venue of divorce action in particular county as dependent on residence or domicile for a specified length of time, 54 A.L.R.2d 898.

Replevin, or similar possessory action, proper county for bringing, 60 A.L.R.2d 487.

Specific performance of contract pertaining to real property, action for, 63 A.L.R.2d 456.

Timber: action for cutting, destruction, or damage of standing timber or trees, 65 A.L.R.2d 1268.

Airplane accident: proper forum and right to maintain action for accident causing death over or in high seas, 66 A.L.R.2d 1002.

Intervention by other stockholders in stockholder's derivative action, 69 A.L.R.2d 562.

Slander action, 70 A.L.R.2d 1340.

Contribution or indemnity claim arising from payment of judgment as claim in motor vehicle accident case, 84 A.L.R.2d 994.

Executor: place of personal representative's appointment as venue of action against him in his official capacity, 93 A.L.R.2d 1199.

Real estate: venue of damage action for breach of real estate sales contract, 8 A.L.R.3d 489.

Venue of civil libel action against newspaper or periodical, 15 A.L.R.3d 1249.

Venue in action for malicious prosecution, 12 A.L.R.4th 1278.

Validity of contractual provision limiting place or court in which action may be brought, 31 A.L.R.4th 404.

Place where claim or cause of action "arose" under state venue statute, 53 A.L.R.4th 1104.

Place where corporation is doing business for purposes of state venue statute, 42 A.L.R.5th 221.

Venue of wrongful death action, 58 A.L.R.5th 535.

Construction and application of venue provisions of Miller Act (40 USCS § 270b (b)), 140 A.L.R. Fed. 615.

92 C.J.S. Venue § 5.

## 38-3-1.1. Jurisdiction of district courts.

All district courts have jurisdiction to review the action of any executive branch, agency or department in those cases in which a statute provides for judicial review.

**History:** Laws 1988, ch. 8, § 2.

## 38-3-2. [Actions against municipality or board of county commissioners.]

All civil actions not otherwise required by law to be brought in the district court of Santa Fe county, wherein any municipality or board of county commissioners is a party defendant, shall be instituted only in the district court of the county in which such municipality is located, or for which such board of county commissioners is acting.

**History:** Laws 1939, ch. 85, § 1; 1941 Comp., § 19-502; 1953 Comp., § 21-5-2.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Section is one fixing venue and not jurisdiction.** State ex rel. Bd. of Cnty. Comm'rs v. Bd. of Cnty. Comm'rs, 59 N.M. 9, 277 P.2d 960 (1954).

**Declaratory action by city against village to determine authority over subdivision, platting and zoning of certain lands.** — Venue in a declaratory suit by the city of Albuquerque against the village of Corrales and its mayor, to secure a determination of the city's authority over the subdivision, platting and zoning of lands lying within Bernalillo county within five miles of the city's boundary should have been laid in adjoining Sandoval county, where Corrales maintained all of its municipal offices and wherein all the territory it encompassed lay, except for lands which it had purportedly annexed, in Bernalillo county; the subdivision, platting and zoning authority of Albuquerque over the land in question was not an interest in land within the contemplation of Subsection D(1) of 38-3-1 NMSA 1978 and the applicable venue statute was this section. City of Albuquerque v. Village of Corrales, 88 N.M. 185, 539 P.2d 205 (1975).

**Applicability to federal claims.** — The venue provisions of this section applied to federal civil rights claims against board of county commissioners. Williams v. Bd of

Cnty. Comm'rs, 1998-NMCA-090, 125 N.M. 445, 963 P.2d 522, cert. denied, 125 N.M. 654, 964 P.2d 818 (1998).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Public officers, proceedings against, 48 A.L.R.2d 423.

Change of venue as justified by fact that large number of inhabitants of local jurisdiction have interest adverse to party to state civil action, 10 A.L.R.4th 1046.

20 C.J.S. Counties § 260; 64 C.J.S. Municipal Corporations § 2203.

## 38-3-3. Change of venue in civil and criminal cases.

The venue in all civil and criminal cases shall be changed, upon motion, to another county free from exception:

A. whenever the judge is interested in the result of the case or is related to or has been counsel for any of the parties; or

B. when the party moving for a change files in the case an affidavit of himself, his agent or attorney, that he believes he cannot obtain a fair trial in the county in which the case is pending because:

(1) the adverse party has undue influence over the minds of the inhabitants of the county;

(2) the inhabitants of the county are prejudiced against the party;

(3) of public excitement or local prejudice in the county in regard to the case or the questions involved in the case, an impartial jury cannot be obtained in the county to try the case; or

(4) of any other cause stated in the affidavit.

**History:** Laws 1929, ch. 60, § 1; C.S. 1929, § 147-105; 1941 Comp., § 19-503; 1953 Comp., § 21-5-3; Laws 1965, ch. 187, § 1; 2003, ch. 52, § 1.

**ANNOTATIONS**

**Cross references.** — For requirement of evidence in support of motion for change of venue, *see* 38-3-5 NMSA 1978.

For locations to which cases removed, *see* 38-3-7 NMSA 1978.

For changes of judges, *see* 38-3-9 and 38-3-10 NMSA 1978.

For costs of changes of venue, *see* 38-3-11 NMSA 1978.

For disqualification of judges, *see* N.M. Const., art. VI, § 18.

**The 2003 amendment,** effective March 19, 2003, deleted former designation A and redesignated former A(1), A(2), A(2)(a) to A(2)(d) as designations A, B, B(1) to B(4) respectively; substituted "another country" for "some country" in the introductory paragraph; in Paragraph B(3) deleted "because" at the beginning; substituted "in the case" for "therein" in present Paragraph B(3); deleted former Subsection B which provided that any party in any civil or criminal case who objects to a change of venue shall move for a change of venue on or before the first day of any regular or special term of court; and deleted Subsection C which read: "If the motion for change of venue is filed in vacation, five days' notice of the time and place of presenting the motion must be given to the opposite party or his attorney".

**Necessity of proving that no fair trial can be had.** — A court which renders the initial decree in child custody and visitation proceedings is the proper venue for subsequent modifications over other district courts of this state. A change of venue for "other cause" under Section 38-3-3A(2)(d) NMSA 1978 (now 38-3-3B(4) NMSA 1978) requires that the movant show that the movant cannot get a fair trial without a change of venue. Dugie v. Cameron, 1999-NMSC-002, 126 N.M. 433, 971 P.2d 390.

**Voir dire answers.** — Answers of prospective jurors to questions on voir dire was evidence to be considered in deciding the venue motions. The evidence of the answers moved the venue question out of the mandatory provisions of Section 38-3-3A NMSA 1978, and into the discretionary provisions of Section38-3-5, NMSA 1978. State v. Montano, 93 N.M. 436, 601 P.2d 69 (Ct. App. 1979).

**The legislature intended Section 38-3-3A NMSA 1978 to apply to the single-judge districts** of the territorial courts and early statehood and is now without force or effect. Cook v. Anding, 2008-NMSC-035, 144 N.M. 400, 188 P.3d 1151.

**Power of trial court to order change of venue upon own motion.** — A trial court, in a proper case and in the exercise of its discretion, has the power to order a change of venue sua sponte. This power existed at common law and the common law is the rule of practice and decision in New Mexico. Valdez v. State, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

**Change of venue may be based on presumed prejudice or on actual prejudice.** — The trial court may change venue based on presumed prejudice or on actual prejudice; presumed prejudice arises when the evidence shows that the community is so saturated with inflammatory publicity about the crime that it must be presumed that the trial proceedings are tainted; actual prejudice requires a direct investigation into the attitudes of potential jurors during voir dire to establish whether there is such widespread and fixed prejudice within the jury pool that a fair trial in that venue would be impossible. State v Astorga, 2015-NMSC-007.

Where district court found insufficient evidence of presumed prejudice and proceeded to voir dire, potential jurors filled out extensive questionnaires, and over the course of voir dire, each potential juror was questioned regarding actual prejudice, jurors who could not be impartial were excused, and the jury that was finally impaneled was composed of jurors who affirmed their ability to remain impartial, defendant's right to a fair and impartial jury was safeguarded, and the district court did not err in denying defendant's motion to change venue. State v Astorga, 2015-NMSC-007.

**Court not to change venue of misfiled suit.** — Absent a statute giving it such authority, a trial court has no power to change the venue of a misfiled lawsuit. Jones v. N.M. State Hwy. Dep't, 92 N.M. 671, 593 P.2d 1074 (1979).

The trial court may not transfer venue of a misfiled suit. Team Bank v. Meridian Oil, Inc., 118 N.M. 147, 879 P.2d 779 (1994).

**Change of venue over objection of defendant in criminal case.** — The venue of a criminal case may be changed on application of the state, even over the objection of the defendant, where public excitement and local prejudice would prevent a fair trial. State v. Archer, 32 N.M. 319, 255 P. 396 (1927)See also; State v. Holloway, 19 N.M. 528, 146 P. 1066 (1914)But see; State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (1972), aff'd, 86 N.M. 31, 519 P.2d 127 (1973), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

**Waiver of constitutional vicinage.** — Once defendant has successfully moved for a change of venue, he cannot subsequently claim a constitutional right to the original venue, as he has waived his right to trial in the county of constitutional vicinage. State v. House, 1999-NMSC-014, 127 N.M. 151, 978 P.2d 967.

**Requirements as to form and time for filing of motion for change of venue.** — See Valdez v. State, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972); State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 688 (1968); Askew v. Fort Sumner Irrigation Dist., 79 N.M. 671, 448 P.2d 183 (Ct. App. 1968); State v. Lindsey, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), and cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970); State v. Tapia, 81 N.M. 365, 467 P.2d 31 (Ct. App. 1970).

**Procedure required upon motion generally.** — When requisite motion to change venue is made, the venue must be changed or, in the alternative, the court may require evidence in its support; if a hearing is had thereon, it is the duty of the court to determine the question by its findings. State v. Fernandez, 56 N.M. 689, 248 P.2d 679 (1952).

The provisions of this section are mandatory when the prescribed steps have been taken, unless evidence is called for. The mandatory provisions become discretionary

once additional evidence is requested. State v. Turner, 90 N.M. 79, 559 P.2d 1206 (Ct. App. 1976), cert. denied, 90 N.M. 9, 558 P.2d 621 (1977) See also 38-3-5 NMSA 1978.

**Procedure when motion based upon ground of interest of judge.** — This section and 38-3-5 NMSA 1978 do not require any evidence in support of the motion for change of venue when based upon the interest of the judge, and dispense with any findings by the judge upon that question. State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933)See also 38-3-9 and 38-3-10 NMSA 1978.

**Motion for venue change by prosecution.** — Trial court did not abuse its discretion in holding, following two highly publicized trials in Taos County, both of which ended in hung juries, that the prosecution was unable to obtain a fair trial in that county and that therefore the trial could be relocated. State v. House, 1999-NMSC-014, 127 N.M. 151, 978 P.2d 967.

**Responsive pleading to motion not required.** — In the absence of statutory requirement no answer or other pleading is required to a motion for change of venue.aff'd sub nom. State v. Montoya, 80 N.M. 64, 451 P.2d 557 (Ct. App. 1968); aff'd sub nom. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969).

There is no statutory requirement for filing of a responsive pleading to a motion for change of venue, and the state's failure to controvert the motion cannot be made the basis for concluding that movant is entitled to a change of venue as a matter of law.aff'd sub nom. State v. Montoya, 80 N.M. 64, 451 P.2d 557 (Ct. App. 1968); Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969).

**Burden of proof when a motion and affidavit are submitted for a change of venue** remains on the moving party and, when evidence is produced, that evidence must be persuasive of the probability that a fair trial cannot be obtained in the county where the cause is pending. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969).

The mere fact no counter-evidence was presented by the state in response to motion for change of venue furnished no basis for a holding that movant was entitled to a change of venue as a matter of law since the burden of proof on the removal motion was on movant. State v. Montoya, 80 N.M. 64, 451 P.2d 557 (Ct. App. 1968), aff'd sub nom. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1977);.

**Exposure of venire members to publicity** about a case by itself does not establish prejudice or create a presumption of prejudice. State v. Chamberlain, 112 N.M. 723, 819 P.2d 673 (1991).

**Potential venue problem cured by instruction.** — Trial court did not abuse its discretion in holding trial in courtroom of building where crime scene was located; any possible prejudice to defendant was cured by instructions to jury that they were not to visit the crime scene on their own. State v. Hernandez, 1998-NMCA-167, 126 N.M. 377, 970 P.2d 149, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

**Sufficiency of showing of grounds for change of venue.** — This section does not mean that it must be conclusively shown that it is impossible to have a fair trial in the county where the venue is laid, but it is sufficient to show a reasonable apprehension that the defendant will not secure a fair trial or that the jury is under an influence inimical to the accused. State v. Alaniz, 55 N.M. 312, 232 P.2d 982 (1951); McCauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968).

**Media publicity.** — Numerous newspaper articles and radio and television stories wherein an accused was mentioned, without more, did not necessarily establish prejudice or such public excitement as would make a fair trial impossible, and a change of venue necessary. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969).

**Evidentiary hearing on motion permitted.** — In a case in which there has been no preceding changes of venue, the right to a venue change is generally mandatory and must be granted; however, if the trial court determines that evidence in support of the motion is required, it may hold an evidentiary hearing. State v. Mantelli, 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842 (2002).

**Failure to request specific findings upon motion precludes appellate review.** — Though a defendant moves for change of venue in murder trial, if he does not request specific findings with reference thereto from the trial court, denial of the motion is not open for appellate review. State v. Fernandez, 56 N.M. 689, 248 P.2d 679 (1952).

**Standard of appellate review.** — An order of a district court denying a motion for a change of venue will not be reversed by the supreme court unless the record shows an abuse of discretion. State v. Ancheta, 20 N.M. 19, 145 P. 1086 (1915); Territory v. Cheney, 16 N.M. 476, 120 P. 335 (1911).

Findings made on a motion to change venue will not be disturbed upon review unless it appears from the evidence that the trial court acted unfairly and committed palpable abuse of discretion. State v. Fernandez, 56 N.M. 689, 248 P.2d 679 (1952).

An appellate court will reverse a trial court's denial of a motion for change of venue only when it is shown that the trial court acted unfairly or committed a palpable abuse of discretion. McCauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968).

The determination, as to whether a change of venue should be granted after a hearing on a motion rests in the sound discretion of the trial court, and this determination will not be disturbed on appeal absent a showing of abuse of this discretion and the burden of showing such an abuse rests on the movant. State v. Rushing, 85 N.M. 540, 514 P.2d 297 (1973).

The trial court possesses broad discretion in ruling on motions to change venue, and the supreme court will not disturb its decision absent a showing of an abuse of that discretion. State v. Chamberlain, 112 N.M. 723, 819 P.2d 673 (1991).

**Burden of showing abuse of discretion.** — The burden to show an abuse of discretion in the case of a ruling on a motion for change of venue lies with the movant. State v. Chamberlain, 112 N.M. 723, 819 P.2d 673 (1991).

**Motion properly denied.** — Where defendant drove a pickup toward a group of trick-or-treaters on Halloween; the chaperone pushed the children out of the way but was struck and killed; defendant then left the scene of the accident; because of the local media coverage, defendant moved for a change of venue; the district court denied the motion, called two jury panels for selection and conducted voir dire; the court asked pointed questions to potential jurors who had heard of the case, including questions that asked those jurors to assess the impact of the publicity on their ability to be fair, whether they could evaluate the evidence without reference to information external to the court proceeding, and whether they had come to any conclusions about who was responsible for the accident; defendant had an opportunity to question jurors; and defendant did not point to any actual prejudice on the part of any juror, the court did not abuse its discretion in refusing to change the venue. State v. Melendrez, 2014-NMCA-062, cert. denied, 2014-NMCERT-006.

Where the child, who was charged with murder, asked for a change of venue on the grounds that pre-trial publicity and public excitement surrounding the case would make it impossible for the child to obtain a fair trial by an impartial jury; the pre-trial publicity occurred when the child escaped from detention; no publicity occurred after the child was recaptured; substantial time elapsed between the publicity and the trial; the publicity consisted of newspaper articles and editorials, online forum postings, and a program on the television show "America's Most Wanted"; and voir dire by the trial court and defense counsel did not reveal any prejudice of the jury panel from the pre-trial publicity, the trial court did not abuse its discretion in denying the motion to change venue. State v. Gutierrez, 2011-NMSC-024, 150 N.M. 232, 258 P.3d 1024.

The trial court did not abuse its discretion by denying defendant's change of venue motion where substantial evidence supported the court's determination that there was no evidence of actual prejudice among the members of the jury. State v. Barrera, 2001-NMSC-014, 130 N.M. 227, 22 P.3d 1177.

Trial court did not abuse its discretion in denying oral request for change of venue where defendant presented no evidence indicating that she was deprived of a fair and impartial jury. State v. Wynne, 108 N.M. 134, 767 P.2d 373 (Ct. App. 1988).

**Denial of motion held error.** — Where defendant filed a proper motion for change of venue showing circumstances whereunder he could not obtain fair trial, such charges not being controverted, trial court committed prejudicial error in not sustaining his motion for it. State v. Alaniz, 55 N.M. 312, 232 P.2d 982 (1951).

**Law reviews.** — For article, "Survey of New Mexico Law, 1982-83: Civil Procedure," see 14 N.M.L. Rev. 17 (1984).

For annual survey of New Mexico law of civil procedure, 19 N.M.L. Rev. 627 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 77 Am. Jur. 2d Venue § 48.

Contempt in violating injunction in industrial dispute, statute as to right of one charged with, to change of venue, 35 A.L.R. 462, 97 A.L.R. 1333, 106 A.L.R. 361, 120 A.L.R. 316, 124 A.L.R. 751, 127 A.L.R. 868.

Corporations, prejudice against officer, stockholder, or employee, as ground for change of venue on application of corporation, 63 A.L.R. 1015.

Lis pendens as affected by change of venue, 71 A.L.R. 1094.

Civil action or civil proceeding, what is, within statute relating to change of venue, 102 A.L.R. 397.

Statute affecting number of changes of venue, 104 A.L.R. 1494.

Appearance to apply for change of venue as submission to jurisdiction of court, 111 A.L.R. 934.

Delay in proceeding to trial, proceedings for change of venue as affecting applicability of statutory requirement or rule of court that action be brought to trial within specified time, 112 A.L.R. 1173.

Power of guardian ad litem or next friend to apply for change of venue, 115 A.L.R. 574.

Nonsuit, dismissal or discontinuance of action, effect on previous orders, 11 A.L.R.2d 1407.

Construction of effect of statutes providing for venue of criminal case in either county, where crime is committed partly in one county and partly in another, 30 A.L.R.2d 1265, 73 A.L.R.3d 907, 100 A.L.R.3d 1174, 11 A.L.R.4th 704.

District and prosecuting attorneys: power or duty of prosecuting attorney to proceed with prosecution after change of venue, 60 A.L.R.2d 864.

Witnesses: construction and effect of statutory provision for change of venue for the promotion of the convenience of witnesses and the ends of justice, 74 A.L.R.2d 16.

Binding effect of order on motion for change of venue, where action is terminated otherwise than on merits and reinstituted, 85 A.L.R.2d 993.

Prohibition as appropriate remedy to review ruling on change of venue in civil case, 93 A.L.R.2d 802.

Inclusion or exclusion of first and last days in computing the time for performance of an act or event which must take place a certain number of days before a known future date, 98 A.L.R.2d 1331.

Fair trial: right of accused in misdemeanor prosecution to change of venue on grounds of inability to secure fair trial and the like, 34 A.L.R.3d 804.

State's right to change of venue in criminal case, 46 A.L.R.3d 295.

Choice of venue to which transfer is to be had, where change is sought because of local prejudice, 50 A.L.R.3d 760.

Adequacy of defense counsel's representation of criminal client regarding venue and recusation matters, 7 A.L.R.4th 942.

Change of venue as justified by fact that large number of inhabitants of local jurisdiction have interest adverse to party to state civil action, 10 A.L.R.4th 1046.

Power of state trial court in criminal case to change venue on its own motion, 74 A.L.R.4th 1023.

Forum non conveniens in products liability cases, 76 A.L.R.4th 22.

What constitutes "initial pleading" for purposes of computing time for removal of civil action from state to federal court under 28 USCS § 1446(b), 130 A.L.R. Fed. 581.

92 C.J.S. Venue § 128.

## 38-3-4. Change of venue by stipulation of parties.

In addition to the provisions for change of venue in Section 38-3-3 NMSA 1978, a change of venue from one county to another within the same judicial district may be ordered by a district judge in any civil or criminal proceeding in a district court if both parties stipulate in writing to that change.

**History:** 1953 Comp., § 21-5-3.1, enacted by Laws 1961, ch. 129, § 1.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 77 Am. Jur. 2d Venue § 52.

92 C.J.S. Venue § 137.

## 38-3-5. [Evidence in support of application; findings; decision.]

Upon the filing of a motion for change of venue, the court may require evidence in support thereof, and upon hearing thereon shall make findings and either grant or overrule said motion.

**History:** Laws 1929, ch. 60, § 2; C.S. 1929, § 147-106; 1941 Comp., § 19-504; 1953 Comp., § 21-5-4.

## ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For motion for change of venue generally, *see* 38-3-3 NMSA 1978.

**Decision is discretionary.** — Trial court's decision on a motion for change of venue is discretionary and is reviewed only for an abuse of discretion. Lopez v. Truckstops Corp. of Am., 105 N.M. 782, 737 P.2d 894 (Ct. App.), cert. denied, 105 N.M. 720, 737 P.2d 79 (1987).

**Procedure required upon motion generally.** — When requisite motion to change venue is made, the venue must be changed or in the alternative, the court may require evidence in its support; and if a hearing is had thereon it is the duty of the court to determine the question by its findings. State v. Fernandez, 56 N.M. 689, 248 P.2d 679 (1952)See also; State v. Turner, 90 N.M. 79, 559 P.2d 1206 (Ct. App. 1976), cert. denied, 90 N.M. 9, 558 P.2d 621 (1977).

**Procedure when motion based upon ground of interest of judge.** — Section 38-3-3 NMSA 1978 and this section do not require any evidence in support of the motion for change of venue when based upon the interest of the judge, and dispense with any findings by the judge upon that question. State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933)See also 38-3-9 and 38-3-10 NMSA 1978.

**Necessity for hearing upon motion.** — In view of this statutory right, a denial of a change of venue without hearing movant's tendered proof is reversible error. Schultz v. Young, 37 N.M. 427, 24 P.2d 276 (1933).

Where motion for a change of venue was timely filed in the form and substance required by 38-3-3 NMSA 1978, the trial court could require a hearing thereon, and where no hearing was held, denial of the motion was reversible error. State v. Childers, 78 N.M. 355, 431 P.2d 497 (Ct. App. 1967).

**Burden of proof when a motion and affidavit are submitted for a change of venue** remains on the moving party and, when evidence is produced, that evidence must be persuasive of the probability that a fair trial cannot be obtained in the county where the cause is pending. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969).

The mere fact no counter-evidence was presented by the state in response to motion for change of venue furnished no basis for a holding that movant was entitled to a change of venue as a matter of law since the burden of proof on the removal motion was on movant. State v. Montoya, 80 N.M. 64, 451 P.2d 557 (Ct. App. 1968); aff'd sub nom. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1977).

The burden of showing that the trial court abused its discretion in denying the motion for a change of venue is on the movant. Lopez v. Truckstops Corp. of Am., 105 N.M. 782, 737 P.2d 894 (Ct. App.), cert. denied, 105 N.M. 720, 737 P.2d 79 (1987).

**Process of determining whether or not the facts necessary for a change of venue exist** is the same as that followed in determining any other fact in a case. McCauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968).

It is for the trial court to determine, on the basis of substantial evidence, whether there is a reasonable apprehension that a fair trial cannot be obtained. McCauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968).

**Section requires the court to make findings of fact if there has been a hearing on a motion,** but where there was no hearing on the motion, and the court ruled summarily, the court was not so required. State v. Shawan, 77 N.M. 354, 423 P.2d 39 (1967).

When evidence is required by the trial court in support of the motion for a change of venue, the court must make findings and decide the issue. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969).

**Failure to request specific findings upon motion precludes appellate review. —** Though a defendant moves for change of venue in murder trial, if he does not request specific findings with reference thereto from the trial court, denial of the motion is not open for appellate review. State v. Fernandez, 56 N.M. 689, 248 P.2d 679 (1952).

Unless specific findings are requested, the absence of findings is waived. State v. Mosier, 83 N.M. 213, 490 P.2d 471 (Ct. App. 1971).

**Findings made on a motion to change venue will not be disturbed upon review** unless it appears from the evidence that the trial court acted unfairly and committed palpable abuse of discretion. State v. Fernandez, 56 N.M. 689, 248 P.2d 679 (1952).

A motion for change of venue which is disposed of after a hearing and upon stated findings will not be disturbed on appeal unless a clear abuse of the trial court's discretion can be shown. State v. Evans, 85 N.M. 47, 508 P.2d 1344 (Ct. App. 1973).

**Denial of change of venue held not error. —** The trial court did not abuse its discretion in denying a change of venue where substantial evidence existed for finding that residents of the county where the venue was had were not prejudiced against

defendant and where no reasons were shown why defendant would not receive a fair and impartial trial in that county. State v. Jones, 52 N.M. 118, 192 P.2d 559 (1948).

Numerous newspaper articles and radio and television stories wherein an accused was mentioned, without more, did not necessarily establish prejudice or such public excitement as would make a fair trial impossible, and a change of venue necessary. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Adequacy of defense counsel's representation of criminal client regarding venue and recusation matters, 7 A.L.R.4th 942.

Change of venue as justified by fact that large number of inhabitants of local jurisdiction have interest adverse to party to state civil action, 10 A.L.R.4th 1046.

## 38-3-6. [Second change of venue not matter of right.]

A second change of venue shall not be allowed in any civil or criminal case, as a matter of right, but shall be within the discretion of the court.

**History:** Laws 1880, ch. 6, § 10; C.L. 1884, § 1834; C.L. 1897, § 2880; Code 1915, § 5572; C.S. 1929, § 147-107; 1941 Comp., § 19-505; 1953 Comp., § 21-5-5.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Standard of proof.** — The parameters found in Section 38-3-3A(2) NMSA 1978 which indicate that a fair trial cannot be had, that apply to a first change of venue apply to a second change of venue. The trial court should apply a reasonable probability standard of proof when balancing conflicting claims regarding the likelihood of a fair trial in a particular venue. Proof of actual prejudice is not required. State v. House, 1999-NMSC-014, 127 N.M. 151, 978 P.2d 967, cert. denied, 528 U.S. 894, 120 S.Ct. 222, 145 L.Ed. 2d 186 (1999).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 77 Am. Jur. 2d Venue § 50.

Adequacy of defense counsel's representation of criminal client regarding venue and recusation matters, 7 A.L.R.4th 942.

92 C.J.S. Venue §§ 136, 211.

## 38-3-7. County to which case may be removed.

In all cases where a change of venue is granted, the case shall be removed to another county within the same judicial district unless the remaining counties are subject to exception, or unless the change of venue is ordered upon any of the grounds relating to the judge. Under these circumstances, the case shall be removed to some county of the nearest judicial district which is free from exception.

**History:** Laws 1889, ch. 77, § 3; C.L. 1897, § 2883; Code 1915, § 5575; C.S. 1929, § 147-108; 1941 Comp., § 19-506; 1953 Comp., § 21-5-6; Laws 1965, ch. 187, § 2.

## ANNOTATIONS

**Compiler's notes.** — When this section was enacted in 1889, it contained in the first sentence following "judicial district" the words "or to the district court of such judicial district sitting for the trial of cases arising under the constitution and laws of the United States, which court is hereby given jurisdiction to try and determine all cases so removed." In Lincoln-Lucky & Lee Mining Co. v. District Court, 7 N.M. 486, 38 P. 580 (1894), the territorial supreme court held this section "null and void insofar as it attempts to confer an abstract power upon a court which had been deprived by absolute legal statutory enactment as well as by necessary implication and operation of law, of jurisdiction in territorial causes." The basis was that under U.S. Rev. jurisdictions could be divided and by Laws 1889, ch. 6, they were divided, and only congress could restore the prior status to the court which it had created, and in addition that the section depended upon the Jury Act of 1889 (ch. 96) which had been held in conflict with the Springer Act and "fell with it." The section was included in its original form as Comp. Laws 1897, § 2883 and was not corrected until compiled in the Code of 1915.

**Cross references.** — For objection by parties to change of venue generally, *see* 38-3-3 NMSA 1978.

**County within the same judicial district was not subject to exception.** — Where defendant was charged with first-degree murder for a murder that occurred in Curry county, defendant sought a change of venue to a county outside the ninth judicial district, and defendant failed to adduce any evidence in support of defendant’s claim that defendant could not obtain a fair trial in Roosevelt county which was within the ninth judicial district, failed to file any affidavits, failed to admit any media articles, and failed to submit any juror questionnaires exhibiting bias or prejudice, the evidence was insufficient to establish that Roosevelt county was subject to exception and the trial court properly ordered that venue be removed to Roosevelt county. State v. Salas, 2010-NMSC-028, 148 N.M. 313, 236 P.3d 32.

**When the venue in a criminal case is changed at the instance of the accused,** he will not be heard to question its regularity after selecting for himself the place of trial. State v. Balles, 24 N.M. 16, 172 P. 196 (1918).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 77 Am. Jur. 2d Venue §§ 88, 89.

92 C.J.S. Venue § 197.

## 38-3-8. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 2003, ch. 52, § 2 repealed 38-3-8 NMSA 1978, as enacted by Laws 1889, ch. 77, § 4, relating to change after first term, effective March 19, 2003. For provisions of former section, *see* the 2002 NMSA 1978 on *NMONESOURCE.COM*.

## 38-3-9. Peremptory challenge to a district judge.

A party to an action or proceeding, civil or criminal, including proceedings for indirect criminal contempt arising out of oral or written publications, except actions or proceedings for constructive and other indirect contempt or direct contempt shall have the right to exercise a peremptory challenge to the district judge before whom the action or proceeding is to be tried and heard, whether he be the resident district judge or a district judge designated by the resident district judge, except by consent of the parties or their counsel. After the exercise of a peremptory challenge, that district judge shall proceed no further. Each party to an action or proceeding may excuse only one district judge pursuant to the provisions of this statute. In all actions brought under the Workmen's Compensation Act (52-1-1 to 52-1-69 NMSA 1978) [Workers' Compensation Act (Chapter 52, Article 1 NMSA 1978)], the employer and the insurance carrier of the employer shall be treated as one party when exercising a peremptory challenge to the judge under this statute. The rights created by this section are in addition to any arising under Article 6 of the constitution of New Mexico.

**History:** 1978 Comp., § 38-3-9, enacted by Laws 1985, ch. 91, § 1.

**ANNOTATIONS**

**Repeals and reenactments.** — Laws 1985, ch. 91, § 1 repealed former 38-3-9 NMSA 1978, as amended by Laws 1977, ch. 228, § 1, and enacted a new section.

**Cross references.** — For motion for change of venue upon ground of interest or relationship with party of judge, *see* 38-3-3 NMSA 1978.

For disqualification of judges, *see* N.M. Const., art. VI, § 18.

For disqualification of probate judges, *see* 34-7-9 NMSA 1978.

**Authority to review timeliness and correctness of a peremptory challenge.** — A district court judge has the authority to decide whether a peremptory challenge filed against the judge is both timely and correct. The authority of the district judge necessarily entails an examination of whether the party seeking to exercise the peremptory challenge is entitled to do so at the time the challenge is made and whether

the party has a sufficient diversity of interest from that of other parties to entitle the party to exercise an independent right of excusal without cause. Quality Automotive Ctr. LLC v. Arrieta, 2013-NMSC-041.

Where respondents' original complaint for wrongful death named Quality Tire & Service as defendant; counsel for Quality Tire & Service filed a motion to dismiss on the grounds that Quality Tire & Service did not exist because the owners had sold the business prior to the accident to Oscar Chavez, who operated a business known as "Quality Automotive Center", and who formed "Quality Automotive Center, LLC" after plaintiffs filed the complaint; the motion to dismiss contained defense counsel's representation of the original owners and Oscar Chavez; plaintiffs filed an amended complaint that named Oscar Chaves and Quality Automotive Center, LLC as defendants; defense counsel entered an appearance on behalf of defendants and filed a notice of peremptory excusal and a motion to dismiss on behalf of Quality Automotive Center, LLC; and the motion to dismiss indicated that Oscar Chavez was the sole organizer and manager of Quality Automotive Center, LLC, the district court had authority to review the peremptory excusal and to determine whether Quality Automotive Center, LLC and Oscar Chaves had a sufficient diversity of interest to entitle Quality Automotive Center, LLC to exercise a separate peremptory challenge. Quality Automotive Ctr. LLC v. Arrieta, 2013-NMSC-041.

**Constitutionality of section.** — This section does not violate any of the following articles and sections of the constitution: N.M. const., art. II, § 18; art. III; art. IV, § 34; art. VI, § 18. State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

**Section provides a procedural method of disqualification,** therefore the supreme court can modify it by rule. State ex rel. Gesswein v. Galvan, 100 N.M. 769, 676 P.2d 1334 (1984).

**Section not exclusive disqualification method.** — The right of disqualification provided by this section is not the exclusive method of disqualification. United Nuclear Corp. v. Gen. Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

**This section does not apply in direct contempt cases.** State v. Pothier, 104 N.M. 363, 721 P.2d 1294 (1986).

**Section clearly gives to "a party" - that is to each party - the right to disqualify** the judge before whom the action or proceeding is to be tried and heard. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

**The state is a "party" to a criminal case** and entitled to file an affidavit of disqualification of a district judge. State ex rel. Tittman v. Hay, 40 N.M. 370, 60 P.2d 353 (1936).

**One who had petitioned to intervene was not a party** to an action within the meaning of this section, where order allowing intervention had not been made. State ex rel. Lebeck v. Chavez, 45 N.M. 161, 113 P.2d 179 (1941).

**Intervenor.** — While a wife of property owner was permitted to intervene in condemnation proceeding, she was not a party in the sense of one entitled to disqualify a trial judge, regardless of whether she must by statute be brought into the suit as a party. Harms v. Coors, 50 N.M. 12, 167 P.2d 353 (1946).

**Where claim is prosecuted under Workmen's [Workers'] Compensation Act, the action taken is a "proceeding"** within the terms of this section. State ex rel. Pac. Emp'rs Ins. Co. v. Arledge, 54 N.M. 267, 221 P.2d 562 (1950).

**Section exclusive method for disqualification of judge by party.** — This section only addresses itself to the issue of a party disqualifying a judge and it appears to be the exclusive method by which a party may disqualify the presiding judge. Doe v. State, 91 N.M. 51, 570 P.2d 589 (1977).

**Section authorizes the disqualification of only one judge by a party.** Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969).

**Disqualified judge is the one before whom the case is to be tried.** Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974); Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969).

**Peremptory challenge in second case where first indictment dismissed nolle prosequi.** — Defendant's peremptory challenge was timely since the defendant filed it within ten days after a second indictment was brought against him subsequent to the dismissal of the first indictment based on nolle prosequi. The defendant's right to disqualify the judge attached upon the filing of the second indictment because nolle prosequi ended the prior criminal proceeding. State v. Ware, 115 N.M. 339, 850 P.2d 1042 (Ct. App.), cert. denied, 115 N.M. 228, 849 P.2d 371 (1993).

**Disqualification barred after party invokes court's discretion.** — A judge may not be statutorily disqualified under this section after a party has invoked the discretion of the court. Smith v. Martinez, 96 N.M. 440, 631 P.2d 1308 (1981); State v. Mantelli, 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842 (2002).

The determinative issue is whether a party has invoked the judicial discretion of the court; if so, that party may not excuse the judge. JMB Retail Properties Co. v. Eastburn, 114 N.M. 115, 835 P.2d 831 (1992).

**Test for determining if discretion involved.** — The rule that a judge may not be peremptorily challenged after a party has invoked the discretion of the court depends, not upon whether the court in fact exercised discretion, but upon whether the response

of the court was subject to discretion. JMB Retail Properties Co. v. Eastburn, 114 N.M. 115, 835 P.2d 831 (1992).

**What constitutes discretionary act.** — An extension of time to answer or otherwise plead is a discretionary act, even if in response to the agreed motion or stipulation of the parties, and, therefore, disqualification of a judge who had granted such a motion was not allowed. JMB Retail Properties Co. v. Eastburn, 114 N.M. 115, 835 P.2d 831 (1992).

**Section applicable to juvenile court judges.** — See Frazier v. Stanley, 83 N.M. 719, 497 P.2d 230 (1972); Smith v. Martinez, 96 N.M. 440, 631 P.2d 1308 (1981).

**Section not applicable to small claims court judges.** Stein v. Speer, 85 N.M. 418, 512 P.2d 1254 (1973).

**Section not applicable to probate judges.** Estate of Tarlton, 84 N.M. 95, 500 P.2d 180 (1972).

**Language of section is absolute and mandatory.** — No discretion is vested in the judge against whom the affidavit is filed as to his disqualification, if the application is timely made. State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

**Disqualification privilege limited to resident judges or appointees.** — The disqualification privilege of this section is limited to resident judges or those appointed by resident judges. Vigil v. Reese, 96 N.M. 728, 634 P.2d 1280 (1981).

**Disqualification affidavit to trial judge.** — An affidavit of disqualification must be directed only to the judge before whom the case is to be tried on the merits. Demers v. Gerety, 92 N.M. 749, 595 P.2d 387 (Ct. App.), aff'd in part, rev'd on other grounds, 92 N.M. 396, 589 P.2d 180 (1978).

**Judge removing himself from case.** — When a judge believes he will not be able to remain impartial, he should use his discretion and remove himself from the case in order to avoid any hint of impropriety. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978).

**Parties have no statutory right to disqualify judge designated by the chief justice.** State v. Ericksen, 94 N.M. 128, 607 P.2d 666 (Ct. App. 1980); Vigil v. Reese, 96 N.M. 728, 634 P.2d 1280 (1981).

**Designated replacement judge subject to disqualification.** — If the resident judge for any reason is unable to be present to try and hear the case, or decides not to try and hear the case, and another judge is designated, the judge designated is subject to disqualification. Martinez v. Carmona, 95 N.M. 545, 624 P.2d 54 (Ct. App. 1980), cert. quashed, 95 N.M. 593, 624 P.2d 535 (1981).

**Disqualification of presiding district judge is accomplished when affidavit provided for in this section is timely made.** State ex rel. Weltmer v. Taylor, 42 N.M. 405, 79 P.2d 937 (1938).

**Affidavit of prejudice.** — The filing of the affidavit of prejudice, after the case is at issue, in the manner and form prescribed by this section and 38-3-10 NMSA 1978, ipso facto divests the judge of all further jurisdiction in the case, and his subsequent proceedings are without jurisdiction and null and void. Rivera v. Hutchings, 59 N.M. 337, 284 P.2d 222 (1955).

In an action for which a judge may be disqualified by the timely filing of statutory affidavit, the judge is ipso facto divested of all further jurisdiction in the case, and his subsequent proceedings are without jurisdiction and null and void. Norton v. Reese, 76 N.M. 602, 417 P.2d 205 (1966).

**Disqualification may be waived.** — Where the judge is disqualified effective when the affidavit is filed, thereafter he has no jurisdiction to act in the case, but such disqualification may be waived. State v. Latham, 83 N.M. 530, 494 P.2d 192 (Ct. App. 1972).

Disqualification for prejudice may be waived, and it is waived by implication as well as by specific acts of the party having a right to rely thereupon. State ex rel. Lebeck v. Chavez, 45 N.M. 161, 113 P.2d 179 (1941).

Disqualification of trial judge may be waived both expressly and by implication, and where defendant on trial for murder, after having filed affidavit of disqualification, appeared voluntarily asking the judge to accept a plea of guilty of second degree murder, the disqualification was waived. State v. Garcia, 47 N.M. 319, 142 P.2d 552 (1943).

Where the judge, after striking the affidavit of disqualification, set the case for trial, defendant made no effort to prohibit the judge from trying the case, defendant appeared on set date and requested a continuance and this continuance was granted, the judge's prior disqualification was effectively waived. State v. Latham, 83 N.M. 530, 494 P.2d 192 (Ct. App. 1972).

After submitting to a judge the sufficiency of a petition for recount of votes, the question of the disqualification of the judge could not thereafter be raised. State ex rel. Gandert v. Armijo, 41 N.M. 38, 63 P.2d 1037 (1936).

One seeking the disqualification of a judge in adoption proceedings who had invoked the ruling of the court on a controverted question was denied the right to have the cause further heard by another judge. Hill v. Patton, 43 N.M. 21, 85 P.2d 75 (1938).

In condemnation proceedings, the submission of exceptions to the commissioner's report for a ruling thereon by district judge waived exceptor's statutory right to disqualify

the district judge in that case. State ex rel. Weltmer v. Taylor, 42 N.M. 405, 79 P.2d 937 (1938).

Disqualification resulting from the filing of an affidavit of prejudice was waived where affidavit was withdrawn. State ex rel. Lebeck v. Chavez, 45 N.M. 161, 113 P.2d 179 (1941).

If a party requests ruling on a motion for change of venue, he thereby loses his right to disqualify the judge in view of this section. State v. Garcia, 47 N.M. 319, 142 P.2d 552 (1943).

**Judge may perform mere formal acts after disqualification.** — The mere signing, by disqualified judge, of certificate compelling attendance of a witness was a formal act and did not invoke a question of jurisdiction. A judge may properly perform mere formal acts after his disqualification. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

**Preliminary matters heard by disqualified judge.** — A judge has no jurisdiction to hear a petition for preliminary injunctive relief after having been disqualified. A proceeding for a preliminary injunction is not a "mere formal act" such as has been contemplated to fall within the "preliminary matter" language of Paragraph A of Rule 1.088.1. Borrego v. El Guique Community Ditch Ass'n, 107 N.M. 594, 762 P.2d 256 (1988)(decided under pre-1988 version of Rule 1-088.1)

**Consolidation order after timely disqualification invalid.** — Where affidavit of disqualification was timely filed, judge's subsequent consolidation order was without legal effect. Pueblo of Laguna v. Cillessen & Son, 101 N.M. 341, 682 P.2d 197 (1984).

**Right to disqualify a presiding district judge is based upon an assumed prejudice or bias** on his part, and not upon his views regarding the law of the case. State ex rel. Weltmer v. Taylor, 42 N.M. 405, 79 P.2d 937 (1938).

**Where it was shown that compensation for one of plaintiff's attorneys, who was the son of the presiding judge,** was on a contingent basis, the judge was disqualified. Tharp v. Massengill, 38 N.M. 58, 28 P.2d 502 (1933).

**Filing of provisional affidavit.** — Though parties may not know before which of two or more eligible judges a case will come on for trial, the party seeking disqualification of one honestly believed by him to be biased could make a provisional affidavit, reciting the facts and adding "that if the judge before whom the case is to be tried or heard should be judge _____, then according to affiant's belief such judge cannot preside over the same with impartiality, etc." Notargiacomo v. Hickman, 55 N.M. 465, 235 P.2d 531 (1951)See also; Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974).

**Execution of affidavit.** — The section is explicit; the affidavit must be executed by a party. It does not authorize an attorney to execute the affidavit as an attorney and such an affidavit will not be effective to disqualify a judge. Coca v. New Mexico Health &

Social Servs. Dep't, 89 N.M. 558, 555 P.2d 381 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

**A copy of the affidavit need not be served on opposing counsel nor must it be brought to the trial judge's attention** after it is filed in the office of the clerk of the district court. Rivera v. Hutchings, 59 N.M. 337, 284 P.2d 222 (1955)(decided under prior law, see now Rule 1-088 NMRA).

**Selection of judge pro tempore.** — When a judge has been disqualified upon an affidavit of prejudice, the parties may agree upon a member of the bar to act as judge pro tempore. Moruzzi v. Federal Life & Cas. Co., 42 N.M. 35, 75 P.2d 320 (1938)(decided under prior law, see now Rule 1-088 NMRA).

**Law reviews.** — For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

For annual survey of New Mexico criminal procedure, see 16 N.M.L. Rev. 25 (1986).

For note, "Determining When a Party Gives Up the Right to Disqualify a Judge by Invoking the Discretion of a Court: *JMB Retail Properties Co. v. Eastburn*," see 24 N.M.L. Rev. 399 (1994).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 46 Am. Jur. 2d Judges §§ 86 et seq., 98, 123, 137, 146, 149, 172, 175, 179.

Constitutionality of statute making mere filing an affidavit of bias or prejudice sufficient to disqualify judge, 5 A.L.R. 1275, 46 A.L.R. 1179.

Affidavit to disqualify judge as contempt, 29 A.L.R. 1273.

Residence or ownership of property in city or other political subdivision which is party to or interested in action as disqualifying judge, 33 A.L.R. 1322.

Right to change of judges on issues raised by petition for writ of error coram nobis, 161 A.L.R. 540.

Relationship of judge to one who is party in an official or representative capacity as disqualification, 10 A.L.R.2d 1307.

Mandamus as remedy to compel assertedly disqualified judge to recuse self or to certify his disqualification, 45 A.L.R.2d 937, 56 A.L.R. Fed. 494.

Relationship to attorney as disqualifying judge, 50 A.L.R.2d 143.

Public office: construction and effect or constitutional statutory provision disqualifying one for public office because of previous tenure of office, 59 A.L.R.2d 716.

Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member, 64 A.L.R.2d 600, 37 A.L.R.4th 1004.

Time for asserting disqualification, 73 A.L.R.2d 1238.

Intervener's right to disqualifying judge, 92 A.L.R.2d 1110.

Witness in the case, disqualification of judge on ground of being a witness, 22 A.L.R.3d 1198.

Bias against counsel for litigant, disqualification of judge for, 23 A.L.R.3d 1416.

Stock in corporation involved in litigation, disqualification of judge because of his or another's holding or owning, 25 A.L.R.3d 1331.

Bias or prejudice: disqualification of judge by state in criminal case for bias or prejudice, 68 A.L.R.3d 509.

Pecuniary interest in fine, penalty, or forfeiture imposed on defendant as disqualifying judge, 72 A.L.R.3d 375.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge, 75 A.L.R.3d 1021.

Adequacy of defense counsel's representation of criminal client regarding venue and recusation matters, 7 A.L.R.4th 942.

Disqualification of judge because of political association or relation to attorney in case, 65 A.L.R.4th 73.

Disqualification from criminal proceeding of trial judge who earlier presided over disposition of case of coparticipant, 72 A.L.R.4th 651.

Disqualification of judge for bias against counsel for litigant, 54 A.L.R.5th 575.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 A.L.R.5th 399.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case, 85 A.L.R.5th 471.

Disqualification of judge for having decided different case against litigant - state cases, 85 A.L.R.5th 547.

Laws governing judicial recusal or disqualification in state proceeding as violating federal or state constitution, 91 A.L.R.5th 437.

48A C.J.S. Judges § 161 et seq.

## 38-3-10. Time for filing affidavit of disqualification.

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

**History:** Laws 1933, ch. 184, § 2; 1941 Comp., § 19-509; 1953 Comp., § 21-5-9; Laws 1971, ch. 123, § 1; 1977, ch. 228, § 2.

**ANNOTATIONS**

**Notice of name of trial judge not essential to section.** — Notice to the parties of the name of a particular judge assigned to try the case is not an essential ingredient in the time period fixed by this section. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978).

**In a criminal case, a case is put at issue when a defendant answers by appearing at his arraignment.** State v. Padilla, 88 N.M. 160, 538 P.2d 802 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975); Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974).

**In a civil case, a case is at issue at that state of procedure when an answer is filed** which requires no further pleadings by the plaintiff. Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974).

For purpose of disqualification, a "case is at issue" at that stage of procedure when an answer is filed which requires no further pleadings by the plaintiff. Atol v. Schifani, 83 N.M. 316, 491 P.2d 533 (Ct. App. 1971).

**For trial de novo on appeal from decision of human rights commission, the cause is not at issue until the transcript** of the hearing below is filed in the district court. Linton v. Farmington Mun. Schs., 86 N.M. 748, 527 P.2d 789 (1974).

**Affidavit to disqualify a district judge must be filed before a party has called upon the court to act judicially** upon any material issue and before he has participated in any proceeding upon any such issue presented by the adverse party. State ex rel. Lebeck v. Chavez, 45 N.M. 161, 113 P.2d 179 (1941); State ex rel. Weltmer v. Taylor, 42 N.M. 405, 79 P.2d 937 (1938).

Whether other matters between other parties had been disposed of, unless they directly affected defendants, was immaterial in deciding whether cause was at issue at time certain defendants filed their affidavits of disqualification of trial judge. State ex rel. Lebeck v. Chavez, 45 N.M. 161, 113 P.2d 179 (1941).

Disqualification affidavit must be filed before the court has acted judicially upon a material issue. State ex rel. Howell v. Montoya, 74 N.M. 743, 398 P.2d 263 (1965).

**Time for filing disqualification motion based on nonstatutory grounds.** — Although not strictly limited by the time limitations of this section, a disqualification motion based on one of the nonstatutory grounds must nevertheless be filed within a reasonable time after the party becomes aware of the grounds for it. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

**Affidavit held timely filed.** — In proceedings for contempt, an affidavit for disqualification of judge filed on the same day as an order to show cause citing relator for contempt was timely filed. State ex rel. Simpson v. Armijo, 38 N.M. 280, 31 P.2d 703 (1934).

A party who files an affidavit or disqualification immediately after a claim for relief is filed is not one who is guilty of the recurrent abuses to which the statute is constantly being put, and his affidavit is timely filed. Martinez v. Carmona, 95 N.M. 545, 624 P.2d 54 (Ct. App. 1980), cert. quashed, 95 N.M. 593, 624 P.2d 535 (1981).

**Affidavit held not timely filed.** — In adoption proceedings, where plaintiff opposed the intervention of another party and offered proof on the motion of such party seeking temporary custody, affidavit filed thereafter to disqualify the judge was not timely. Hill v. Patton, 43 N.M. 21, 85 P.2d 75 (1938).

Disqualification affidavit filed after subpoena directing judgment debtor to appear concerning his ability to satisfy a judgment previously entered against him was issued was not timely and the district court could properly hold debtor in contempt for his refusal to answer questions in supplementary proceeding. State ex rel. Howell v. Montoya, 74 N.M. 743, 398 P.2d 263 (1965).

Affidavit of disqualification was not timely filed where district judge already had performed judicial acts in refusing to make a commitment on a motion for continuance and in allowing the withdrawal of a plea of not guilty. State v. Cline, 69 N.M. 305, 366 P.2d 441 (1961).

Request for continuance by the defendant called upon the court to exercise discretion in its judicial capacity, and such action was sufficient to render the subsequent filing of the affidavit of disqualification untimely. State v. Hester, 70 N.M. 301, 373 P.2d 541 (1962).

Trial judge's presiding over defendant's arraignment and ruling on his motion to dismiss constituted judicial act within the scope of this section, so that affidavit of disqualification filed after those acts took place was not timely filed. State v. Budau, 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

Defendant's oral attempt to disqualify a certain judge immediately prior to the start of the trial, coupled with filing of a statutory affidavit of disqualification while the jury was deliberating on its verdict, was not timely where no provisional affidavit of disqualification was filed 10 days or more before the beginning of the term of court. State v. Sanchez, 86 N.M. 68, 519 P.2d 304 (Ct. App. 1974).

Where defendant's case was originally set for jury trial by the trial court on July 30, was continued at the request of defendant's counsel to September 10, defendant's affidavit of disqualification, filed on November 21, was not timely, and the trial court committed no error in striking it. State v. Padilla, 88 N.M. 160, 538 P.2d 802 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**Action to consolidate was not placed at issue** for purposes of timely filing affidavits of disqualification until date when defendants filed response to plaintiff's second amended petition required to effectively add crucial party to proposed consolidated arbitration. Pueblo of Laguna v. Cillessen & Son, 101 N.M. 341, 682 P.2d 197 (1984).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Adequacy of defense counsel's representation of criminal client regarding venue and recusation matters, 7 A.L.R.4th 942.

Judge's previous legal association with attorney connected to current case as warranting disqualification, 85 A.L.R.4th 700.

## 38-3-11. Costs paid by county of origin.

Whenever a change of venue is granted, all costs in civil and criminal cases shall be paid from the court fund of the county in which the case originated.

**History:** 1953 Comp., § 21-5-10, enacted by Laws 1965, ch. 187, § 3.

# ARTICLE 4
# Parties

## 38-4-1. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1981, ch. 115, § 1, repealed 38-4-1 NMSA 1978, as enacted by Laws 1907, ch. 76, § 1, relating to representation of numerous parties with a common or general interest by one or more of such parties, effective March 21, 1981.

## 38-4-2. [Several persons liable on contract, judgment or statute; parties defendant.]

Where two or more persons are bound by contract or by judgment, decree or statute, whether jointly only, or jointly or severally, or severally only, and including the parties to negotiable paper, common orders and checks, and sureties on the same, or separate instruments, or by any liability growing out of the same, the action thereon may, at the option of the plaintiff, be brought against any or all of them; when any of these so bound are dead, the action may be brought against any or all of the survivors with any or all of the representatives of the decedents, or against any or all of such representatives. An action or judgment against any one or more of several parties jointly bound, shall not be a bar to proceedings against the others.

**History:** Laws 1880, ch. 6, § 5; C.L. 1884, § 1885; C.L. 1897, § 2942; Code 1915, § 4076; C.S. 1929, § 105-110; 1941 Comp., § 19-602; 1953 Comp., § 21-6-2.

## ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For joinder of persons necessary for just adjudication, *see* Rule 1-019 NMRA.

For permissive joinder of parties, *see* Rule 1-020 NMRA.

For class actions, *see* Rule 1-023 NMRA.

For judgments upon multiple claims or involving multiple parties, *see* Rule 1-054 NMRA.

**The payee of a joint and several note may look to either of the joint makers for payment,** and where one of them dies, he is not compelled to pursue his remedy against the estate of the deceased debtor, nor is his action barred against another joint maker because the time has expired wherein he might have presented his claim against the estate for allowance. Newhall v. Field, 13 N.M. 82, 79 P. 711 (1905).

**Joint indemnity agreement construed as joint and several.** — Under this section and 38-4-3 NMSA 1978, an indemnity agreement, if joint, is to be construed as being joint and several. Fid. Nat'l Bank v. Lobo Hijo Corp., 92 N.M. 737, 594 P.2d 1193 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

**Wife who joins with her husband on a note is jointly and severally liable** and may be legally bound to pay the entire debt. A judgment on a joint and several note signed by both the husband and the wife is collectible from the community property or the separate property of either or both. Commerce Bank & Trust v. Jones, 83 N.M. 236, 490 P.2d 678 (1971).

**Procedure upon appeal where joint judgment erroneous.** — This section and 38-4-3 NMSA 1978 having abrogated the common-law rule requiring the reversal of a judgment

as to all parties jointly liable, which was erroneous as to one, the supreme court may affirm as to one, in a joint judgment, and reverse as to another. McDonald v. Mazon, 23 N.M. 439, 168 P. 1069 (1917).

**Law reviews.** — For article, "New Mexico's Uniform Commercial Code: Who is the Beneficiary of Stop Payment Provisions of Article 4?", see 4 Nat. Resources J. 69 (1964).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 47 Am. Jur. 2d Judgments § 673 et seq.

Judgment in favor of less than all parties to contract as bar to action against other parties, 3 A.L.R. 124.

Payment of, or proceeding to collect, judgment against one tort-feasor as release of others, 27 A.L.R. 805, 65 A.L.R. 1087, 166 A.L.R. 1099, 40 A.L.R.3d 1181.

50 C.J.S. Judgments § 758.

## 38-4-3. [Joint contracts create joint and several liability; assumption of debt; partners; parties defendant.]

All contracts, which by the common law are joint only, shall be held and construed to be joint and several; and in all cases of joint obligations or assumptions by partners and others, suit may be brought and prosecuted against any one or more of the parties liable thereon, and when more than one person is joined as defendant in any such suit, such suit may be prosecuted, and judgment rendered against any one or more of such defendants.

**History:** Laws 1878, ch. 4, § 3; C.L. 1884, § 1889; C.L. 1897, § 2946; Code 1915, § 4078; C.S. 1929, § 105-112; 1941 Comp., § 19-603; 1951 Comp., § 21-6-3.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Compiler's notes.** — This section, except as to partners, may be superseded by 38-4-2 NMSA 1978.

**Cross references.** — For joinder of persons needed for just adjudication, *see* Rule 1-019 NMRA.

For permissive joinder of parties, *see* Rule 1-020 NMRA.

For class actions, *see* Rule 1-023 NMRA.

For judgments upon multiple claims or involving multiple parties, *see* Rule 1-054 NMRA.

**Action on forthcoming bond.** — Though a bond sued on was a writing obligatory and appeared to be joint, only by its terms, by the authority of this section it must be considered to be joint and several and the plaintiff could bring suit against any one or more of the parties to the obligations, without joining the others, and without showing that judgment has been obtained and the remedy exhausted against the principal. Romero v. Wagner, 3 N.M. (Gild.) 167, 3 P. 50 (1884).

**Joint indemnity agreement construed as joint and several.** — Under 38-4-2 NMSA 1978 and this section, an indemnity agreement, if joint, is to be construed as being joint and several. Fid. Nat'l Bank v. Lobo Hijo Corp., 92 N.M. 737, 594 P.2d 1193 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

**Wife who joins with her husband on a note is jointly and severally liable** and may be legally bound to pay the entire debt. A judgment on a joint and several note signed by both the husband and the wife is collectible from the community property or the separate property of either or both. Commerce Bank & Trust v. Jones, 83 N.M. 236, 490 P.2d 678 (1971).

**A partner may be sued individually without regard to the partnership.** U.S. v. Gumm Bros., 9 N.M. 611, 58 P. 398 (1899); Curran v. William Kendall Boot & Shoe Co., 8 N.M. 417, 45 P. 1120 (1896).

**One copartner may maintain an action at law on a promissory note against a copartner.** Mayer v. Lane, 33 N.M. 24, 262 P. 180 (1927); Lane v. Mayer, 33 N.M. 28, 262 P. 182 (1927).

**Liability of copartner for punitive damages for other partner's conduct.** — Absent a finding of ratification, authorization, or participation in the fraudulent conduct, punitive damages may not be recovered from copartners for one partner's fraudulent conduct. Duncan v. Henington, 114 N.M. 100, 835 P.2d 816 (1992).

Copartners of partner found liable for fraud were liable to plaintiff jointly and severally for the award of compensatory damages, attorney fees, and costs; however, only partner committing fraudulent acts was liable to plaintiff for the award of punitive damages. Duncan v. Henington, 114 N.M. 100, 835 P.2d 816 (1992).

**Dismissal seasonably entered by leave of court as to one of a number of defendants** severally liable does not discharge from liability his co-obligors and codefendants. Bank of Commerce v. Broyles, 16 N.M. 414, 120 P. 670 (1910), rev'd on other grounds sub nom. Schmidt v. Bank of Commerce, 234 U.S. 64, 34 S. Ct. 730, 58 L. Ed. 1214 (1914); Newhall v. Field, 13 N.M. 82, 79 P. 711 (1905).

**Supreme court has power to reverse joint judgment as to one defendant and affirm as to the other,** where the facts and law justify such action, in view of this

section which abrogates the common-law rule. McDonald v. Mazon, 23 N.M. 439, 168 P. 1069 (1917).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 59 Am. Jur. 2d Parties §§ 110, 118.

Judgment for or against partner as res judicata in favor of or against copartner not a party to the judgment, 11 A.L.R.2d 847.

Dismissal, discontinuance, or nonsuit as to some of defendants in contract action against partnership or partners as affecting others, 44 A.L.R.2d 580.

## 38-4-4. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1981, ch. 115, § 1, repealed 38-4-4 NMSA 1978, as enacted by Laws 1897, ch. 73, § 105, relating to actions against two or more defendants jointly or severally liable on a contract, effective March 21, 1981.

## 38-4-5. [Suits against partners; joinder; enforcement of judgment; service of process.]

Suits may be brought by or against a partnership as such, or against all or either of the individual members thereof; and a judgment against the firm as such may be enforced against the partnership's property, or that of such members as have appeared or been served with summons; but a new action may be brought against the other members in the original cause of action. When the action is against the partnership as such, service of summons on one of the members, personally, shall be sufficient service on the firm.

**History:** Laws 1880, ch. 6, § 6; C.L. 1884, § 1886; C.L. 1897, § 2943; Code 1915, § 4077; C.S. 1929, § 105-111; 1941 Comp., § 19-605; 1953 Comp., § 21-6-5.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For actions on joint obligations or assumptions by partners generally, *see* 38-4-3 NMSA 1978.

For service of process generally, *see* Rule 1-004 NMRA.

**Partnership is a distinct legal entity in the sense that it may be sued** as such in the partnership name. Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966); Nat'l Sur. Co. v. George E. Breece Lumber Co., 60 F.2d 847 (10th Cir. 1932).

**Liability of copartner for punitive damages.** — Absent a finding of ratification, authorization, or participation in the fraudulent conduct, punitive damages may not be recovered from copartners for one partner's fraudulent conduct. Duncan v. Henington, 114 N.M. 100, 835 P.2d 816 (1992).

Copartners of partner found liable for fraud were liable to plaintiff jointly and severally for the award of compensatory damages, attorney fees, and costs; however, only partner committing fraudulent acts was liable to plaintiff for the award of punitive damages. Duncan v. Henington, 114 N.M. 100, 835 P.2d 816 (1992).

**Suit in name of all partners.** — Although a partner is a general agent of the partnership, a partner may not sue alone on a cause of action belonging to a partnership; instead, the action must be brought in the names of the partners. Daniels Ins., Inc. v. Daon Corp., 106 N.M. 328, 742 P.2d 540 (Ct. App. 1987).

A partner cannot bring suit as an individual on a claim belonging to the partnership, nor does an individual partner have a separate cause of action for a proportionate share of a partnership claim. First Nat'l Bank v. Sanchez, 112 N.M. 317, 815 P.2d 613 (1991).

**Partner served with summons not party to suit.** — A partner does not become a party to a suit against the partnership solely by virtue of being served with summons in the case; the partner must also be identified as a party in the complaint. Lava Shadows, Ltd. v. Johnson, 1996-NMCA-043, 121 N.M. 575, 915 P.2d 331, cert. denied, 121 N.M. 644, 916 P.2d 844.

**Partner's verification of complaint not appearance.** — Since the complaint named only the partnership as the plaintiff, a partner's verification of the complaint, even taken together with the partner's authorization of the suit, did not constitute an appearance by the partner and he was not a party at the time of trial. Lava Shadows, Ltd. v. Johnson, 1996-NMCA-043, 121 N.M. 575, 915 P.2d 331, cert. denied, 121 N.M. 644, 916 P.2d 844.

**Judgment not authorized against nonparty.** — Since the partner was not a party to the suit at the time of trial, the judgment could not be entered against him even if he was made a party in a proceeding to contest the judgment after the trial. Lava Shadows, Ltd. v. Johnson, 1996-NMCA-043, 121 N.M. 575, 915 P.2d 331, cert. denied, 121 N.M. 644, 916 P.2d 844.

**Partner may sue another at law on a promissory note, executed by the partnership** to him, in view of this section. Mayer v. Lane, 33 N.M. 24, 262 P. 180 (1927); Lane v. Mayer, 33 N.M. 28, 262 P. 182 (1927).

**In action against a partnership in its own name, judgment may be rendered against a partner individually** if he has been served with process or has appeared in the action. Nat'l Sur. Co. v. George E. Breece Lumber Co., 60 F.2d 847 (10th Cir. 1932).

**Partner settling claim that is not usual to the business.** — While a partner acting within his or her actual authority may execute a valid release of a partnership claim, it is questionable whether there could be implied actual authority or apparent authority for a partner to settle any part of a partnership claim that was not usual to the business. Of course, an individual partner may release personal claims based upon damage to personal property and interests. First Nat'l Bank v. Sanchez, 112 N.M. 317, 815 P.2d 613 (1991).

**Effect of answer by member upon entry of default judgment against partnership.** — In an action against a partnership, an answer purporting to be merely the personal answer of one member of a partnership, and not in behalf of the partnership, did not prevent a default judgment against the partnership. Kempner v. McMahan, 35 N.M. 313, 296 P. 802 (1931).

**Persons bound by judgment in action against individual members of firm.** — Actions are authorized against the firm by the firm name, but where the action is against the individual members of the firm and not against the firm as such, only those served can be bound by the judgment. Good v. Red River Valley Co., 12 N.M. 245, 78 P. 46 (1904).

**Effect of judgment against firm upon subsequent action against individual member.** — A judgment against the firm in an action where only one of its members was a party cannot extend its lien against the property of the other partner who is entitled to his day in court to present any defense which he may have to the original cause of action in a new action. Lewinson v. First Nat'l Bank, 11 N.M. 510, 70 P. 567 (1902).

A judgment which was taken on a judgment on a note of a firm against a partner who was not served and did not appear in the first action was not obtained on the same cause of action as the note and was no bar to a later action on the note under this section. First Nat'l Bank v. Lewinson, 12 N.M. 147, 76 P. 288 (1904).

**Amendment of judgment on appeal.** — Where action was brought against named persons as copartnership, and judgment was rendered against the copartnership and not against the individuals, the supreme court, on appeal, supplied the omission of the individual names by ordering them inserted in the judgment. Wirt v. George W. Kutz & Co., 15 N.M. 500, 110 P. 575 (1910).

**Law reviews.** — For note, "Commercial Law - The New Mexico Supreme Court Answers a Moot Question of Partnership Law: First National Bank in Albuquerque v. Sanchez," see 23 N.M.L. Rev. 251 (1993).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 59A Am. Jur. 2d Partnership §§ 698, 700, 702, 708, 709, 712, 713.

## 38-4-6. [Married woman.]

A married woman shall sue and be sued as if she were unmarried.

**History:** Laws 1897, ch. 73, § 8; C.L. 1897, § 2685 (8); Code 1915, § 4075; C.S. 1929, § 105-109; 1941 Comp., § 19-606; 1953 Comp., § 21-6-6.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Section permits a married woman to institute and maintain an action for her physical injuries,** pain and suffering in her own name without the joinder of her husband. Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952)See also; Roberson v. U-Bar Ranch, Inc., 303 F. Supp. 730 (D.N.M. 1968).

**Right extends to nonresident married women.** Roberson v. U-Bar Ranch, Inc., 303 F. Supp. 730 (D.N.M. 1968).

**Husband proper party to bring action for medical expenses and loss of services arising from injuries to wife.** — Where physical injuries are suffered by the wife because of negligence of the defendant, the cause of action for medical expenses, loss of services to the community, as well as loss of earnings, if any, of the wife belongs to the community, and the husband as its head is the proper party to bring such an action against one who wrongfully injured the wife. Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952).

**Right of wife to sue husband for torts committed during marriage.** — One spouse may sue the other for intentional torts. Flores v. Flores, 84 N.M. 601, 506 P.2d 345 (Ct. App.), cert. denied, 84 N.M. 592, 506 P.2d 336 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Judgment in spouse's action for personal injuries as binding, as regards loss of consortium and similar resulting damage, upon other spouse not a party to the action, 12 A.L.R.3d 933.

41 C.J.S. Husband and Wife § 111.

## 38-4-7. Infant; suits between spouses.

An infant who has been lawfully married, may institute, prosecute to judgment or defend any action against his spouse in his own name without a guardian or next friend.

**History:** Laws 1897, ch. 73, § 9; C.L. 1897, § 2685 (9); Code 1915, § 4080; Laws 1921, ch. 34, § 1; C.S. 1929, § 105-201; 1941 Comp., § 19-607; 1953 Comp., § 21-6-7; Laws 1975, ch. 257, § 8-105.

**ANNOTATIONS**

**Cross references.** — For definition of infant, *see* 38-4-13 NMSA 1978.

For age of majority, *see* 28-6-1 NMSA 1978.

For suits by or against infants or incompetents generally, *see* Rule 1-017 NMRA.

## 38-4-8. [Infants; bond of next friend.]

Any person who acts as next friend for an infant in any suit to recover any personal property, debt or damages, shall, if required by the court, execute a bond to such infant in double the amount claimed in such suit, with such sureties as shall be approved by the court, conditioned that such next friend shall account to such infant for all money or property which may be recovered in such suit. Such bond shall be delivered to and filed in the office of the clerk of the court in which said suit is pending.

**History:** Laws 1897, ch. 73, § 11; C.L. 1897, § 2685 (11); Code 1915, § 4082; C.S. 1929, § 105-203; 1941 Comp., § 19-608; 1953 Comp., § 21-6-8.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For definition of infant, *see* 38-4-13 NMSA 1978.

For age of majority, *see* 28-6-1 NMSA 1978.

For suits by or against infants or incompetents generally, *see* Rule 1-017 NMRA.

## 38-4-9. Costs in suit brought by certain representatives of infant.

The guardian, conservator or next friend of any infant who commences or prosecutes a suit shall be responsible for the costs thereof, unless such infant be permitted by the court to sue as a poor person, as provided by law.

**History:** Laws 1897, ch. 73, § 12; C.L. 1897, § 2685 (12); Code 1915, § 4083; C.S. 1929, § 105-204; 1941 Comp., § 19-609; 1953 Comp., § 21-6-9; Laws 1975, ch. 257, § 8-106.

**ANNOTATIONS**

**Cross references.** — For liability of guardian ad litem for costs, *see* 38-4-12 NMSA 1978.

For the definition of infant, *see* 38-4-13 NMSA 1978.

For age of majority, *see* 28-6-1 NMSA 1978.

For suits by or against infants or incompetents generally, *see* Rule 1-017 NMRA.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Allowance of fees for guardian ad litem appointed for infant defendant, as costs, 30 A.L.R.2d 1148.

## 38-4-10. Guardian ad litem for infant defendant.

Appointment of a guardian ad litem may be made by the court in which the suit is pending, or by the judge thereof in vacation, upon the written request of the infant defendant, if the age of fourteen years or more, or, if said infant is under the age of fourteen, on the written request of a relative or friend of the infant, or on the written consent of any competent person proposed as guardian ad litem, and such request and consent shall be filed in the office of the clerk of the court before any answers by such infant shall be filed.

**History:** Laws 1897, ch. 73, § 14; C.L. 1897, § 2685 (14); Code 1915, § 4085; C.S. 1929, § 105-206; 1941 Comp., § 19-610; 1953 Comp., § 21-6-10; Laws 1975, ch. 257, § 8-107.

**ANNOTATIONS**

**Compiler's notes.** — This section may be affected by the last sentence of Rule 1-017C NMRA.

**Cross references.** — For the definition of infant, *see* 38-4-13 NMSA 1978.

For age of majority, *see* 28-6-1 NMSA 1978.

For appointment of guardians ad litem for infants or incompetents generally, *see* Rule 1-017 NMRA.

**Applicability of section.** — This section does not expressly authorize appointment of a guardian ad litem for an infant plaintiff, and no other statute either authorizes or requires court approval of a settlement by a child, with or without representation through a guardian ad litem. Collins ex rel. Collins v. Tabet, 111 N.M. 391, 806 P.2d 40 (1991).

**Law reviews.** — For note, "Tort Law - Either the Parents or the Child May Claim Compensation for the Child's Medical and Nonmedical Damages: Lopez v. Southwest Community Health Services," see 23 N.M.L. Rev. 373 (1993).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 42 Am. Jur. 2d Infants §§ 173 to 177.

Bastardy: maintainability of bastardy proceedings against infant defendant without appointment of guardian ad litem, 69 A.L.R.2d 1379.

Capacity of guardian to sue or to be sued outside state where appointed, 94 A.L.R.2d 162.

43 C.J.S. Infants §§ 222 to 233.

## 38-4-11. Failure to apply for appointment of guardian ad litem.

If an infant defendant, or a relative or friend of an infant under the age of fourteen, neglects for twenty days to procure the appointment of a guardian ad litem to defend the suit, the court shall appoint some competent person to be the guardian ad litem for such infant in the defense of such suit.

**History:** Laws 1897, ch. 73, § 15; C.L. 1897, § 2685 (15); Code 1915, § 4086; C.S. 1929, § 105-207; 1941 Comp., § 19-611; 1953 Comp., § 21-6-11; Laws 1975, ch. 257, § 8-108.

### ANNOTATIONS

**Compiler's notes.** — This section may be affected by the last sentence of Rule 1-017C NMRA.

**Cross references.** — For definition of infants, *see* 38-4-13 NMSA 1978.

For age of majority, *see* 28-6-1 NMSA 1978.

For appointment of guardians ad litem for infants or incompetents generally, *see* Rule 1-017 NMRA.

## 38-4-12. Liability of guardian ad litem for costs.

No person appointed guardian ad litem for an infant for the purpose of defending a suit against such infant shall be liable for the costs of such suit, unless especially charged by the court for some personal misconduct in such cause.

**History:** Laws 1897, ch. 73, § 16; C.L. 1897, § 2685 (16); Code 1915, § 4087; C.S. 1929, § 105-208; 1941 Comp., § 19-612; 1953 Comp., § 21-6-12; Laws 1975, ch. 257, § 8-109.

### ANNOTATIONS

**Cross references.** — For responsibility for costs in suit brought by certain representatives of infants, *see* 38-4-9 NMSA 1978.

For age of majority, *see* 28-6-1 NMSA 1978.

## 38-4-13. Definition of "infant" as used in Sections 38-4-7 through 38-4-12 NMSA 1978.

As used in Sections 38-4-7 through 38-4-12 NMSA 1978, "infant" means a person who has not reached the age of majority.

**History:** 1953 Comp., § 21-6-12.1, enacted by Laws 1973, ch. 64, § 1.

**ANNOTATIONS**

**Cross references.** — For age of majority, *see* 28-6-1 NMSA 1978.

## 38-4-14. Incapacitated person; definition.

As used in the Probate Code [Chapter 45 NMSA 1978] the term "incapacitated person" means any person who demonstrates over time either partial or complete functional impairment by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he is unable to manage his personal care or he is unable to manage his property and financial affairs.

**History:** Laws 1925, ch. 22, § 1; C.S. 1929, § 85-301; 1941 Comp., § 19-613; 1953 Comp., § 21-6-13; Laws 1975, ch. 257, § 8-110; 1989, ch. 252, § 1.

**ANNOTATIONS**

**The 1989 amendment,** effective June 16, 1989, substituted "demonstrates over time either partial or complete functional impairment" for "is impaired", deleted "advanced age", following "disability", and substituted all of the present language following "minority" for "to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or management of his affairs".

## 38-4-15. Appointment of guardian ad litem to defend suit.

Appointment of a guardian ad litem shall be made by the court in which the suit is pending, or by the judge thereof in vacation, upon the written request and petition of a relative or friend of the incapacitated person. However, in the event no relative or friend of the incapacitated person makes application for the appointment of a guardian ad litem within twenty days after service of process upon the incapacitated person, then the court in which said action or proceeding is pending, may, upon the application of any other party to the action or proceeding, appoint some qualified person to act as guardian ad litem for the incapacitated person in said cause.

**History:** Laws 1925, ch. 22, § 4; C.S. 1929, § 85-304; 1941 Comp., § 19-614; 1953 Comp., § 21-6-14; Laws 1975, ch. 257, § 8-111.

**ANNOTATIONS**

**Compiler's notes.** — This section may be affected by the last sentence of Rule 1-017C NMRA.

**Cross references.** — For service of process against insane or incompetent persons, *see* 38-1-12 NMSA 1978.

For appointment of guardians ad litem for infants or incompetents generally, *see* Rule 1-017C NMRA.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Mental condition which will justify the appointment of guardian, committee, or conservator of the estate for an incompetent or spendthrift, 9 A.L.R.3d 774.

## 38-4-16. Compromise by guardian ad litem.

The guardian ad litem so appearing in any action or proceeding for and on behalf of an incapacitated person shall have power to compromise the same and to agree to the judgment to be entered in the action or proceeding for or against the protected person, subject to the approval of the court in which the suit is pending.

History: Laws 1925, ch. 22, § 6; C.S. 1929, § 85-306; 1941 Comp., § 19-616; 1953 Comp., § 21-6-16; Laws 1975, ch. 257, § 8-112; 2009, ch. 159, § 13.

**ANNOTATIONS**

**The 2009 amendment,** effective June 19, 2009, after "judgment to be entered", deleted "therein" and added "in the action or proceeding"; and after "for or against", deleted "his ward".

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Validity and enforceability of agreement to drop or compromise will contest or withdraw objections to probate, or of agreement to induce others to do so, 42 A.L.R.2d 1319.

Power of incompetent spouse's guardian or representative to sue for granting or vacation of divorce or annulment of marriage, or to make compromise or settlement in such suit, 32 A.L.R.5th 673.

## 38-4-17. Costs paid by guardian ad litem.

No person appointed guardian ad litem for an incapacitated person, for the purpose of bringing a suit for or defending a suit against such incapacitated person, shall be

liable for the costs of such suit, unless especially charged by the court for some personal misconduct in such case.

**History:** Laws 1925, ch. 22, § 7; C.S. 1929, § 85-307; 1941 Comp., § 19-617; 1953 Comp., § 21-6-17; Laws 1975, ch. 257, § 8-113.

## 38-4-18. Partnerships and corporations may be represented by partner, officer or director in proceedings in magistrate and metropolitan courts.

In any proceeding in the magistrate and metropolitan courts of this state, a partnership or a corporation that is a party may be represented by a partner, officer or a director of the partnership or corporation even though the partner, officer or director is not an attorney.

**History:** Laws 1987, ch. 103, § 1.

# ARTICLE 5
# Drawing and Empaneling Jurors

## 38-5-1. Qualification of jurors.

A. A person who is at least eighteen years of age, a United States citizen, a resident of New Mexico residing in the county for which a jury may be convened is eligible and may be summoned for service as a juror by the courts, unless the person is incapable of rendering jury service because of:

(1) physical or mental illness or infirmity; or

(2) undue or extreme physical or financial hardship.

B. A person who was convicted of a felony and who meets all other requirements for eligibility may be summoned for jury service if the person has successfully completed all conditions of the sentence imposed for the felony, including conditions for probation or parole.

**History:** 1953 Comp., § 19-1-1, enacted by Laws 1969, ch. 222, § 1; 1991, ch. 71, § 1; 2005, ch. 107, § 4; 2006, ch. 101, § 1.

**ANNOTATIONS**

**Repeals and reenactments.** — Laws 1969, ch. 222, § 17, repealed 19-1-1 to 19-1-16, 1953 Comp., relating to the drawing and empaneling of jurors, and enacted 38-5-1, 38-5-3 and 38-5-4 to 38-5-16 NMSA 1978.

**Cross references.** — For constitutional right to jury trial, *see* N.M. Const., art. II, § 12.

For jury trials in magistrate courts, *see* 35-8-1 to 35-8-5 NMSA 1978 and Rule 2-601 NMRA.

**The 2006 amendment,** effective May 17, 2006, added Subsection B to provide a person convicted of a felony may serve on a jury if the person has completed the sentenced probation and parole.

**The 2005 amendment,** effective July 1, 2005, deleted the disqualification of eligibility for jury service because of conviction of a felony; and added Subsection B to provide that a person is eligible for jury service unless the person is incapable of rendering jury service because of undue or extreme physical or financial hardship.

**The 1991 amendment,** effective April 1, 1991, rewrote the section which read "Any person who is a qualified elector is eligible and may be summoned for service as a juror by the district courts unless such person is incapable because of physical or mental illness or infirmity to render jury service."

**Duty to protect non-English-speaking juror's right to participate in jury service.** — Judges and attorneys have responsibilities in protecting a non-English-speaking juror's constitutional right under Article VII, Section 3 of the New Mexico Constitution to participate in jury service. The appellate record must demonstrate that a trial judge has made every reasonable effort to provide interpreters for non-English-speaking jurors; defense attorneys must raise the unconstitutionality of proposed dismissals of jurors for lack of fluency in English; and prosecutors representing the state must protect the rights of all non-English-speaking New Mexicans to serve on juries, both because it is their duty to do so and because an otherwise unnecessary reversal and retrial may well be the consequence of denying those rights. State v. Samora, 2013-NMSC-038.

**Constitutional right to sit upon juries.** — Where, at the beginning of jury selection, the trial court asked a Spanish-speaking prospective juror, who had difficulty understanding the English language, if the juror understood English well enough to proceed with jury selection without the aid of an interpreter; the juror stated that the juror had been able to follow the discussions to that point; the trial court did not make an effort to find an interpreter for the juror; at the conclusion of voir dire, the juror admitted that the juror had not been able to understand a large part of the voir dire; the trial court dismissed the juror; defendant objected on the ground that the juror had understood English well enough to serve without an interpreter during voir dire, and there was no evidence that the jury was unfair or impartial and the evidence of defendant's guilt was substantial, the dismissal of the juror violated Article VII, Section 3 of the New Mexico Constitution, but the error was not fundamental error requiring reversal of defendant's convictions. State v. Samora, 2013-NMSC-038.

**Presence of defendant is not required** during the jury culling process in which the judge or designee disqualifies or exempts prospective jurors pursuant to the statutory

exemptions contained in this section and 38-5-11 NMSA 1978. State v. Sanders, 2000-NMSC-032, 129 N.M. 728, 13 P.3d 460.

**Qualification of grand juror as elector.** — Grand juror did not have to be a properly registered voter to be a qualified elector, for purposes of sitting on the grand jury. State v. Chama Land & Cattle Co., 111 N.M. 317, 805 P.2d 86 (Ct. App.), cert. denied, 111 N.M. 262, 804 P.2d 1081 (1990).

A juror has only to meet the requirements of N.M. Const., art. VII, § 1 to be a qualified elector under this section, and therefore to be qualified to serve as a grand juror. State v. Chama Land & Cattle Co., 111 N.M. 317, 805 P.2d 86 (Ct. App.), cert. denied, 111 N.M. 262, 804 P.2d 1081 (1990).

**Law reviews.** — For comment, "Juries - New Trial - Discovery of Juror's Disqualification or False Answer on Voir Dire as Ground for New Trial," see 7 Nat. Resources J. 415 (1967).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 47 Am. Jur. 2d Jury § 159.

Unfamiliarity with English language as affecting competency of a juror, 34 A.L.R. 194.

Former jeopardy where jury discharged because of nonresidence, 38 A.L.R. 716.

Effect of and remedies for, exclusion of eligible class or classes of persons from jury list in criminal case, 52 A.L.R. 919.

Right to consent to trial of criminal case before less than twelve jurors, 70 A.L.R. 279, 105 A.L.R. 1114.

Membership in secret order or organization for the suppression of crime as ground of challenge of juror, 158 A.L.R. 1361.

Right to peremptory challenges in selection of jury to try issue of former conviction, 162 A.L.R. 429.

Effect of and remedies for, exclusion of eligible class of persons from jury list in civil case, 162 A.L.R. 1422.

Governing law as to existence or character of offense for which one has been convicted in a federal court or court of another state as bearing upon disqualification to sit on jury, 175 A.L.R. 805.

Failure of juror in criminal case to disclose his previous jury service within disqualifying period as ground for reversal, 13 A.L.R.2d 1482.

Law enforcement officers as qualified jurors in criminal cases, 72 A.L.R.3d 895.

Former law enforcement officers as qualified jurors in criminal cases, 72 A.L.R.3d 958.

Validity of requirement or practice of selecting prospective jurors exclusively from list of registered voters, 80 A.L.R.3d 869.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury: visual impairment as disqualification, 48 A.L.R.4th 1154.

Propriety of substituting juror in bifurcated state trial after end of first phase and before second phase is given to jury, 89 A.L.R.4th 423.

Constitutional right to jury trial in cause of action under state unfair or deceptive trade practices law, 54 A.L.R.5th 631.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 59 A.L.R.5th 1.

Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction - state cases, 70 A.L.R.5th 587.

Disqualification or exemption of juror for conviction of, or prosecution for, criminal offense, 75 A.L.R.5th 295.

50 C.J.S. Juries § 134.

## 38-5-2. Exemption from jury service; excusals; service of disqualified juror.

A. A person who has served as a member of a petit jury panel or a grand jury in either state or federal courts within the preceding thirty-six months shall be exempt from sitting or serving as a juror in a court of this state when the person requests to be exempted from service by reason of the exemption granted by this subsection.

B. A person who is seventy-five years of age or older who files an affidavit requesting an exemption from jury service with a local court shall be permanently exempt from jury service.

C. A person may be excused from jury service at the discretion of the judge or the judge's designee, with or without the person's personal attendance upon the court, if:

(1) jury service would cause undue or extreme physical or financial hardship to the prospective juror or to a person under the prospective juror's care or supervision;

(2) the person has an emergency that renders the person unable to perform jury service; or

(3) the person presents other satisfactory evidence to the judge or the judge's designee.

D. A person requesting an exemption or an excuse from jury service shall take all necessary action to obtain a ruling on the request no later than the date on which the person is scheduled to appear for jury duty.

E. The judge, in the judge's discretion, upon granting any excuse, may disallow the fees and mileage of the person excused.

F. The service upon a jury of a person disqualified shall, of itself, not vitiate any indictment found or any verdict rendered by that jury, unless actual injury to the person complaining of the injury is shown.

G. As used in this section and Section 38-5-1 NMSA 1978, "undue or extreme physical or financial hardship":

(1) means circumstances in which a person would:

(a) be required to abandon another person under the person's care or supervision due to the extreme difficulty of obtaining an appropriate substitute caregiver during the period of jury service;

(b) incur costs that would have a substantial adverse impact on the payment of necessary daily living expenses of the person or the person's dependent; or

(c) suffer physical hardship that would result in illness or disease; and

(2) does not exist solely because a prospective juror will be absent from employment.

History: 1953 Comp., § 19-1-2, enacted by Laws 1973, ch. 150, § 1; 1979, ch. 173, § 1; 2005, ch. 107, § 5; 2009, ch. 26, § 1.

## ANNOTATIONS

**Repeals and reenactments.** — Laws 1973, ch. 150, § 1, repealed former 19-1-2, 1953 Comp., relating to exemptions from jury service, and enacted a new 19-1-2, 1953 Comp.

**Cross references.** — For mileage and compensation for jurors, *see* 38-5-15 NMSA 1978.

For exemption from jury service of state guard members, *see* 20-5-15 NMSA 1978.

**The 2009 amendment,** effective June 19, 2009, added Subsection B.

**The 2005 amendment,** effective July 1, 2005, added Subsections B(1) through (3) to provide that a person may be excused from jury service at the discretion of the judge or the judge's designee because of physical or financial hardship, an emergency or other factors satisfactory to the judge or the judge's designee; added Subsection C to require a person who requests an exemption or excuse from jury service to obtain a ruling not later than the scheduled appearance date; and added Subsection F to define "undue or extreme physical or financial hardship" for this section and Section 38-5-1 NMSA 1978.

**"Disqualified" juror.** — A "disqualified" juror is one who is the opposite of, or contrary of, a qualified juror. State v. Chama Land & Cattle Co., 111 N.M. 317, 805 P.2d 86 (Ct. App.), cert. denied, 111 N.M. 262, 804 P.2d 1081 (1990).

There is no substantive difference between an unqualified juror and a disqualified juror. Neither should be on the grand jury. State v. Chama Land & Cattle Co., 111 N.M. 317, 805 P.2d 86 (Ct. App.), cert. denied, 111 N.M. 262, 804 P.2d 1081 (1990).

**Applicability of section.** — This section applies to a juror never qualified as well as to a juror who was once qualified but is not now qualified. State v. Chama Land & Cattle Co., 111 N.M. 317, 805 P.2d 86 (Ct. App.), cert. denied, 111 N.M. 262, 804 P.2d 1081 (1990).

**Presence of grand juror not disruptive.** — There is nothing inherently disruptive about the presence of a grand juror who had no preconceived interest in the way the witnesses testified. State v. Chama Land & Cattle Co., 111 N.M. 317, 805 P.2d 86 (Ct. App.), cert. denied, 111 N.M. 262, 804 P.2d 1081 (1990).

**Showing of prejudice required.** — A defendant must show prejudice resulting from an unqualified juror's presence on the grand jury before the court of appeals will set aside an indictment. State v. Chama Land & Cattle Co., 111 N.M. 317, 805 P.2d 86 (Ct. App.), cert. denied, 111 N.M. 262, 804 P.2d 1081 (1990).

**No abuse of court's discretion.** — Where the trial court excused one prospective juror because he had been convicted of a felony in 1958, the court explaining that it did not know whether the person excused was eligible to serve as a juror and did not want any questions of eligibility to arise later, and the defendant asserted this was error, but did not explain how excusing this person was an abuse of the trial court's discretion, then, under these circumstances, there was no abuse of the court's discretion. State v. Padilla, 91 N.M. 451, 575 P.2d 960 (Ct. App. 1978).

**Law reviews.** — For comment, "Juries - New Trial - Discovery of Juror's Disqualification or False Answer on Voir Dire as Ground for New Trial," see 7 Nat. Resources J. 415 (1967).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 47 Am. Jur. 2d Jury § 180 et seq.

Contributing to fund for prosecution as disqualifying juror, 1 A.L.R. 519.

Prosecutor or witness for prosecution, relationship to, as disqualifying juror in criminal case, 18 A.L.R. 375.

Relationship to one financially affected by offense charged as disqualifying juror, 63 A.L.R. 183.

Class membership in which may be supposed to involve bias or prejudice, power of court to exclude all persons belonging to, from panel or venire for particular case, 105 A.L.R. 1527.

Dissolution of marriage as affecting disqualifying relationship by affinity in case of juror, 117 A.L.R. 800.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case, 1 A.L.R.2d 1291.

Attorneys, exclusion from jury list in criminal cases, 32 A.L.R.2d 890.

Jury: who is lawyer or attorney disqualified or exempt from service, or subject to challenge for cause, 57 A.L.R.4th 1260.

Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction - state cases, 70 A.L.R.5th 587.

50 C.J.S. Juries § 153.

## 38-5-3. Source for juror selection.

A. Each county clerk shall make available to the secretary of state a database of registered voters of the clerk's county. The secretary of state shall preserve and make available to the department of information technology, by electronic media, a database of New Mexico registered voters, by county, which shall be updated every six months. The director of the motor vehicle division of the taxation and revenue department shall make available by electronic media to the department of information technology a database of driver's license holders in each county, which shall be updated every six months. The secretary of taxation and revenue shall make available to the department of information technology, by electronic media, a database of New Mexico personal income tax filers by county, which shall be updated every six months. The updates shall occur in June and December.

B. The department of information technology shall program the merger of the registered voter, driver's license and personal income tax filer databases from each county to form a master jury database and write a computer program so that a random selection of jurors can be made. A discrimination shall not be exercised except for the elimination of persons who are not eligible for jury service. The administrative office of the courts shall provide specifications for the merging of the registered voter, driver's license and personal income tax filer databases to form the master jury database. The master jury database shall be the database that produces the random jury list for the selection of petit or grand jurors for the state courts.

C. The secretary of veterans' services and the adjutant general of the department of military affairs shall make available, by electronic media, to the administrative office of the courts a database of service members who were killed or missing in action during military service, which shall be updated every six months. The administrative office of the courts shall remove the names of service members who were killed or missing in action during military service from the master jury database that produces the random jury list for the state courts.

D. The court shall, by order, designate the number of potential jurors to be selected and the date on which the jurors are to report for empaneling. Within fifteen days after receipt of a copy of the order, the administrative office of the courts shall provide the random jury list to the court. The department of information technology shall print the random jury list and jury summons mailer forms within ten days after receiving the request from the administrative office of the courts. Upon issuance of the order, the department of information technology shall draw from the most current registered voter, driver's license and personal income tax filer databases to create the random jury list.

E. The department of information technology may transfer the master jury database to a court that has compatible equipment to accept such a transfer. The court accepting the master jury database shall transfer the information to a programmed computer used for the random selection of petit or grand jurors.

History: 1978 Comp., § 38-5-3, enacted by Laws 1991, ch. 71, § 2; 2005, ch. 107, § 6; 2007, ch. 290, § 25; 2009, ch. 157, § 1; 2011, ch. 26, § 1.

## ANNOTATIONS

**Repeals and reenactments.** — Laws 1991, ch. 71, § 2 repealed former 38-5-3 NMSA 1978, as enacted by Laws 1969, ch. 222, § 3, relating to pollbooks as the source for juror selection, and enacted a new section, effective April 1, 1991.

**The 2011 amendment,** effective June 17, 2011, required the administrative office of the courts to remove the names of service members who are killed or missing in action during military service from the master jury database.

**The 2009 amendment,** effective June 19, 2009, in Subsection A, in the second, third and fourth sentences, after "which shall be updated", deleted "monthly" and added "every six months", and added the last sentence.

**The 2007 amendment,** effective July 1, 2007, changed the name of the information systems division of the general services department to the department of technology information.

**The 2005 amendment,** effective July 1, 2005, provided in Subsection A that the secretary of the taxation and revenue shall make available to the information systems division of the general services department a database of personal income tax filers by county; and in Subsection B, provided that the division shall merge the registered voter, driver's license and personal income tax filer databases in each county to form a master jury data base.

**Time allowed to place names of newly enfranchised persons on jury lists. —** When a new group is qualified to sit as jurors, a period of time will be allowed for their names to begin to appear on the jury lists. State v. Barnett, 85 N.M. 404, 512 P.2d 977 (Ct. App. 1973).

Possible two-year period which could elapse under this section before the names of newly enfranchised individuals begin to appear on jury lists is not so long as to deny defendant his right to due process. State v. Barnett, 85 N.M. 404, 512 P.2d 977 (Ct. App. 1973).

**Failure to include in pollbooks newly enfranchised persons prior to the next general election** was not a denial of due process. State v. Barnett, 85 N.M. 404, 512 P.2d 977 (Ct. App. 1973).

Where the jury array did not include members of the then recently enfranchised class of persons between the ages of 18 and 21 years, defendant was not deprived of due process. State v. Barnett, 85 N.M. 404, 512 P.2d 977 (Ct. App. 1973).

**Subsequent expansion to include nonvoters with driver's licenses. —** The legislature's intent to wait until after the 1990 general election to enlarge the jury pool to include nonvoting citizens with driver's licenses was not inconsistent with defendant's constitutional rights. State v. Gonzales, 112 N.M. 544, 817 P.2d 1186 (1991).

Defendant was not denied her right to a venire composed of voter registration and driver's license records as required by this section, where her trial took place before the expanded pool took effect. State v. Neely, 112 N.M. 702, 819 P.2d 249 (1991).

Defendant was not denied his right to a venire composed from voter registration and driver's license records, since the plain language of this section required the jury pool to be expanded 90 days after the next general election and defendant's trial took place

before the expanded pool took effect. State v. Chamberlain, 112 N.M. 723, 819 P.2d 673 (1991).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 47 Am. Jur. 2d Jury § 100 et seq.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case, 1 A.L.R.2d 1291.

Validity of requirement or practice of selecting prospective jurors exclusively from list of registered voters, 80 A.L.R.3d 869.

Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction - state cases, 70 A.L.R.5th 587.

50 C.J.S. Juries §§ 155 to 160.

## 38-5-3.1. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1989, ch. 366, § 2 repealed 38-5-3.1 NMSA 1978, as enacted by Laws 1983, ch. 107, § 1, relating to the juror selection pilot program in the thirteenth judicial district, effective June 16, 1989.

## 38-5-4. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1991, ch. 71, § 8 repealed 38-5-4 NMSA 1978, as enacted by Laws 1969, ch. 222, § 4, relating to jury wheels, effective April 1, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMONESOURCE.COM*.

## 38-5-5. Jury tampering; penalties.

Jury tampering consists of:

A. the willful placing of names in a jury wheel or removal of the names other than in accordance with law;

B. the selection or drawing of jurors other than in accordance with law;

C. the attempt to threaten, coerce or induce a trial juror to vote for a false verdict or a grand juror to vote for no indictment or for a false indictment; or

D. the threatening, coercing or inducing of a trial juror to vote for a false verdict or a grand juror to vote for no indictment or for a false indictment.

Whoever violates the provisions of Subsection A or B of this section is guilty of a petty misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978. Whoever violates the provisions of Subsection C of this section is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978. Whoever violates the provisions of Subsection D of this section is guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History:** 1953 Comp., § 19-1-5, enacted by Laws 1969, ch. 222, § 5; 1989, ch. 343, § 1; 1997, ch. 208, § 2.

**ANNOTATIONS**

**Cross references.** — For punishment for petty misdemeanors, *see* 31-19-1 NMSA 1978.

**The 1997 amendment,** effective July 1, 1997, in the last paragraph, substituted "third degree felony" for "fourth degree felony" near the end of the second sentence, substituted "second degree felony" for "third degree felony" near the end of the third sentence, and added "and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978" to the end of the second and third sentences.

**The 1989 amendment,** effective June 16, 1989, in the catchline, substituted "penalties" for "misdemeanor"; in Subsection A, substituted "removal of the names" for "removal therefrom"; substituted present Subsection C for the former subsection which read "the threatening, coercing or inducing a trial juror to vote for a false verdict or a grand juror to vote for a false indictment or the attempt thereto"; added Subsection D; and substituted the present concluding paragraph for the former concluding paragraph which read "Whoever commits jury tampering is guilty of a petty misdemeanor".

## 38-5-5.1. Legislative declaration.

It is the policy of this state that all qualified citizens have an obligation to serve on juries and to give truthful information concerning attitudes, opinions and feelings about topics relevant to the proceeding for which they are called to serve when summoned by the courts of this state.

History: Laws 2005, ch. 107, § 2.

**ANNOTATIONS**

**Effective dates.** — Laws 2005, ch. 107, § 11 made Laws 2005, ch. 107, § 2 effective July 1, 2005.

## 38-5-6 to 38-5-9. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1991, ch. 71, § 8 repealed 38-5-6 to 38-5-9 NMSA 1978, as enacted by Laws 1969, ch. 222, §§ 6 to 9, relating to jury commissioners, recording of potential jury list, master jury wheel, and selection of jurors from master jury wheel, effective April 1, 1991. For provisions of former sections, *see* the 1990 NMSA 1978 on *NMONESOURCE.COM*.

## 38-5-10. Summoning of jurors; claiming exemption.

Upon drawing a list of jurors for grand jury or petit jury service, the clerk shall issue a summons for each juror ordering his attendance at a time and place as fixed by the district judge or magistrate ordering the drawing. The summons may be served by first class mail or in a manner provided for the service of civil process. A willful failure to appear as ordered in the summons is a petty misdemeanor. Accompanying each summons, the clerk of the court shall submit for the information of the jurors the listing of those classes of persons or qualifications provided by law under which an exemption from jury service may be claimed. Jurors shall be provided a form upon which they may state the facts supporting their eligibility to claim exemption from jury service and to express a claim for exemption.

**History:** 1953 Comp., § 19-1-10, enacted by Laws 1969, ch. 222, § 10; 1991, ch. 71, § 3.

**ANNOTATIONS**

**Cross references.** — For exemptions from jury service, *see* 38-5-2 NMSA 1978.

For fee of sheriff for serving jury venire, *see* 4-41-18 NMSA 1978.

For punishment for petty misdemeanor, *see* 31-19-1 NMSA 1978.

For service of process generally, *see* Rule 1-004 NMRA.

**The 1991 amendment,** effective April 1, 1991, inserted "or magistrate" near the end of the first sentence; substituted "first class" for "registered or certified" in the second sentence; substituted "state the facts" for "make affidavit to the facts" in the final sentence; and made minor stylistic changes throughout the section.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 47 Am. Jur. 2d Jury § 184 et seq.

50 C.J.S. Juries §§ 153, 154, 171 to 173.

## 38-5-10.1. Postponement of petit jury service.

A. A person scheduled to appear for service on a petit jury may request a postponement of the date of initial appearance for jury service. The request for postponement shall be granted if the juror:

(1) has not previously been granted a postponement; and

(2) agrees to a future date, approved by the court, when the juror will appear for jury service that is not more than six months after the date on which the prospective juror originally was called to serve.

B. A subsequent request to postpone jury service may be approved by the court only in the event of an emergency that could not have been anticipated at the time the initial postponement was granted. Prior to the grant of a subsequent postponement, the prospective juror must agree to a future date on which the juror will appear for jury service within six months of the postponement.

C. A court shall postpone and reschedule the service of a summoned juror, without affecting the summoned juror's right to request a postponement under Subsections A and B of this section, if the summoned juror is:

(1) employed by an employer with five or fewer full-time employees, or their equivalent, and another employee of the same employer is summoned to appear during the same period;

(2) the only person performing particular services for a business, commercial or agricultural enterprise and whose services are so essential to the operations of the business, commercial or agricultural enterprise that the enterprise must close or cease to function if the person is required to perform jury duty; or

(3) required to attend to an emergency as determined by the judge.

History: Laws 2005, ch. 107, § 3.

**ANNOTATIONS**

**Effective dates.** — Laws 2005, ch. 107, § 11 made Laws 2005, ch. 107, § 3 effective July 1, 2005.

## 38-5-11. Qualifying jury panels.

A. The court shall empanel jurors in a random manner. The judge or the judge's designee shall preside over the empaneling of a petit jury panel. The district judge or the judge's designee shall preside over the empaneling of the grand jury panel. Jurors who appear for service shall be questioned under oath as to their eligibility for jury service by the judge or the judge's designee. Claims of exemption, requests for excuse

from service or postponement of service shall be ruled upon by the judge or the judge's designee.

B. The judge or the judge's designee shall submit questionnaires to prospective jurors to:

(1) obtain any information that will aid the court in ruling on requests for exemption or excuse from service or postponement of service;

(2) aid the court and the parties in voir dire examination of jurors or in determining a juror's qualifications to serve on a particular petit jury panel, trial jury or grand jury; or

(3) aid in the determination of challenges for cause and peremptory challenges.

C. The judge or the judge's designee shall certify a numbered list of the jury panel members' names when qualified. The certified list of jurors and the questionnaires obtained from jurors shall be made available for inspection and copying by a party to a pending proceeding or their attorney or to any person having good cause for access to the list and the questionnaires.

**History:** 1953 Comp., § 19-1-11, enacted by Laws 1969, ch. 222, § 11; 1970, ch. 40, § 1; 1991, ch. 71, § 4; 2005, ch. 107, § 7.

## ANNOTATIONS

**Cross references.** — For examination of jurors, *see* Rules 1-047 and 5-605 NMRA.

For juror questionnaires, *see* UJI Criminal 14-110 and 14-111 NMRA.

**The 2005 amendment,** effective July 1, 2005, deleted former Subsection B, which provided the criteria for excusing, excluding or postponing the services of a person as a juror; and added Subsection B(2), which provided that questionnaires to prospective jurors obtain information to aid in the determination of challenges.

**The 1991 amendment,** effective April 1, 1991, inserted "or his designee or magistrate or his designee" following "judge" throughout the section; in Subsection A, added the first and third sentences, rewrote the second sentence which read "The district judge will preside over the empaneling of petit jury and grand jury panels" and inserted "or postponement of services" in the final sentence; inserted "or postpone the services of" in the introductory phrase of Subsection B; inserted "or postponement of service" in the first sentence in Subsection C; and made related and minor stylistic changes throughout the section.

**Impermissible manipulation of the jury venire.** — Where the court clerk's systematic policy of placing all Spanish-only speaking prospective jurors in one panel, and effectively excluding these prospective jurors from all other panels, potentially violates both the prospective jurors' right to serve on a jury and the defendant's right to a fair and impartial jury. State v. Flores, 2015-NMCA-002, cert. granted, 2014-NMCERT-012.

**Presence of defendant is not required** during the jury culling process in which the judge or designee disqualifies or exempts prospective jurors pursuant to the statutory exemptions contained in 38-5-1 NMSA 1978 and this section. State v. Sanders, 2000-NMSC-032, 129 N.M. 728, 13 P.3d 460.

**Law reviews.** — For comment, "Juries - New Trial - Discovery of Juror's Disqualification or False Answer on Voir Dire as Ground for New Trial," see 7 Nat. Resources J. 415 (1967).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 47 Am. Jur. 2d Jury § 178 et seq.

Criminal case, excusing qualified juror drawn in, as ground of complaint by defendant, 96 A.L.R. 508.

Illness or other disability of civil case juror, proper procedure upon, 99 A.L.R.2d 684.

Religious belief as ground for exemption or excuse from jury service, 2 A.L.R.3d 1392.

Law enforcement officers as qualified jurors in criminal cases, 72 A.L.R.3d 895.

Former law enforcement officers as qualified jurors in criminal cases, 72 A.L.R.3d 958.

Excusing, on account of public, charitable, or educational employment, one qualified and not specifically exempted as juror in state criminal case as ground of complaint by accused, 99 A.L.R.3d 1261.

Cure of prejudice resulting from statement by prospective juror during voir dire, in presence of other prospective jurors, as to defendant's guilt, 50 A.L.R.4th 969.

Exclusion of public and media from voir dire examination of prospective jurors in state criminal case, 16 A.L.R.5th 152.

Use of peremptory challenges to exclude persons from criminal jury based on religious affiliation - post-Batson state cases, 63 A.L.R.5th 375.

Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction - state cases, 70 A.L.R.5th 587.

50 C.J.S. Juries §§ 205, 206.

## 38-5-12. Petit jury panels; number to be qualified; period of service; time for summoning.

A. The judge shall determine the number of jurors to be summoned for service, the date and time for the appearance of jurors for qualification, the number of jurors to be qualified to provide panels of jurors for trial service and the size of trial jury panels. Procedures such as the use of alternate jury panels should be established where appropriate to lessen the burden of jury service on persons retained on petit jury panels. Jurors may be drawn, summoned and qualified by the judge at any time to supplement jury panels requiring replacement or augmentation. Petit jury panels may be qualified and may serve as the trial needs of the court require without regard to court terms.

B. The supreme court shall establish, by rule, the appropriate length of jury terms. The court shall consider the number of trials held, the availability of jurors and the administrative and financial impact.

History: 1953 Comp., § 19-1-12, enacted by Laws 1969, ch. 222, § 12; 1970, ch. 40, § 2; 1971, ch. 136, § 1; 1977, ch. 382, § 1; 1979, ch. 173, § 2; 2005, ch. 107, § 8.

### ANNOTATIONS

**The 2005 amendment,** effective July 1, 2005, eliminated in Subsection A the requirement that judges determine the length of time jurors are retained for service, the limitation of time a juror may be required to service on a jury panel, and the exemption for jury service of persons who have service on a jury within the preceding thirty-six months; and added a new Subsection B to require the supreme court to establish the length of jury terms.

**Section authorizes district judge, with time limitations, to determine the length of time jurors are retained** for service. State v. Gonzales, 82 N.M. 388, 482 P.2d 252 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971)(decided under prior law).

**Term of service of jurors is to be determined by the district judge and may differ from the term of the court.** 1969 Op. Att'y Gen. No. 69-52 (rendered under prior law).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 47 Am. Jur. 2d Jury § 186 et seq.

Irregularity in drawing names for a jury panel as ground of complaint by a defendant in a criminal prosecution, 92 A.L.R. 1109.

Petit jury: prior service on grand jury which considered indictment against accused as disqualification for service on petit jury, 24 A.L.R.3d 1236.

Validity of statutory classifications based on population - jury selection statutes, 97 A.L.R.3d 434.

Excusing, on account of public, charitable, or educational employment, one qualified and not specifically exempted as juror in state criminal case as ground of complaint by accused, 99 A.L.R.3d 1261.

50 C.J.S. Juries § 164 et seq.

## 38-5-13. Drawing and qualifying trial jury.

The district court of each county shall maintain a list of the names of the jurors duly empaneled and present for the trial of a case. The judge shall cause the names to be randomly selected until sufficient names have been drawn to provide the number of jurors required for the trial. The name and number of each juror shall be announced. Twelve or six jurors shall compose a petit jury in the district courts for the trial of civil causes. Twelve jurors shall compose a petit jury in criminal and children's court cases. Magistrate and metropolitan jury court selection shall be conducted in accordance with supreme court rules.

History: 1953 Comp., § 19-1-13, enacted by Laws 1969, ch. 222, § 13; 1991, ch. 71, § 5; 2005, ch. 107, § 9.

**ANNOTATIONS**

**Cross references.** — For number of jurors required to return verdict in civil cases, *see* 38-5-17 NMSA 1978 and Rules 1-038 and 1-048 NMRA.

For selection of jurors in criminal cases generally, *see* Rule 5-605 NMRA.

For requirement of unanimous verdict in criminal cases, *see* Rule 5-611 NMRA.

**The 2005 amendment,** effective July 1, 2005, eliminated all former requirements concerning the jury lot slip container and lot slips, and provided that names shall be randomly selected.

**The 1991 amendment,** effective April 1, 1991, added "Jury lot slip container" at the beginning of the catchline; added Subsection A; designated the formerly undesignated provision as Subsection B; and, in Subsection B, deleted "before each name is drawn" following "rotated" in the third sentence, inserted "or six" following "Twelve" and deleted "or criminal" following "civil" in the fifth sentence, added the last three sentences; and made minor stylistic changes throughout the subsection.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 50 C.J.S. Juries §§ 192 to 198.

## 38-5-14. Exercising challenges to jurors.

The court shall permit the parties to a case to express in the record of trial any challenge to a juror for good cause. The court shall rule upon the challenge and may

excuse any juror for good cause. Challenges for good cause and peremptory challenges shall be made outside the hearing of the jury. The party making a challenge shall not be announced or disclosed to the jury panel, but each challenge shall be recorded by the clerk and placed in the case file. In civil trials, the opposing parties shall exercise peremptory challenges alternately. In juvenile or criminal cases, the state or prosecution shall pass or accept or make any peremptory challenge as to each juror before the defendant is called upon to pass, accept or exercise a peremptory challenge as to the juror. In civil cases, each party may challenge five jurors peremptorily. When there are two or more parties defendant or parties plaintiff, they shall exercise their peremptory challenges jointly, and if all cannot agree on a challenge desired by one party on a side, then the challenge is forfeited. However, if the relief sought by or against the parties on the same side of a civil case differs, or if their interests are diverse, or if cross-claims are to be tried, the court shall allow each party on that side of the suit five peremptory challenges.

**History:** 1953 Comp., § 19-1-14, enacted by Laws 1969, ch. 222, § 14; 1991, ch. 71, § 6.

## ANNOTATIONS

**Cross references.** — For challenges of jurors in civil cases, *see* Rule 1-038E NMRA.

For challenging of alternate jurors in civil cases, *see* Rule 1-047B NMRA.

For challenging of jurors in criminal cases, *see* Rule 5-606 NMRA.

**The 1991 amendment,** effective April 1, 1991, added "and placed in the case file" at the end of the fourth sentence and made minor stylistic changes throughout the section.

**If and when the trial court reverses its ruling on a challenge of a juror for cause,** the court should ask the party whose challenge was overruled if that party wishes to use a peremptory challenge retroactively. Benavidez v. City of Gallup, 2007-NMSC-026, 141 N.M. 808, 161 P.3d 853.

**Meaning of "party".** — The rule is well established that more than one defendant having identical interests and a common defense in a suit constitute but one party; if there is no suggestion of antagonism of interests between defendants found in the pleadings and no adverse issues pleaded by them, they constitute but one party. However, the rule is different if the pleadings show that one defendant has asked for judgment over against another defendant; the question then to be determined is whether or not there is a conflict of interest between the defendants. Am. Ins. Co. v. Foutz & Bursum, 60 N.M. 351, 291 P.2d 1081 (1955) (decided under former law).

**Section recognizes possibility of multiple parties.** — This section, concerning the exercise of peremptory challenges of prospective jurors, clearly recognizes that there

may be and often are multiple parties on each side of an action or proceeding. Romero v. Felter, 83 N.M. 736, 497 P.2d 738 (1972).

**Separate controversy between third-party plaintiff and defendant.** — Where a third-party plaintiff alleged that the negligent acts of a third-party defendant were a breach or violation of a duty owed to him and prayed for full indemnity or, in the alternative, contribution from the third-party defendant for any amount which should be granted the plaintiffs as a result of the principal suit, and the third-party defendant asserted defenses against the third-party plaintiff, there was an antagonism of interests between the third-party plaintiff and defendant sufficient to constitute a separate controversy between them for purposes of exercising their peremptory challenges. Am. Ins. Co. v. Foutz & Bursum, 60 N.M. 351, 291 P.2d 1081 (1955) (decided under former law).

**Although manner of exercising challenges of jurors ordered by the court was erroneous, it was harmless** where appellant had two peremptory challenges left. Territory v. Padilla, 12 N.M. 1, 71 P. 1084 (1903).

**Law reviews.** — For note and comment, "Trends in New Mexico Law: 1994-95: Criminal Procedure – What Constitutes a Race-Neutral Explanation for Using Peremptory Challenges? State v. Guzman and Purkett v. Elem," see 26 N.M.L. Rev. 555 (1996).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 47 Am. Jur. 2d Jury § 228 et seq.

Membership in secret order or organization for the suppression of crime as proper subject of examination, or ground of challenge, of juror, 31 A.L.R. 411, 158 A.L.R. 1361.

Presumption of innocence or rule as to reasonable doubt, failure to understand or unwillingness to accept as rendering juror incompetent, 40 A.L.R. 612.

Personal injury or death action, questions to jury in, as to interest in, or connection with, indemnity insurance company, 56 A.L.R. 1454, 74 A.L.R. 849, 95 A.L.R. 388, 105 A.L.R. 1319, 4 A.L.R.2d 761.

Statutory grounds for challenge of jurors for cause of exclusive or common-law grounds, 64 A.L.R. 645.

Extrinsic evidence in support of challenge to juror for cause, right to introduce, 65 A.L.R. 1056.

Implied bias or interest because of relationship to one who would be subject to challenge for that reason, challenge of proposed juror for, 86 A.L.R. 118.

Excusing qualified juror drawn in criminal case, defendant's right to complain of, as affected by existence or absence of right of peremptory challenge, 96 A.L.R. 514.

Insurance company, prospective juror's connection with, as ground for challenge for cause in action for personal injuries or damage to property, 103 A.L.R. 511.

Defense, prejudice against certain type of, as ground of challenge for cause of juror in criminal case, 112 A.L.R. 531.

Secret order or organization for suppression of crime, membership in, as ground for a challenge of juror, 158 A.L.R. 1361.

Competency of juror as affected by his participation in a case of similar character, but involving the party making the objection, 160 A.L.R. 753.

Right to peremptory challenges in selection of jury to try issue of former conviction, 162 A.L.R. 429.

Governing law as to existence or character of offense for which one has been convicted in a federal court or court of another state, as bearing upon disqualification to sit on jury, 175 A.L.R. 805.

Peremptory challenge after acceptance of juror, 3 A.L.R.2d 499.

Waiver of peremptory challenge or challenges in civil case other than by acceptance by juror, 56 A.L.R.2d 742.

Additional counsel: right to peremptory challenge as prejudice by appearance of additional counsel in civil case after impaneling of jury, 56 A.L.R.2d 971.

Previous knowledge of facts of civil case by juror as disqualification, 73 A.L.R.2d 1312.

Residents or taxpayers of litigating political subdivision, disqualification in absence of specific controlling statute, 81 A.L.R.2d 708.

Relationship of juror to witness in civil case as ground of disqualification, 85 A.L.R.2d 851.

Number: effect of allowing excessive number of peremptory challenges, 95 A.L.R.2d 957.

Number of peremptory challenges allowable in civil cases where there are more than two parties involved, 32 A.L.R.3d 747.

Capital punishment, beliefs as disqualifying juror in capital case for cause, 39 A.L.R.3d 550.

Use of peremptory challenge to exclude from jury persons belonging to race or class, 79 A.L.R.3d 14, 20 A.L.R.5th 398.

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors, 86 A.L.R.3d 571.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case, 94 A.L.R.3d 15.

Additional peremptory challenges because of multiple criminal charges, 5 A.L.R.4th 533.

Validity and construction of statute or court rule prescribing number of peremptory challenges in criminal cases according to nature of offense or extent of punishment, 8 A.L.R.4th 149.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Cure of prejudice resulting from statement by prospective juror during voir dire, in presence of other prospective jurors, as to defendant's guilt, 50 A.L.R.4th 969.

Professional or business relations between proposed juror and attorney as ground for challenge for cause, 52 A.L.R.4th 964.

Fact that juror in criminal case, or juror's relative or friend, has previously been victim of criminal incident as ground of disqualification, 65 A.L.R.4th 743.

Effect of juror's false or erroneous answer on voir dire regarding previous claims or actions against himself or his family, 66 A.L.R.4th 509.

Prospective juror's connection with insurance company as ground for challenge for cause, 9 A.L.R.5th 102.

Use of peremptory challenges to exclude ethnic and racial groups, other than Black Americans, from criminal jury - post-Batson state cases, 20 A.L.R.5th 398.

Use of preemptory challenges to exclude caucasian persons, as a racial group, from criminal jury - post-Batson state cases, 47 A.L.R.5th 259.

Propriety of inquiry on voir dire as to juror's attitude toward, or acquaintance with literature dealing with amount of damage awards, 63 A.L.R.5th 285.

Use of peremptory challenges to exclude persons from criminal jury based on religious affiliation - post-Batson state cases, 63 A.L.R.5th 375.

Examination and challenge of state case jurors on basis of attitudes toward homosexuality, 80 A.L.R.5th 469.

Examination and challenge of federal case jurors on basis of attitudes toward homosexuality, 85 A.L.R. Fed. 864.

50 C.J.S. Juries §§ 247 to 259, 267 to 285.

## 38-5-15. Mileage and compensation for jurors.

Persons summoned for jury service and jurors shall be reimbursed for travel from their place of actual residence to the courthouse when their attendance is ordered, at the rate allowed public officers and employees per mile of necessary travel. Persons summoned for jury service and jurors shall be compensated for their time in travel, attendance and service at the highest prevailing state minimum wage rate.

**History:** 1953 Comp., § 19-1-15, enacted by Laws 1969, ch. 222, § 15; 1970, ch. 40, § 3; 1976 (S.S.), ch. 16, § 1; 1979, ch. 285, § 1; 1991, ch. 71, § 7.

**ANNOTATIONS**

**Cross references.** — For Per Diem and Mileage Act, *see* 10-8-1 NMSA 1978.

For provision of meals and accommodations for jurors, *see* 34-6-41 NMSA 1978.

**The 1991 amendment,** effective April 1, 1991, deleted "and jury commissioners" following "jurors" in the catchline; deleted "Jury commissioners" at the beginning of the first and second sentences; and made related stylistic changes.

**When jurors are kept together a night during the course of a trial, they should be paid for this time.** 1969 Op. Att'y Gen. No. 69-101.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 47 Am. Jur. 2d Jury § 99.

50 C.J.S. Juries § 207.

## 38-5-16. Challenge to jury array.

Any party to a civil action or defendant in a criminal action, at the opening of trial and before the empaneling of the jury is commenced, by motion to quash the jury array, may challenge the jury panel on the ground that the members thereof were not selected substantially in accordance with law. If the motion is sustained, then the trial will be stayed until a jury panel has been selected and qualified in accordance with law. Such a challenge is waived if not raised before the trial jury panel has been sworn and selection of the trial jury commenced.

**History:** 1953 Comp., § 19-1-16, enacted by Laws 1969, ch. 222, § 16.

**ANNOTATIONS**

**Cross references.** — For challenges to jurors in civil and criminal cases generally, *see* 38-5-14 NMSA 1978.

For challenges of jurors in civil cases, *see* Rule 1-038E NMRA.

For challenges of jurors in criminal cases, *see* Rule 5-606 NMRA.

**Representative cross-section of the community.** — In order to show a prima facie violation of the fair cross-section requirement, a defendant must demonstrate that (1) the group alleged to be excluded is a "distinctive" group in the community, (2) the group's representation in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) this under-representation results from the systematic exclusion of the group in the jury-selection process. State v. Casillas, 2009-NMCA-034, 145 N.M. 783, 205 P.3d 830, cert. denied, 145 N.M. 783, 213 P.3d 507.

**Section permits challenge to the jury panel** on the ground that the members thereof were not selected substantially in accordance with law. State v. Gonzales, 82 N.M. 388, 482 P.2d 252 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

**Denial of motion to quash held proper.** — Even where trial judge, in denying motion made under this section, incorrectly ruled that motion was not timely, motion was otherwise defective where defendant made no claims that jury array was defective or was in any way not selected and qualified according to law, but rather appeared to be asking the court to find out whether the selection of jury array was proper, and trial court was correct in denying the motion. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

**Waiver not established.** — Section 38-5-16 NMSA 1978 does not bar objections to unlawful jury selection where a party does not know the selection process has been unlawful prior to swearing in the prospective jury panel and jury selection has been commenced. State v. Flores, 2015-NMCA-002, cert. granted, 2014-NMCERT-012.

**Violation of section must be established.** — An assertion that the jury panel includes an excessive proportion of persons related to law enforcement personnel and a request for a continuance in order to obtain evidence related to this assertion will not be granted where no violation of this section is established. State v. Trujillo, 99 N.M. 251, 657 P.2d 107 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 47 Am. Jur. 2d Jury § 247 et seq.

Failure of juror in criminal case to disclose his previous jury service within disqualifying period as ground for reversal, 13 A.L.R.2d 1482.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case, 94 A.L.R.3d 15.

Religious belief, affiliation or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire, 95 A.L.R.3d 172.

Age group underrepresentation in grand jury or petit jury venire, 62 A.L.R.4th 859.

Propriety, under state statute or court rule, of substituting state trial juror with alternate after case has been submitted to jury, 88 A.L.R.4th 711.

50 C.J.S. Juries §§ 260 to 266.

## 38-5-17. [Verdict by ten or more jurors; polling jury.]

In civil causes when the jury, or as many as ten of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict; if upon such inquiry or polling, more than two of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case.

**History:** 1978 Comp. § 38-5-17, enacted by Laws 1933, ch. 98, § 1.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For number of jurors in criminal cases, *see* 38-5-13 NMSA 1978.

For right to jury trial, *see* N.M. Const., art. II, § 12.

For number of jurors and requirements as to verdicts in civil cases, *see* Rules 1-038 and 1-048 NMRA.

For requirement of unanimous verdict in criminal cases, *see* Rule 5-611A NMRA.

**Ten jurors must agree to each material finding supporting verdict.** — This section means that a verdict must be received by the court when at least 10 jurors, not necessarily the same 10, agree to each material finding supporting that verdict; provided, however, that none of the jurors, upon whose votes the verdict depends, is guilty of irreconcilable inconsistencies or material contradictions when his votes on all issues are considered. Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

**Section does not mean the same 10 jurors must agree on every issue.** Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

**Any 10 jurors are necessary and sufficient to agree on any issue, so long as none of these jurors has voted inconsistently.** Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970).

**Polling of jury is not proper to determine amount of damage award** or for the purpose of revealing its determination of factual issues, since jury verdicts are required to be written. Sanchez v. Martinez, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982).

**Answers to special interrogatories cannot be orally modified. —** Written answers made by a jury to special interrogatories cannot be modified by oral answers of jurors to questions by the court. Sanchez v. Martinez, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982).

**Jury polling did not constitute "jury-urging". —** Where plaintiff' was employed by defendant as a surgeon; defendant terminated plaintiff's employment when defendant's administrative staff who attended a peer review meeting reported to defendant's staff who did not attend the meeting that plaintiff had engaged in unprofessional and aggressive behavior at the meeting; plaintiff sued defendant for violation of the confidentiality provisions of Section 41-9-5 NMSA 1978; a special verdict form required the jury to check a blank if it found that defendant had breached its implied promise that plaintiff would not suffer adverse consequences by participating in the peer review process and to place "Yes" in the blank if it found that defendant's breach of the implied promise was a proximate cause of plaintiff's damages; the jury checked the blank, but did not place "Yes" in the blank; the special verdict form indicated that the jury found that although defendant breached the implied promise, the breach was not a proximate cause of plaintiff's damages; at defendant's request, the district court polled the jury and determined that one juror was uncertain or confused about the answer to the question of proximate cause; the district court sent the jury back to deliberate on the proximate cause question with instructions to place "Yes" in the blank if the jury determined that the breach was a proximate cause of the damages and not to place "Yes" in the blank if the jury determined that the breach was not a proximate cause; when the jury returned, the special verdit form included a "Yes" in answer to the proximate cause question; and defendant argued that the district court's actions were coercive and constituted impermissible "verdict-urging", the district court's statements to the jury were neutral in form and substance and the district court did not err in permitting the jury to further deliberate on the proximate cause question. Yedidag v. Roswell Clinic Corp., 2013-NMCA-096, cert. granted, 2013-NMCERT-009.

## 38-5-18. Employer prohibited from penalizing employee for jury service.

A. An employer shall not deprive an employee of employment or threaten or otherwise coerce the employee because the employee receives a summons for jury

service, responds to the summons, serves as a juror or attends court for prospective jury service.

B. An employer shall not require or request an employee to use annual, vacation or sick leave for time spent responding to a summons for jury service, participating in the jury selection process or serving on a jury. Nothing in this subsection requires an employer to provide annual, vacation or sick leave to employees who are not otherwise entitled to those benefits under company policies.

History: Laws 1979, ch. 47, § 1; 2005, ch. 107, § 10.

**ANNOTATIONS**

**The 2005 amendment,** effective July 1, 2005, added Subsection B to prohibit employers from requiring or requesting that employees use annual, vacation or sick time for jury service, and provided that employers are not required to grant leave time to employees who are not otherwise entitled to those benefits.

**Law reviews.** — For article, "Defending the Abusively Discharged Employee: In Search of a Judicial Solution," see 12 N.M.L. Rev. 711 (1982).

## 38-5-19. Penalty.

An employer, either individually or through his agent, who violates Section 1 [38-5-18 NMSA 1978] of this act is guilty of a petty misdemeanor.

**History:** Laws 1979, ch. 47, § 2.

# ARTICLE 6
# Witnesses and Their Competency

## 38-6-1 to 38-6-3. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1981, ch. 115, § 1, repealed 38-6-1 through 38-6-3 NMSA 1978, relating to the issuance and service of subpoenas against witnesses, effective March 21, 1981.

## 38-6-4. Per diem and mileage for witnesses.

A. Witnesses shall be allowed no fees for services, but shall receive per diem expense and mileage at the rate specified for nonsalaried public officers as provided in the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978] for that time in which attendance is required, with certification of the clerk of the court.

B. The district judge in any civil case pending in the district court may order the payment of a reasonable fee, to be taxed as costs, in addition to the per diem and mileage as provided for in Subsection A of this section, for any witness who qualifies as an expert and who testifies in the cause in person or by deposition. The additional compensation shall include a reasonable fee to compensate the witness for the time required in preparation or investigation prior to the giving of the witness's testimony. The expert witness fee which may be allowed by the court shall be limited to one expert regarding liability and one expert regarding damages unless the court finds that additional expert testimony was reasonably necessary to the prevailing party and the expert testimony was not cumulative.

C. The provisions of this section shall apply only to cases filed on or after its effective date.

**History:** Laws 1887, ch. 40, § 1; C.L. 1897, § 1810; Code 1915, § 5898; C.S. 1929, § 155-104; 1941 Comp., § 20-104; 1953 Comp., § 20-1-4; Laws 1959, ch. 62, § 1; 1971, ch. 139, § 1; 1975, ch. 105, § 1; 1983, ch. 189, § 1.

## ANNOTATIONS

**Compiler's notes.** — The reference to the effective date in Subsection C means the effective date of Laws 1983, Chapter 189, which was June 17, 1983.

**Cross references.** — For limitation on taxation of costs, *see* 39-2-9 NMSA 1978.

For fees for witnesses in workers' compensation cases, *see* 52-5-7 NMSA 1978.

**Expert costs.** — An expert was forced to wait for the production of the documents, which he needed to prepare for the testimony that he later gave. Any costs that were incurred as a result of the delay are recoverable under Section 38-6-4B NMSA 1978. H-B-S P'ship v. Aircoa Hospitality Services, Inc., 2008-NMCA-013, 143 N.M. 404, 176 P.3d 1136.

Where expert testimony was reasonably necessary, as part of the mix of information the district court needed, it should be recompensed. Primetime Hospitality, Inc. v. City of Albuquerque, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112.

**Expert witness fees in summary judgment.** — Where defendants obtained summary judgment in a toxic tort action, defendants were entitled to recover expert witness fees for witnesses whose affidavits and testimony were material to the award of summary judgment for defendants and to the exclusion of the testimony of plaintiff's expert witnesses and whose testimony was not cumulative. Andrews v. U.S. Steel Corp., 2011-NMCA-032, 149 N.M. 461, 250 P.3d 887.

**Expert witnesses' fees are treated as costs and are taxed upon entry of judgment to the prevailing party,** not at the time a complaint is filed. Mantz v. Follingstad, 84

N.M. 473, 505 P.2d 68 (Ct. App. 1972), overruled on other grounds by Peralta v. Martinez, 90 N.M. 391, 564 P.2d 194 (Ct. App. 1977).

**Separate finding of reasonable necessity for multiple witnesses.** — The court did not abuse its discretion in allowing the fees of two expert witnesses as costs. A separate finding of "reasonable necessity" was not required, since it could be inferred that this section was considered by the court. Ulibarri v. Gee, 106 N.M. 637, 748 P.2d 10 (1987).

**Expert's expenses allowed as costs.** — Expense of a survey made preparatory for trial, and upon which the surveyor testified, is properly allowed as costs. Ulibarri Landscaping Material, Inc. v. Colony Materials, Inc., 97 N.M. 266, 639 P.2d 75 (Ct. App. 1981), cert. denied, 98 N.M. 50, 644 P.2d 1039 (1982).

Allowance of an expert witness fee was reasonable based on testimony that, in addition to the time the witness spent preparing for and testifying at trial, he spent additional time analyzing and investigating reports prepared by other party's expert witness. Key v. Chrysler Motors Corp., 1999-NMCA-028, 127 N.M. 38, 976 P.2d 523, aff'd in part, 2000-NMSC-010, 128 N.M. 739, 998 P.2d 575 (2000).

**Award of costs for fees of expert witnesses who do not testify** in person or in a deposition is not authorized by New Mexico statute. Fernandez v. Espanola Pub. Sch. Dist., 2004-NMCA-068, 135 N.M. 677, 92 P.3d 689, aff'd, 2005-NMSC-026, 138 N.M. 283, 119 P.3d 163.

Because none of the plaintiffs' expert witnesses had testified in the cause either in person or in a deposition prior to the time that plaintiffs had accepted defendants' offer of judgment, the court lacked discretion to award costs under the express language of Subsection B of this section. Fernandez v. Espanola Pub. Sch. Dist., 2004-NMCA-068, 135 N.M. 677, 92 P.3d 689, aff'd, 2005-NMSC-026, 138 N.M. 283, 119 P.3d 163.

**Physicians appearing as expert witnesses.** — Fees paid to physicians who testified as expert witnesses at trial or served as consulting experts to plaintiff were properly awarded as costs against defendant. Gillingham v. Reliable Chevrolet, 1998-NMCA-143, 126 N.M. 30, 966 P.2d 197.

**Costs allowed in case of fraudulent claim.** — In an action to quiet title to property, where a claim was based upon a document expressly found to have been forged by defendant, the trial court's order denying an award of costs for plaintiff's expert witness and imposition of sanctions against defendant was reversed and remanded for reconsideration. Martinez v. Martinez, 1997-NMCA-096, 123 N.M. 816, 945 P.2d 1034.

**Case resting on Workers' Compensation Act was not controlling authority** for a case interpreting Subsection B of this section. Fernandez v. Espanola Pub. Sch. Dist., 2004-NMCA-068, 135 N.M. 677, 92 P.3d 689, aff'd, 2005-NMSC-026, 138 N.M. 283, 119 P.3d 163.

**Use of court fund for payment of expert witnesses.** — A district court in the administration of justice may use its court fund to pay for expert witnesses regardless or whether or not such an expert is testifying for the prosecution. Further, this section does not set a limitation on this fee. Perhaps, however, the fee set out in this section would furnish a good guideline for the district court to use in setting the fees for that expert which must be paid from the court fund. 1966 Op. Att'y Gen. No. 66-14.

No statutory provision authorizes the payment of expert witnesses for their professional services from the county court funds. 1909-12 Op. Att'y Gen. No. 78.

**Law reviews.** — For article, "Rule 68 Offers of Judgment: Lessons From the New Mexico Experience," see 39 N.M.L. Rev. 349 (2009).

For article, "Settlement Without Sacrifice: The Recovery of Expert Witness Fees as Costs Under New Mexico's Rule 1-068," see 38 N.M.L. Rev. 655 (2008).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 20 Am. Jur. 2d Costs § 54; 81 Am. Jur. 2d Witnesses §§ 68 to 74.

Detention: right of witness detained in custody for future appearance to fees for such detention, 50 A.L.R.2d 1439.

Corporate litigant, allowance, as taxable costs, of witness fees and mileage of stockholders, directors, officers, and employees of, 57 A.L.R.2d 1243.

Allowance of mileage or witness fees with respect to witnesses who were not called to testify or not permitted to do so when called, 22 A.L.R.3d 675.

Contingent fee informant testimony in state prosecutions, 57 A.L.R.4th 643.

Requirements, under Rule 45(c) of Federal Rules of Civil Procedure and Rule 17(d) of Federal Rules of Criminal Procedure, relating to service of subpoena and tender of witness fees and mileage allowance, 77 A.L.R. Fed. 863.

20 C.J.S. Costs §§ 107 to 117; 97 C.J.S. Witnesses §§ 35 to 48.

## 38-6-5. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1981, ch. 115, § 1, repealed 38-6-5 NMSA 1978, relating to mileage and per diem expenses for witnesses and fixing trial dates for criminal cases, effective March 21, 1981.

## 38-6-6. Privileged communications.

A. No husband shall be compelled to disclose any communication made by his wife during the marriage, and no wife shall be compelled to disclose any communication made to her by her husband during the marriage.

B. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity.

C. In the courts of the state, no certified public accountant or public accountant shall be permitted to disclose information obtained in the conduct of any examination, audit or other investigation made in a professional capacity, or which may have been disclosed to said accountant by a client, without the consent in writing of such client or his, her or its successors or legal representatives.

D. If a person offers himself as a witness and voluntarily testifies with reference to the communications specified in this section, that is a consent to the examination of the person to whom the communications were made as above provided.

**History:** Laws 1880, ch. 12, § 7; C.L. 1884, § 2081; C.L. 1897, § 3020; Code 1915, § 2174; C.S. 1929, § 45-512; Laws 1933, ch. 33, § 1; 1939, ch. 235, § 1; 1941 Comp., § 20-112; 1953 Comp., § 20-1-12; Laws 1973, ch. 223, § 1.

## ANNOTATIONS

**Compiler's notes.** — It has been stated in Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 312, 551 P.2d 1354, 1359 (1976), that "no person has a privilege, except as provided by constitution or rule of . . . court . . .."

**Cross references.** — For privileges generally, *see* Rule 11-501 NMRA.

**Spousal privilege.** — This statute extends a spousal testimonial privilege to any communication. Rule 11-505 NMRA, however, provides that one spouse may prevent another from disclosing a confidential communication made during the marriage. Thus, the statute is far more comprehensive and seeks to grant a greater privilege than does the rule. The New Mexico supreme court has held that any conflict between the rules of evidence and statutes attempting to create evidentiary privileges must be resolved in favor of the rules. Section 38-6-6A NMSA 1978, which mirrors the older common law rule that neither spouse could be compelled to disclose a communication made during the marriage, does not govern the court's decision. State v. Teel, 103 N.M. 684, 712 P.2d 792 (Ct. App. 1985).

**In suit for alienation of affections, letters written to plaintiff by her husband,** showing a deep affection for her, were competent to rebut claim of defendant that no

affection existed and there was none to be lost. Murray v. Murray, 30 N.M. 557, 240 P. 303 (1925).

**Attorney-client privilege should only be applied to protect communications - not facts.** State ex rel. State Hwy. Comm'n v. Steinkraus, 76 N.M. 617, 417 P.2d 431 (1966).

**Allowance of accountant's testimony held not error.** — The privilege in this section is available only to the client and where this privilege was not asserted by objection or otherwise, allowance of the testimony of defendant's accountant was not error. Ash v. H.G. Reiter Co., Inc., 78 N.M. 194, 429 P.2d 653 (1967).

**Law reviews.** — For article, "New Mexico's Accountant-Client Privilege," see 37 N.M.L. Rev. 387 (2007).

For note, "Protecting Privileged Information-A New Procedure for Resolving Claims of the Physician-Patient Privilege in New Mexico-Pina v. Expinoza," see 32 N.M.L. Rev. 453 (2002).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 81 Am. Jur. 2d Witnesses §§ 285, 286, 290.

Privilege of communication to attorney as affected by termination of employment, 5 A.L.R. 728.

Privilege of communication to attorney by client in attempt to establish false claim, 5 A.L.R. 977, 9 A.L.R. 1081.

Admissibility of statements by attorney out of court as to probability of verdict or decision adverse to client, 8 A.L.R. 1334.

Waiver by beneficiary or personal representative, in actions on insurance policy of privilege of communications to physician, 15 A.L.R. 1544.

Competency of hospital physician or attendant to testify as to condition of patient, 22 A.L.R. 1217.

Privilege as to family matters or affairs incidentally learned by physicians while professionally attending patient, 24 A.L.R. 1202.

Applicability and effect in suit for alienation of affections of rule excluding confidential communications between husband and wife, 36 A.L.R. 1068, 82 A.L.R. 825.

Privilege as to facts learned on autopsy or post-mortem examination, 58 A.L.R. 1134.

Instruction which either affirms or denies jury's right to draw unfavorable inference against party invoking privilege against testimony of physician, 131 A.L.R. 696.

Public health record as subject of privilege, 136 A.L.R. 856.

Public officers or employees, constitutionality, construction and effect of statute or regulation relating specifically to divulgence of information acquired by, 165 A.L.R. 1302.

Conversations between husband and wife relating to property or business as within rule excluding private communications between them, 4 A.L.R.2d 835.

Observed matters: "communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse, 10 A.L.R.2d 1389.

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician, 25 A.L.R.2d 1429.

Admissibility of evidence of unperformed compromise agreement, 26 A.L.R.2d 858.

Deadman's Statute as applicable to spouse of party disqualified from testifying, 27 A.L.R.2d 538.

Divorce: effect of divorce or annulment on competency of one former spouse as witness against other in criminal prosecution, 38 A.L.R.2d 570.

Wills: proof of due execution of lost will as affected by privilege attaching to attorney-client communications, 41 A.L.R.2d 401.

Nurse or attendant, privilege of communications by or to, 47 A.L.R.2d 742.

Waiver by party of privilege as to communications with counsel by taking stand and testifying, 51 A.L.R.2d 521.

Hypothetical question, right of physician, notwithstanding physician-patient privilege, to give expert testimony based on, 64 A.L.R.2d 1056.

Privilege as to communications to attorney in connection with drawing of will, 66 A.L.R.2d 1302, 75 A.L.R.4th 1144.

Executors: waiver of attorney-client privilege by personal representative or heir of deceased client or by guardian of incompetent, 67 A.L.R.2d 1268.

Calling or offering accused's spouse as witness for prosecution as prejudicial misconduct, 76 A.L.R.2d 920.

Spouse as competent witness for or against co-offender with other spouse, 90 A.L.R.2d 648.

Federal courts as following law of forum state with respect to privileged communications, 95 A.L.R.2d 320.

Persons other than client or attorney affected by, or included within, attorney-client privilege, 96 A.L.R.2d 125, 31 A.L.R.4th 1226.

Who may waive privilege of confidential communications to physician by person since deceased, 97 A.L.R.2d 393.

Corporation's right to assert attorney-client privilege, 98 A.L.R.2d 241, 26 A.L.R.5th 628, 27 A.L.R.5th 76.

Mental condition: testimony as to communications or observations as to mental condition of patient treated for other condition, 100 A.L.R.2d 648.

Tort: applicability of attorney-client privilege to communications with respect to contemplated tortious acts, 2 A.L.R.3d 861.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 A.L.R.3d 1244.

Applicability in criminal proceedings of privilege as to communications between physician and patient, 7 A.L.R.3d 1458.

Attorney-client privilege as affected by communications between several attorneys, 9 A.L.R.3d 1420.

Crime: attorney-client privilege as affected by its assertion as to communications, or transmission of evidence, relating to crime already committed, 16 A.L.R.3d 1029.

Disclosure of name, identity, address, occupation, or business of client as violation of attorney-client privilege, 16 A.L.R.3d 1047.

Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery proceedings, 21 A.L.R.3d 912.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 A.L.R.3d 1401.

Bankruptcy trustee: power of trustee in bankruptcy to waive privilege of communications available to bankrupt, 31 A.L.R.3d 557.

Admissibility of statements to physician by person since deceased, 37 A.L.R.3d 778.

Who is "clergyman" or the like entitled to assert privilege attaching to communications to clergymen or spiritual advisers, 49 A.L.R.3d 1205.

Matters to which the privilege covering communications to clergyman or spiritual adviser extends, 71 A.L.R.3d 794.

Competency of one spouse to testify against other in prosecution for offense against child of both or either, 93 A.L.R.3d 1018.

Effect, on competency to testify against spouse or on marital communication privilege, of separation or other marital instability short of absolute divorce, 98 A.L.R.3d 1285.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident) - state case, 1 A.L.R.4th 673.

Spouse's betrayal or connivance as extending marital communications privilege to testimony of third person, 3 A.L.R.4th 1104.

Communication between unmarried couple living together as privileged, 4 A.L.R.4th 422.

Testimony before or communications to private professional society's judicial commission, ethics committee or the like, as privileged, 9 A.L.R.4th 807.

Existence of spousal privilege where marriage was entered into for purpose of barring testimony, 13 A.L.R.4th 1305.

Applicability of attorney-client privilege to communications made in presence of or solely to or by third person, 14 A.L.R.4th 594.

Attorney-client privilege as extending to communications relating to contemplated civil fraud, 31 A.L.R.4th 458.

Privilege as to communications between lay representative in judicial or administrative proceedings and client, 31 A.L.R.4th 1226.

Privileged communications between accountant and client, 33 A.L.R.4th 539.

Attorney as witness for client in civil proceedings - modern state cases, 35 A.L.R.4th 810.

Physician's tort liability for unauthorized disclosure of confidential information about patient, 48 A.L.R.4th 668.

Discovery: right to ex parte interview with injured party's treating physician, 50 A.L.R.4th 714.

Communications between spouses as to joint participation in crime as within privilege of interspousal communications, 62 A.L.R.4th 1134.

Compelling testimony of opponent's expert in state court, 66 A.L.R.4th 213.

Who is "representative of the client" within state statute or rule privileging communications between an attorney and the representative of the client, 66 A.L.R.4th 1227.

Invasion of privacy by a clergyman, church, or religious group, 67 A.L.R.4th 1086.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution - modern state cases, 74 A.L.R.4th 223.

Competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction, 74 A.L.R.4th 277.

Involuntary disclosure or surrender of will prior to testator's death, 75 A.L.R.4th 1144.

Adverse presumption or inference based on party's failure to produce or examine spouse - modern cases, 79 A.L.R.4th 694.

Determination of whether a communication is from a corporate client for purposes of the attorney-client privilege - modern cases, 26 A.L.R.5th 628.

What corporate communications are entitled to attorney-client privilege - modern cases, 27 A.L.R.5th 76.

Waiver of evidentiary privilege by inadvertent disclosure-state law, 51 A.L.R.5th 603.

Testimonial privilege for confidential communications between relatives other than husband and wife - state cases, 62 A.L.R.5th 629.

Marital privilege under Rule 501 of Federal Rules of Evidence, 46 A.L.R. Fed. 735.

Immunity's sufficiency to meet federal grand jury witness' claim of privilege against adverse spousal testimony, 82 A.L.R. Fed. 600.

Waiver of evidentiary privilege by inadvertent disclosure - federal law, 159 A.L.R. Fed. 153.

Views of United States Supreme Court as to attorney-client privilege, 159 A.L.R. Fed. 243.

97 C.J.S. Witnesses §§ 252 to 314.

## 38-6-7. News sources and information; mandatory disclosure prohibited; definitions; special procedure for prevention of injustice issue.

A. Unless disclosure be essential to prevent injustice, no journalist or newscaster, or working associates of a journalist or newscaster, shall be required to disclose before any proceeding or authority, either:

(1) the source of any published or unpublished information obtained in the gathering, receiving or processing of information for any medium of communication to the public; or

(2) any unpublished information obtained or prepared in gathering, receiving or processing of information for any medium of communication to the public.

B. For the purpose of this act [this section]:

(1) "proceeding or authority" includes any proceeding or investigation before, or by, any legislative, judicial, executive or administrative body or person;

(2) "medium of communication" means any newspaper, magazine, press association, news service, wire service, news or feature syndicate, broadcast or television station or network, or cable television system;

(3) "information" means any written, oral or pictorial news or other material;

(4) "published information" means any information disseminated to the public by the person from whom disclosure is sought;

(5) "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated, and includes but is not limited to, all notes, news copy, outtakes, photographs, films, recording tapes or other data of whatever sort not disseminated to the public through a medium of communication;

(6) "processing" includes compiling, storing and editing of information;

(7) "journalist" means any person who, for gain is engaged in gathering, preparing, editing, analyzing or commenting on news for a newspaper, magazine, news agency, news or feature syndicate, press association or wire service, or who was so engaged at the time a source or information was procured;

(8) "newscaster" means any person who, for gain is engaged in gathering, preparing, editing, analyzing, commenting on or broadcasting news for radio or television transmission, or who was so engaged at the time a source or information was procured; and

(9) "working associates [associate]" means any person who works for the person, in his capacity as a journalist or newscaster, from whom a source or information is sought and who was so engaged at the time a source or information was procured, or any person employed by the same individual or entity that employs the person, in his capacity as a journalist or newscaster, from whom a source or information is sought, and who was so engaged at the time a source or information was procured.

C. If the proceeding in which disclosure is sought is in the district court, that court will determine whether disclosure is essential to prevent injustice. In all other proceedings, application shall be made to the district court of the county in which the proceeding is being held for an order for disclosure. Disclosure shall, in no event, be ordered except upon written order of the district court stating the reasons why disclosure is essential to prevent injustice. Such an order is appealable to the supreme court if the appeal is docketed in that court within ten days after its entry. The matter shall be considered as an extraordinary proceeding and shall be heard de novo and within twenty days from date of docketing. The taking of an appeal shall operate to stay proceedings as to the prevention of injustice issue only in the district court.

**History:** 1953 Comp., § 20-1-12.1, enacted by Laws 1973, ch. 31, § 1.

## ANNOTATIONS

**Repeals and reenactments.** — Laws 1973, ch. 31, § 1, repealed 20-1-12.1, 1953 Comp., relating to the reporter's privilege, and enacted a new section.

**Cross references.** — For privilege to refuse to disclose informer's identity, *see* Rule 11-510 NMRA.

**Attempt to create rule of evidence.** — The privilege created by this section, insofar as it protects disclosure in a judicial proceeding of information obtained in gathering, receiving or processing of information for any medium of communication to the public, is an attempt to create a rule of evidence. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

**Privilege created by Subsection A is constitutionally invalid** and cannot be relied upon or enforced in judicial proceedings, under Subsection C or otherwise. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

**Scope of privilege.** — In holding that this privilege cannot be relied upon or enforced in judicial proceedings, the supreme court explicitly declined to rule on whether the privilege could properly be asserted in proceedings or investigations before or by any legislative, executive or administrative body or person or to decide the validity of the procedures prescribed for making application to the district court for an order of disclosure directed to such proceedings. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

**Law reviews.** — For comment, "Coopting the Journalist's Privilege: Of Sources and Spray Paint," see 23 N.M.L. Rev. 435 (1993).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Privilege of newsgatherer against disclosure of confidential sources or information, 99 A.L.R.3d 37.

97 C.J.S. Witnesses § 259.

## 38-6-8. Witnesses with mental retardation; competency evaluation.

A. As used in this section:

(1) "witness with mental retardation" means a witness in a proceeding whom the court has found after hearing, as provided in Subsection B of this section, to have mental retardation; and

(2) "mental retardation" means substantial limitations in present functioning characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work.

B. In any judicial proceeding wherein a witness with mental retardation may or will testify, the court on its own motion or on motion of the proponent of the witness with mental retardation, and after hearing, may order the use of one of the alternative procedures for determining competency to testify or for taking the testimony of the witness with mental retardation described below, provided that the court finds at the time of the order, by a preponderance of the evidence in the case, that the witness with mental retardation is likely, as a result of submitting to usual procedures for determining competency or as a result of testifying in open court:

(1) to suffer unreasonable and unnecessary mental or emotional harm; or

(2) to suffer a temporary loss of or regression in cognitive or behavioral functioning or communicative abilities such that his ability to testify will be significantly impaired.

C. If the court orders the use of an alternative procedure pursuant to this section, the court shall make and enter specific findings on the record describing the reasons for such order.

D. A court that makes findings in accordance with Subsection B of this section may order any of the following suitable alternative procedures for determining the competency to testify or for taking the testimony of the witness with mental retardation:

(1) taking the testimony of the witness with mental retardation while permitting a person familiar to the witness such as a family member, clinician, counselor, social worker or friend to sit near or next to him;

(2) taking the testimony of the witness with mental retardation in court but off the witness stand;

(3) if the proceeding is a bench proceeding, taking the testimony of the witness with mental retardation in a setting familiar to the witness;

(4) if the proceeding is a jury trial, videotaping of testimony, out of the presence of the jury or in a location chosen by the court or by agreement of the parties; or

(5) the procedure set forth in Paragraph (1) in combination with Paragraph (2), (3) or (4) of this subsection.

E. Testimony taken by a videotape pursuant to an order under Subsection B of this section shall be taken in the presence of the judge, counsel for all parties and such other persons as the court may allow. Counsel shall be given the opportunity to examine, confront or cross-examine the witness with mental retardation to the same extent as would be permitted if ordinary procedures had been followed, subject to such protection of the mentally retarded witness as the judge deems necessary.

F. An order issued under Subsection B of this section that the testimony of the witness with mental retardation be videotaped out of the presence of the jury shall provide that the videotape be shown in court to the jury in the presence of the judge, the parties and the parties' counsel. At such courtroom showing, the audio portion of the video shall be entered into the record as would any oral testimony and shall be treated in all respects as oral testimony to the jury.

G. The videotape or giving of testimony taken by an alternative procedure pursuant to an order issued under Subsection B of this section shall be admissible as substantive evidence to the same extent as and in lieu of live testimony by the witness in any proceeding for which the order is issued or in any related proceeding against the same party when consistent with the interests of justice, provided that such an order is entered or re-entered based on current findings at the time when, or within a reasonable time before, the videotape or testimony is offered into evidence, and provided, in the

case of a related criminal proceeding, that the requirements of Subsection E of this section were satisfied when the videotape was recorded or the alternative procedure was used.

H. Whenever, pursuant to an order issued under Subsection B of this section, testimony is recorded on videotape, the court shall ensure that:

(1) the recording equipment is capable of making an accurate recording and is operated by a competent operator;

(2) the recording is in color and is taken in well-lit conditions;

(3) the presence of the presiding judge, the attorneys, the defendant or parties, if in the room, and all other persons present is stated on the recording;

(4) the witness with mental retardation is visible at all times and, to the extent reasonably possible, the recording shows all persons present in the room as a jury would perceive them in open court;

(5) every voice on the recording is audible and identifiable;

(6) the recording is accurate, undistorted in picture or sound quality and has not been altered except as ordered by the court; and

(7) each party is afforded the opportunity to view the recording before it is shown in the courtroom.

I. The fact that the witness with mental retardation has been found in a court proceeding to be incompetent to make informed decisions of a personal, medical or financial nature, or is under a guardianship or conservatorship shall not preclude the witness from testifying if found competent to testify and, further, shall not preclude a determination of competency to testify.

J. The use of alternative procedures shall not be denied because they may take significantly more time than conventional procedures.

K. Expert opinion shall be admissible at any hearing held pursuant to this section, including hearings to determine the competency of a witness with mental retardation to testify.

L. Nothing in this section shall be deemed to prohibit the court from using other appropriate means, consistent with this section and other laws and with the defendant's rights, to protect a witness with mental retardation from trauma during a court proceeding.

**History:** Laws 1993, ch. 333, § 1.

# ARTICLE 6A
# Uniform Child Witness Protective Measures

## 38-6A-1. Short title.

This act [38-6A-1 through 38-6A-9 NMSA 1978] may be cited as the "Uniform Child Witness Protective Measures Act".

History: Laws 2011, ch. 98, § 1.

**ANNOTATIONS**

**Effective dates.** — Laws 2011, ch. 98, § 11 made the Uniform Child Witness Protective Measures Act effective July 1, 2012.

**Severability.** — Laws 2011, ch. 98, § 10 provided that if any part or application of the Uniform Child Witness Protective Measures Act was held invalid, the remainder or its application to other situations or persons shall not be affected.

## 38-6A-2. Definitions.

As used in the Uniform Child Witness Protective Measures Act:

A. "alternative method" means:

(1) in a criminal proceeding in which a child witness does not give testimony in an open forum in full view of the finder of fact, a videotaped deposition of the child witness that complies with the following requirements:

(a) the deposition was presided over by a district judge;

(b) the defendant was represented by counsel at the deposition or waived counsel;

(c) the defendant was present at the deposition; and

(d) the defendant was given an adequate opportunity to cross-examine the child witness, subject to such protection of the child witness as the judge deemed necessary;

(2) in a criminal proceeding in which a child witness does not give testimony face-to-face with the defendant, a videotaped deposition of the child witness that complies with the following requirements:

(a) the deposition was presided over by a district judge;

(b) the defendant was represented by counsel at the deposition or waived counsel;

(c) the defendant was able to view the deposition, including the child witness, through closed-circuit television or equivalent technology, and the defendant and counsel were able to communicate with each other during the deposition through headsets and microphones or equivalent technology; and

(d) the defendant was given an adequate opportunity to cross-examine the child witness, subject to such protection of the child witness as the judge deemed necessary; or

(3) in a noncriminal proceeding, testimony by closed-circuit television, deposition, testimony in a closed forum or any other method of testimony that does not include one or more of the following:

(a) having the child testify in person in an open forum;

(b) having the child testify in the presence and full view of the finder of fact and presiding officer; and

(c) allowing all of the parties to be present, to participate and to view and be viewed by the child;

B. "child witness" means:

(1) an individual under the age of sixteen who has been or will be called to testify in a noncriminal proceeding; or

(2) an alleged victim under the age of sixteen who has been or will be called to testify in a criminal proceeding;

C. "criminal proceeding" means a trial or hearing before a court in a prosecution of a person charged with violating a criminal law of New Mexico or a delinquency proceeding pursuant to the Delinquency Act [Chapter 32A, Article 2 NMSA 1978] involving conduct that if engaged in by an adult would constitute a violation of a criminal law of New Mexico;

D. "noncriminal proceeding" means a trial or hearing before a court or an administrative agency of New Mexico having judicial or quasi-judicial powers in a civil case, an administrative proceeding or any other case or proceeding other than a criminal proceeding; and

E. "presiding officer" means the person under whose supervision and jurisdiction the proceeding is being conducted. "Presiding officer" includes a judge in whose court a

case is being heard, a quasi-judicial officer or an administrative law judge or hearing officer.

History: Laws 2011, ch. 98, § 2.

**ANNOTATIONS**

**Effective dates.** — Laws 2011, ch. 98, § 11 made the Uniform Child Witness Protective Measures Act effective July 1, 2012.

**Severability.** — Laws 2011, ch. 98, § 10 provided that if any part or application of the Uniform Child Witness Protective Measures Act was held invalid, the remainder or its application to other situations or persons shall not be affected.

## 38-6A-3. Applicability.

A. The Uniform Child Witness Protective Measures Act applies to the testimony of a child witness in a criminal or noncriminal proceeding. However, the Uniform Child Witness Protective Measures Act does not preclude, in a criminal or noncriminal proceeding, any other procedure permitted by law:

(1) for a child witness to testify by an alternative method, however denominated; or

(2) for protecting the interests of or reducing mental or emotional harm to a child witness.

B. The supreme court may adopt rules of procedure and evidence to implement the provisions of the Uniform Child Witness Protective Measures Act.

History: Laws 2011, ch. 98, § 3.

**ANNOTATIONS**

**Effective dates.** — Laws 2011, ch. 98, § 11 made the Uniform Child Witness Protective Measures Act effective July 1, 2012.

**Severability.** — Laws 2011, ch. 98, § 10 provided that if any part or application of the Uniform Child Witness Protective Measures Act was held invalid, the remainder or its application to other situations or persons shall not be affected.

## 38-6A-4. Hearing whether to allow testimony by alternative method.

A. The presiding officer in a criminal or noncriminal proceeding may order a hearing to determine whether to allow a child witness to testify by an alternative method. The presiding officer, for good cause shown, shall order the hearing upon motion of a party,

a child witness or an individual determined by the presiding officer to have sufficient standing to act on behalf of the child.

B. A hearing to determine whether to allow a child witness to testify by an alternative method shall be conducted on the record after reasonable notice to all parties, to any nonparty movant and to any other person the presiding officer specifies. The child's presence is not required at the hearing unless ordered by the presiding officer.

History: Laws 2011, ch. 98, § 4.

**ANNOTATIONS**

**Effective dates.** — Laws 2011, ch. 98, § 11 made the Uniform Child Witness Protective Measures Act effective July 1, 2012.

**Severability.** — Laws 2011, ch. 98, § 10 provided that if any part or application of the Uniform Child Witness Protective Measures Act was held invalid, the remainder or its application to other situations or persons shall not be affected.

## 38-6A-5. Standards for determining whether a child witness may testify by alternative method.

A. In a criminal proceeding, the presiding officer may allow a child witness to testify by an alternative method in the following situations:

(1) the child may testify otherwise than in an open forum in the presence and full view of the finder of fact upon a showing that the child witness may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm; and

(2) the child may testify other than face-to-face with the defendant if the presiding officer makes specific findings that the child witness would be unable to testify face-to-face with the defendant without suffering unreasonable and unnecessary mental or emotional harm.

B. In a noncriminal proceeding, the presiding officer may allow a child witness to testify by an alternative method if the presiding officer finds that allowing the child to testify by an alternative method is necessary to serve the best interests of the child or enable the child to communicate with the finder of fact. In making this finding, the presiding officer shall consider:

(1) the nature of the proceeding;

(2) the age and maturity of the child;

(3) the relationship of the child to the parties in the proceeding;

(4) the nature and degree of mental or emotional harm that the child may suffer in testifying; and

(5) any other relevant factor.

History: Laws 2011, ch. 98, § 5.

**ANNOTATIONS**

**Effective dates.** — Laws 2011, ch. 98, § 11 made the Uniform Child Witness Protective Measures Act effective July 1, 2012.

**Severability.** — Laws 2011, ch. 98, § 10 provided that if any part or application of the Uniform Child Witness Protective Measures Act was held invalid, the remainder or its application to other situations or persons shall not be affected.

## 38-6A-6. Factors for determining whether to permit alternative method.

If the presiding officer determines that a standard pursuant to Section 5 [38-6A-5 NMSA 1978] of the Uniform Child Witness Protective Measures Act has been met, the presiding officer shall determine whether to allow a child witness to testify by an alternative method and in doing so shall consider:

A. alternative methods reasonably available for protecting the interests of or reducing mental or emotional harm to the child;

B. available means for protecting the interests of or reducing mental or emotional harm to the child without resort to an alternative method;

C. the nature of the case;

D. the relative rights of the parties;

E. the importance of the proposed testimony of the child;

F. the nature and degree of mental or emotional harm that the child may suffer if an alternative method is not used; and

G. any other relevant factor.

History: Laws 2011, ch. 98, § 6.

**ANNOTATIONS**

**Effective dates.** — Laws 2011, ch. 98, § 11 made the Uniform Child Witness Protective Measures Act effective July 1, 2012.

**Severability.** — Laws 2011, ch. 98, § 10 provided that if any part or application of the Uniform Child Witness Protective Measures Act was held invalid, the remainder or its application to other situations or persons shall not be affected.

## 38-6A-7. Order regarding testimony by alternative method.

A. An order allowing or disallowing a child witness to testify by an alternative method shall state the findings of fact and conclusions of law that support the presiding officer's determination.

B. An order allowing a child witness to testify by an alternative method shall:

(1) state the method by which the child is to testify;

(2) list any individual or category of individuals allowed to be in, or required to be excluded from, the presence of the child during the testimony;

(3) state any special conditions necessary to facilitate a party's right to examine or cross-examine the child;

(4) state any condition or limitation upon the participation of individuals present during the testimony of the child; and

(5) state any other condition necessary for taking or presenting the testimony.

C. The alternative method ordered by the presiding officer shall be no more restrictive of the rights of the parties than is necessary under the circumstances to serve the purposes of the order and shall be subject to the other provisions of the Uniform Child Witness Protective Measures Act.

History: Laws 2011, ch. 98, § 7.

**ANNOTATIONS**

**Effective dates.** — Laws 2011, ch. 98, § 11 made the Uniform Child Witness Protective Measures Act effective July 1, 2012.

**Severability.** — Laws 2011, ch. 98, § 10 provided that if any part or application of the Uniform Child Witness Protective Measures Act was held invalid, the remainder or its application to other situations or persons shall not be affected.

## 38-6A-8. Right of party to examine child witness.

An alternative method ordered by the presiding officer shall permit a full and fair opportunity for examination or cross-examination of the child witness by each party, subject to such protection of the child witness as the presiding officer deems necessary.

History: Laws 2011, ch. 98, § 8.

**ANNOTATIONS**

**Effective dates.** — Laws 2011, ch. 98, § 11 made the Uniform Child Witness Protective Measures Act effective July 1, 2012.

**Severability.** — Laws 2011, ch. 98, § 10 provided that if any part or application of the Uniform Child Witness Protective Measures Act was held invalid, the remainder or its application to other situations or persons shall not be affected.

## 38-6A-9. Uniformity of application and construction.

In applying and construing the Uniform Child Witness Protective Measures Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

History: Laws 2011, ch. 98, § 9.

**ANNOTATIONS**

**Effective dates.** — Laws 2011, ch. 98, § 11 made the Uniform Child Witness Protective Measures Act effective July 1, 2012.

**Severability.** — Laws 2011, ch. 98, § 10 provided that if any part or application of the Uniform Child Witness Protective Measures Act was held invalid, the remainder or its application to other situations or persons shall not be affected.

# ARTICLE 7
# Admissibility and Sufficiency of Evidence

## 38-7-1. Verified accounts; instruments in writing; denial under oath.

Except as provided in the Uniform Commercial Code [Chapter 55 NMSA 1978], accounts duly verified by the oath of the party claiming the same, or his agent, and promissory notes and other instruments in writing, not barred by law, are sufficient evidence in any suit to enable the plaintiff to recover judgment for the amount thereof, unless the defendant or his agent denies the same under oath.

**History:** Laws 1880, ch. 5, § 18; C.L. 1884, § 1878; C.L. 1897, § 2931; Code 1915, § 2176; C.S. 1929, § 45-603; 1941 Comp., § 20-207; 1953 Comp., § 20-2-7; Laws 1961, ch. 96, § 11-103.

**ANNOTATIONS**

**Cross references.** — For admissibility of evidence in civil actions in district courts, *see* Rule 11-101 NMRA et seq.

**Section held unconstitutional.** — Because this section prescribes an evidentiary rule of practice or procedure, an area constitutionally within the power of the supreme court and not the legislature, this section is unconstitutional. Miller & Assocs., Ltd. v. Rainwater, 102 N.M. 170, 692 P.2d 1319 (1985).

**Law reviews.** — For annual survey of New Mexico commercial law, see 16 N.M.L. Rev. 1 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 1 Am. Jur. 2d Accounts and Accounting § 12 et seq.

Accounts receivable: sufficiency of evidence as to items included in "accounts receivable" under contract selling, assigning, pledging, or reserving such items, 41 A.L.R.2d 1395.

1 C.J.S. Account, Action on §§ 33 to 43.

## 38-7-2. [Consideration imported by written contract.]

Every contract in writing hereafter made shall import a consideration in the same manner and as fully as sealed instruments have heretofore done.

**History:** Laws 1901, ch. 62, § 12; Code 1915, § 2181; C.S. 1929, § 45-608; 1941 Comp., § 20-208; 1953 Comp., § 20-2-8.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Under this section, it is not necessary, in a suit upon a written contract, to allege a consideration.** Flores v. Baca, 25 N.M. 424, 184 P. 532 (1919).

**Express allegation of mortgagor's ownership.** — In foreclosure complaint, an express allegation of mortgagor's ownership of mortgaged premises was unnecessary; it was implied. Franklin v. Harper, 32 N.M. 108, 252 P. 170 (1926); Flores v. Baca, 25 N.M. 424, 184 P. 532 (1919).

**Option agreement.** — Where option agreement was alleged to be in writing it was sufficient to withstand the attack of a motion to dismiss for failure to allege consideration. Rubenstein v. Weil, 75 N.M. 562, 408 P.2d 140 (1965).

**Contract which is not entirely in writing is regarded as an oral or verbal contract,** and a complaint in a suit upon such a contract, which fails to allege a consideration, is fatally defective. Flores v. Baca, 25 N.M. 424, 184 P. 532 (1919).

**Under this section, a draft imports a consideration.** First Nat'l Bank v. Home Ins. Co., 16 N.M. 66, 113 P. 815 (1911).

**"Import a consideration" construed.** — The language "import a consideration," as used in this section, means that in the absence of evidence on the point, it will be presumed that there was a sufficient consideration and the burden of proof on the question is on the party denying the existence of consideration. Burt v. Horn, 97 N.M. 515, 641 P.2d 546 (Ct. App. 1982).

**A deed, being merely a specialized form of contract, consideration is imported** in the same manner and as fully as sealed instruments. Rael v. Cisneros, 82 N.M. 705, 487 P.2d 133 (1971).

**Adjustment of disputes is sufficient consideration.** — If disputes have arisen under a contract, and the parties thereto enter into a new contract as a means of adjusting such disputes, such adjustment of disputes is a sufficient consideration. Burt v. Horn, 97 N.M. 515, 641 P.2d 546 (Ct. App. 1982).

**Instrument bearing evidence of lack of consideration destroys presumption.** — Where the instrument upon its face bears the evidence of its infirmity and lack of consideration, it without more furnishes the proof which destroys the presumption of consideration. Burt v. Horn, 97 N.M. 515, 641 P.2d 546 (Ct. App. 1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 17A Am. Jur. 2d Contracts § 121; 68 Am. Jur. 2d Seals § 11.

17 C.J.S. Contracts §§ 15, 72.

## 38-7-3. [Abstracts of title; admissibility; explanation; contradiction.]

Any abstract of the title to real estate, located in the state of New Mexico, certified to as correct by the secretary, and under the seal of any title abstract company, incorporated and doing business under the laws of the state, or by an individual bonded abstracter, shall be received in all of the courts of this state as evidence of the things recited therein, in the same manner, and to a like extent, that the public records are now admitted, and such abstract may be explained or contradicted in the same manner and to the same extent as such records may now be.

**History:** Laws 1882, ch. 69, § 1; C.L. 1884, § 2744; C.L. 1897, § 3934; Code 1915, § 2188; C.S. 1929, § 45-615; Laws 1943, ch. 16, § 1; 1941 Comp., § 20-212; 1953 Comp., § 20-2-13.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**In suit to quiet title between parties claiming under conflicting grants, a certified abstract of title was admissible,** even though the certificate excepted any "conflicts" with other grants, and inadvertently referred to the records of the wrong county, where the error was apparent. Jackson v. Gallegos, 38 N.M. 211, 30 P.2d 719 (1934).

**Law reviews.** — For article, "The New Mexico Legal Rights Demonstration Land Grant Project," see 8 N.M.L. Rev. 1 (1978).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Duty and liability of abstracter to employer respecting matters to be included in abstract, 28 A.L.R.2d 891.

Negligence in preparing abstract of title as ground of liability to one other than person ordering abstract, 50 A.L.R.4th 314.

32A C.J.S. Evidence § 890.

## 38-7-4. [False or forged abstract; penalty.]

Any officer of such company, who shall certify to any such abstract that it is true and correct, knowing the same to be false, or any person who shall forge the name of any such officer, or the seal of any such company, shall, upon conviction, be deemed guilty of a felony, and be fined not more than five hundred dollars [($500)], or imprisonment in the penitentiary not more than three years, or both, in the discretion of the court.

**History:** Laws 1882, ch. 69, § 2; C.L. 1884, § 2745; C.L. 1897, § 3935; Code 1915, § 2189; C.S. 1929, § 45-616; 1941 Comp., § 20-213; 1953 Comp., § 20-2-14.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

# ARTICLE 8
# Depositions for Use in Foreign State

## 38-8-1. [Order for appearance of witness and production of documents.]

Where an order has been made by the court or a judge in a foreign state, territory or country, or stipulation has been entered into, or a notice given pursuant to the practice in such state, territory or country for the taking of the deposition of a witness within this state for use in a legal proceeding or cause pending in such state, territory or country, any judge shall, upon proof of such facts, issue an order directing the witness or witnesses to attend before the judge, notary or commissioner therein named, and to testify under oath or affirmation, and to produce such books, papers and writings as may be deemed material, at a time and place certain, and upon such further day or days as the judge, notary or commissioner may appoint, but no witness shall be compelled to attend outside the judicial district in which he shall reside, or sojourn, nor unless served with a copy of such order ten days before the return day therein mentioned and is paid witness fees and mileage in the same manner as are required upon the service of a subpoena in a cause pending in the district court.

**History:** Laws 1907, ch. 84, § 1; Code 1915, § 2160; C.S. 1929, § 45-301; 1941 Comp., § 20-301; 1953 Comp., § 20-3-1.

**ANNOTATIONS**

**Bracketed material. —** The bracketed material was inserted by the compiler and is not part of the law.

**Cross references. —** For allowance of per diem and mileage for witnesses in district courts, *see* 38-6-4 NMSA 1978.

For depositions in civil actions in district courts generally, *see* Rule 1-026 NMRA et seq..

For discovery and production of documents in civil actions in district courts generally, *see* Rule 1-034 NMRA.

For discovery in civil actions in magistrate courts, *see* Rule 2-501 NMRA.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 23 Am. Jur. 2d Depositions and Discovery §§ 148, 149.

26A C.J.S. Depositions §§ 61, 62.

## 38-8-2. [Disobedience of witness; use of copies of documents.]

In case any witness shall refuse or fail to appear, be sworn or affirmed, and answer such questions as may be put to him, he may be proceeded against in the same manner and to the same extent as if such witness were testifying in a cause being tried before the district court; but no witness shall be required to deliver up any book, paper

or writing to be annexed to the said deposition and taken out of this state, but a copy of the same may be annexed to such deposition.

**History:** Laws 1907, ch. 84, § 2; Code 1915, § 2161; C.S. 1929, § 45-302; 1941 Comp., § 20-302; 1953 Comp., § 20-3-2.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For consequences of refusal to make discovery in civil actions in district courts, *see* Rule 1-037 NMRA.

For punishment for contempt for refusal to obey subpoenas in civil actions in district courts, *see* Rule 1-045 NMRA.

## 38-8-3. [False testimony punishable as perjury.]

The giving of false testimony before such judge, commissioner or notary shall be punished in the same manner and to the same extent as if given before the court upon the trial of a cause in the district court.

**History:** Laws 1907, ch. 84, § 3; Code 1915, § 2162; C.S. 1929, § 45-303; 1941 Comp., § 20-303; 1953 Comp., § 20-3-3.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For perjury generally, *see* 30-25-1 NMSA 1978.

# ARTICLE 9
# Interpreters for Deaf

## 38-9-1. Short title.

Chapter 38, Article 9 NMSA 1978 may be cited as the "Deaf Interpreter Act".

History: Laws 1979, ch. 263, § 1; 2007, ch. 23, § 1.

**ANNOTATIONS**

**The 2007 amendment,** effective June 15, 2007, changed "This act" to "Chapter 38, Article 9 NMSA 1978".

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Deaf-mute as witness, 50 A.L.R.4th 1188.

## 38-9-2. Definitions.

As used in the Deaf Interpreter Act:

A. "appointing authority" means the presiding judge or magistrate of any court and the hearing officer or other person authorized to administer oaths in any administrative proceeding before a board, commission, agency, institution, department or licensing authority of the state or any of its political subdivisions wherein an interpreter is required pursuant to the provisions of the Deaf Interpreter Act;

B. "deaf person" means any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit him from understanding voice communications;

C. "principal party in interest" means a person in any judicial or administrative proceeding in which he is a named party or who will or may be bound by the decision or action or foreclosed from pursuing his rights by the decision or action which may be taken in the proceeding; and

D. "interpreter" means a person who may through sign language, manual spelling or orally, through lip reading, as required, translate and communicate between a principal party in interest and other parties.

**History:** Laws 1979, ch. 263, § 2.

## 38-9-3. Interpreter required.

If a deaf person who is a principal party in interest has provided notice and proof of disability, if required, pursuant to Section 38-9-6 NMSA 1978, the appointing authority shall appoint an interpreter, after consultation with the deaf person, to interpret or to translate the proceedings to the person and to interpret or translate the person's testimony. Interpreters may be selected from current lists of interpreters provided by the commission for deaf and hard-of-hearing persons for:

A. interpreters certified by the national registry of interpreters for the deaf; or

B. other interpreters qualified through action of the commission for deaf and hard-of-hearing persons.

History: Laws 1979, ch. 263, § 3; 2007, ch. 23, § 2.

**ANNOTATIONS**

**The 2007 amendment,** effective June 15, 2007, changed Section "6 of the Deaf Interpreter Act" to Section "38-9-6 NMSA 1978"; changed "vocational rehabilitation division" to "commission for deaf and hard-of-hearing persons"; and in Subsection B, changed the former requirement that interpreters qualify through joint action and agreement of the vocational rehabilitation division, the New Mexico registry of interpreters for the deaf, incorporated, and the New Mexico association of the deaf or by nomination by a deaf person or appoint authority to the requirement that interpreters qualify through action of the commission for deaf and hard-of-hearing persons.

## 38-9-4. Interpreter waiver.

A deaf person who is a principal party in interest may at any point in any proceeding waive the right to the services of an interpreter.

**History:** Laws 1979, ch. 263, § 4.

## 38-9-5. Interpreter; services.

Whenever any deaf person is requesting or receiving services from any health, welfare or educational agency under the authority of the state or any political subdivision of the state or municipality, an interpreter may be appointed to interpret or translate the actions of any personnel providing the services and to assist the deaf person in communicating with the personnel.

**History:** Laws 1979, ch. 263, § 5.

## 38-9-6. Notice; proof of disability.

Every deaf person whose appearance at a proceeding entitles the person to an interpreter shall notify the appointing authority of the person's disability at least two weeks prior to any appearance and shall request the services of an interpreter. An appointing authority may require a person requesting the appointment of an interpreter to furnish reasonable proof of the person's disability when the appointing authority has reason to believe that the person is not so disabled. Reasonable proof shall include but not be limited to a statement from a doctor, an audiologist, the vocational rehabilitation division of the public education department, the commission for deaf and hard-of-hearing persons or a school nurse that identifies the person as deaf or as having hearing so seriously impaired as to prohibit the person from understanding voice communications.

History: Laws 1979, ch. 263, § 6; 2007, ch. 23, § 3.

**ANNOTATIONS**

**The 2007 amendment,** effective June 15, 2007, changed "vocational rehabilitation division" to "vocational rehabilitation division of the public education department" and added the provision that reasonable proof may include a statement from the commission for deaf and hard-of-hearing persons.

## 38-9-7. Coordination of interpreter requests.

A. Whenever an appointing authority receives a valid request for the services of an interpreter, the appointing authority shall request the commission for deaf and hard-of-hearing persons to furnish a list of interpreters.

B. The New Mexico association of the deaf and the New Mexico registry of interpreters for the deaf are authorized to assist the commission to prepare and continually update a listing of available interpreters. When requested by an appointing authority to provide assistance in providing an interpreter, the commission shall supply a list of available interpreters.

C. An interpreter who has been appointed shall be reimbursed by the appointing authority at a fixed rate reflecting a current approved fee schedule as established by the commission and the administrative office of the courts. Nothing in this section shall be construed to prevent any state department, board, institution, commission, agency or licensing authority or any political subdivision of the state from employing an interpreter on a full-time basis or under contract at a mutually agreed upon compensation rate.

History: Laws 1979, ch. 263, § 7; 2007, ch. 23, § 4.

**ANNOTATIONS**

**The 2007 amendment,** effective June 15, 2007, in Subsection A, changed "vocational rehabilitation division" to "commission for deaf and hard-of-hearing persons"; in Subsection B, changed "division" to "commission"; and in Subsection C, changed "division" to "commission and the administrative office of the courts".

## 38-9-8. Interpreter permitted.

Whenever a deaf person is interested in any administrative or judicial proceeding in which an interpreter would be required for a principal party in interest, he shall be entitled to utilize an interpreter to translate the proceeding for him and to assist him in presenting his testimony or comment.

**History:** Laws 1979, ch. 263, § 8.

## 38-9-9. Oath of interpreter.

Every interpreter appointed pursuant to the provisions of the Deaf Interpreter Act, before entering upon his duties, shall take an oath that he will make a true interpretation in an understandable manner to the deaf person for whom he is appointed.

**History:** Laws 1979, ch. 263, § 9.

## 38-9-10. Privileged communication.

Whenever a deaf person communicates through an interpreter to any person under such circumstances that the communication would be privileged, and the deaf person could not be compelled to testify as to the communications, the privilege shall apply to the interpreter as well.

**History:** Laws 1979, ch. 263, § 10.

# ARTICLE 10
# Court Interpreters

## 38-10-1. Short title.

This act [38-10-1 through 38-10-8 NMSA 1978] may be cited as the "Court Interpreters Act".

**History:** Laws 1985, ch. 209, § 1.

**ANNOTATIONS**

**Sharing or borrowing an interpreter does not constitute structural error** and reversal is warranted only on a showing of prejudice. State v. Nguyen, 2008-NMCA-073, 144 N.M. 197, 185 P.3d 368, cert. denied, 2008-NMCERT-004, 144 N.M. 47, 183 P.3d 932.

**Sharing of interpreters is a not a personal decision of the defendant.** — The decision whether to use one interpreter to cover translations for the juror and for the defendant is not a personal right of the defendant, but falls within the realm of decisions by counsel that implicate constitutional rights, but that nevertheless can be waived by counsel, in the absence of any showing of prejudice. State v. Nguyen, 2008-NMCA-073, 144 N.M. 197, 185 P.3d 368, cert. denied, 2008-NMCERT-004, 144 N.M. 47, 183 P.3d 932.

**Law reviews.** — For article, "Attorney as interpreter: A return to babble," 20 N.M.L. Rev. 1 (1990).

For article, "Lawyers, Linguists, Story-Tellers and Limited English Speaking Witnesses," see 27 N.M.L. Rev. 77 (1997).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of foreign language speaking defendant, 79 A.L.R.4th 1102.

## 38-10-2. Definitions.

As used in the Court Interpreters Act:

A. "appointing authority" means the presiding judge of a court in which an interpreter is required pursuant to the provisions of the Court Interpreters Act;

B. "interpreter" means a person who has a sufficient range of formal and informal language skills in English and another language so that he is readily able to interpret, translate and communicate simultaneously and consecutively in either direction between a non-English speaking person and other parties;

C. "non-English speaking person" means a person who:

(1) cannot speak or understand the English language;

(2) speaks only or primarily a language other than the English language; or

(3) has a dominant language other than English, which inhibits that person's comprehension of the proceedings or communication with counsel or the presiding judicial officer;

D. "principal party in interest" means a person in a judicial proceeding who is a named party or who will or may be bound by the decision or action or foreclosed from pursuing his rights by the decision or action which may be taken in the proceeding; and

E. "witness" means a witness in any judicial proceeding.

**History:** Laws 1985, ch. 209, § 2.

## 38-10-3. Certified interpreter required; compensation.

A. After July 1, 1986, if a non-English speaking person who is a principal party in interest or a witness has requested an interpreter, the appointing authority shall appoint, after consultation with the non-English speaking person or his attorney, an interpreter certified pursuant to the Court Interpreters Act to interpret or to translate the proceedings to him and to interpret or translate his testimony. The appointing authority shall select the interpreter from the current list of certified interpreters provided by the administrative office of the courts, except as provided in Subsection B of this section.

B. The appointing authority may appoint an interpreter pursuant to Subsection A of this section who is not certified but who is otherwise competent only when the

appointing authority has made diligent efforts to obtain a certified interpreter and has found none to be reasonably available in the judicial district.

C. The appointing authority shall reimburse the interpreter at a fixed rate according to a current approved fee schedule established by the administrative office of the courts.

D. Nothing in this section shall be construed to prevent any court from employing a certified interpreter on a full-time basis or under contract at a mutually agreed upon compensation rate.

**History:** Laws 1985, ch. 209, § 3.

**ANNOTATIONS**

**Cross references.** — For the duties of the administrative office of courts, *see* 34-9-3 NMSA 1978.

**Right to interpreter.** — Statutory and constitutional provisions do not mandate the appointment of an interpreter to assist respondents to translate documents or interpret discussions taking place outside of court. State ex rel. CYFD v. William M, 2007-NMCA-055, 141 N.M. 765, 161 P.3d 262.

## 38-10-4. Court interpreters advisory committee created; duties.

There is created the "court interpreters advisory committee" which consists of the director of the administrative office of the courts and four persons appointed by the chief justice of the New Mexico supreme court, who are a justice of the New Mexico supreme court, a district court judge, a district court clerk and a professional in foreign languages or linguistics. The court interpreters advisory committee shall provide advice and recommendations to the administrative office of the courts on the development of an interpreters training and certification program. The advisory committee shall meet initially no later than August 1, 1985, to organize and elect a chairman. Thereafter, the committee shall meet as necessary at the call of the chairman or the request of a majority of committee members. Advisory committee members shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

**History:** Laws 1985, ch. 209, § 4.

**ANNOTATIONS**

**Cross references.** — For the director of the administrative office of the courts, *see* 34-9-1 NMSA 1978.

## 38-10-5. Certification; administration.

The administrative office of the courts shall:

A. develop and administer a certification program for interpreters;

B. identify or provide for the development of and certify the examinations, courses and training required for certification of interpreters pursuant to the Court Interpreters Act;

C. develop and maintain a current list of available certified interpreters and provide to each court a list of certified interpreters available within that judicial district;

D. set such certification fees as may be necessary;

E. adopt and disseminate to each court an approved fee schedule for certified interpreters; and

F. adopt and promulgate rules and regulations necessary to carry out the provisions of the Court Interpreters Act.

**History:** Laws 1985, ch. 209, § 5.

## 38-10-6. Interpreter waiver.

A. A non-English speaking person who is a principal party in interest or a witness may at any point in any proceeding waive the right to the services of an interpreter, but only when such waiver is:

(1) approved by the appointing authority after he has explained the nature and effect of the waiver to the non-English speaking person through an interpreter; and

(2) made on the record after the non-English speaking person has consulted with his attorney.

B. At any point in any proceeding, a non-English speaking person may retract his waiver pursuant to Subsection A of this section and request an interpreter.

**History:** Laws 1985, ch. 209, § 6.

## 38-10-7. Interpreter permitted.

Whenever a non-English speaking person is interested in any judicial proceeding in which an interpreter would be required for a principal party in interest or a witness, he shall be entitled to utilize a certified interpreter to interpret the proceedings for him and to assist him in presenting his testimony or comment.

**History:** Laws 1985, ch. 209, § 7.

## 38-10-8. Oath of interpreter.

Every interpreter appointed pursuant to the provisions of the Court Interpreters Act, before entering upon his duties, shall take an oath that he will make a true and impartial interpretation or translation in an understandable manner using his best skills and judgment in accordance with the standards and ethics of the interpreter profession.

**History:** Laws 1985, ch. 209, § 8.

### ANNOTATIONS

**Mandatory non-English speaking juror guidelines.** — In addition to administering the initial interpreter's oath to correctly interpret testimony, the trial court must, prior to excusing the jury for deliberations, administer an oath on the record in the presence of the jury instructing the interpreter not to participate in the jury's deliberations; the interpreter must be identified on the record by name and state whether he or she is certified, and whether he or she understands the instructions; the trial court must instruct the jury about the interpreter's role during deliberations; after deliberations, but before the verdict is announced, the trial court must ask the interpreter on the record whether he or she abided by the oath not to participate in deliberations and the interpreter's response must be made part of the record; at the request of any party the trial court must allow jurors to be questioned to the same effect; and the trial court must instruct the interpreter not to reveal any part of the jury deliberations until after the case is closed. State v. Pacheco, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745.