



STATE OF NEW MEXICO COMPENDIUM OF LAW

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements/Prerequisites to Suit

New Mexico has only two laws that require pre-suit notification: the New Mexico Tort Claims Act, which relates to claims against the State of New Mexico, N.M. STAT. ANN. § 41-4-16 (2014) and the New Mexico Medical Malpractice Act, which requires a claim first be submitted to the Medical Review Panel prior to filing a malpractice action against a “qualifying healthcare provider,” N.M. STAT. ANN. § 41-5-15 (2014). The pre-suit notification requirement of the New Mexico Tort Claims Act is preempted in instances when it is in direct conflict with the procedural requirements of a federal statute, such as in the Emergency Medical Treatment and Active Labor Act, 42 U.S.C.S. § 1395dd (2011). *See, e.g., Godwin v. Mem’l Health Ctr.*, 2001-NMCA-33, 130 N.M. 434, 25 P.3d 273.

Relationship to the Federal Rules of Civil Procedure

New Mexico’s Rules of Civil Procedure are modeled on the Federal Rules of Civil Procedure, though not identical. The most significant differences are found in NMRA, Rule 1-026 (2012), relating to discovery.

Organization of the State Court System

- A) **Judicial selection.** In New Mexico, judges may be selected either by election or by gubernatorial appointment. In the latter case, typically arising when a vacancy exists on the court or a new judicial position is created, the Governor appoints the judge from a list of candidates recommended to him by a bi-partisan judicial selection committee (whose membership is composed of judges; a lawyer and non-lawyer appointed by the governor; the speaker of the house of representatives; the president pro tempore of the senate; the dean of the University of New Mexico law school; and four lawyers appointed jointly by the president of the state bar and the judge members of the commission.). A judge appointed to the bench is required to stand for election in the first contested election after his or her appointment. *See generally Methods of Judicial Selection: New Mexico*, AM. JUDICATURE SOC’Y http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=NM (last visited June 6, 2017).
- B) **Structure.** New Mexico has five levels of courts.
- 1) **Magistrate Courts.** Magistrate Courts are courts of limited jurisdiction, in all counties except Bernalillo County. Magistrate Court judges are not required to be lawyers, except in magistrate districts with populations over 200,000. These courts typically handle misdemeanor and traffic cases, along with small civil cases. *See generally* The Judicial Branch of New Mexico, *About the Courts*,

N.M. CTS., www.nmcourts.gov/newface/about/index.php (last visited June 6, 2017).

- 2) **Metropolitan Court.** The Metropolitan Court is the court of limited jurisdiction for Bernalillo County, New Mexico (where Albuquerque is located). The Metropolitan Court judges are required to be lawyers. The Metropolitan Court handles misdemeanors and traffic cases along with small civil cases. *See generally* BERNALILLO CNTY. METRO. CT., <http://www.metrocourt.state.nm.us/xnet/> (last visited June 6, 2017).
- 3) **District Courts.** District Courts are the courts of general jurisdiction. *See generally* The Judicial Branch of New Mexico, *About the Courts*, N.M. CTS., www.nmcourts.gov/newface/about/index.php (last visited June 6, 2017).
- 4) **New Mexico Court of Appeals.** The New Mexico Court of Appeals is the intermediate appellate court for the State. *See generally* N.M. CT. OF APPEALS, <http://coa.nmcourts.gov/> (last visited June 6, 2017).
- 5) **New Mexico Supreme Court.** The New Mexico Supreme Court is the ultimate appellate court for New Mexico. *See generally* N.M. SUPREME CT., <http://nmsupremecourt.nmcourts.gov/> (last visited June 6, 2017).

C) **Alternative dispute resolution.**

- 1) **Mandatory arbitration.** The only mandatory arbitration in New Mexico is Bernalillo County's mandatory arbitration program for district court cases. N.M. L.D.R. Dist 2 LR2-603 (2016), Court Annexed Arbitration, sets forth this rule. The rule provides that arbitration is required for all civil cases where only money is at issue and where no party seeks an amount in excess of \$25,000.00, exclusive of punitive damages, interest, costs and attorney fees. The losing party in an arbitration may proceed to District Court; however, the result, if not more favorable, will include liability not only for costs but also attorney fees at the District Court level. Additionally, if a party fails to participate in good faith, an arbitrator may award the opposing party pre-judgment interest, attorney fees and additional costs.
- 2) **Mandatory mediation.** Individual judges throughout New Mexico often require mediation prior to trial. In Bernalillo County, there is a program by which any party to a case may request assignment to "settlement week," which occurs in September of every year. N.M. L.D.R. Dist 2 LR2-602 (2016), the Settlement Facilitation Program, further describes the court recommended settlement procedure. Practicing lawyers or other qualifying persons, e.g., judges, psychologists or other professionals, are appointed by the Court to mediate cases through this process.
- 3) **Time limit for filing motion to compel arbitration.** A party seeking to compel arbitration shall file and serve on the other parties a motion to compel arbitration

no later than ten (10) days after service or the answer or service of the last pleading directed to such claims. Rule 1-007.2 NMRA (2017)

Service of Summons

A) **Person.** Service of Summons upon a person is governed by Rule 1-004(F) NMRA (2015). Service on a person includes service “to the individual personally; or if the individual refuses to accept service, by leaving the process at the location where the individual has been found” If the individual refuses to receive copies or permit them to be left, New Mexico recognizes this action as valid service.

1) **Substituted service.** If service of process by the first method fails, and the party has not signed for or accepted service, New Mexico recognizes substituted service. Substituted service is achieved by delivering a copy of the process to some person residing at the usual place of abode of the defendant who is over the age of fifteen (15) years and mailing by first class mail to the defendant at the defendant's last known mailing address a copy of the process or the summons and complaint.

2) **Place of employment.** If service is not accomplished in accordance with these methods,

then service of process may be made by delivering a copy of the process at the actual place of business or employment of the defendant to the person apparently in charge thereof and by mailing a copy of the summons and complaint by first class mail to the defendant at the defendant's last known mailing address and at the defendant's actual place of business or employment.

Rule 1-004(F) NMRA (2015).

B) **Corporation.** Service of summons upon a corporation is governed by Rule 1-004(G) NMRA (2015). New Mexico does not distinguish service upon a public or private corporation. Under this statute,

(1) [s]ervice may be made upon:

(a) a domestic or foreign corporation, a limited liability company or an equivalent business entity by serving a copy of the process to an officer, a managing or a general agent or to any other agent authorized by appointment, by law or by this rule to receive service of process. If the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant;

(b) a partnership by serving a copy of the process to any general partner;

(c) an unincorporated association which is subject to suit under a common name, by serving a copy of the process to an officer, a managing or general agent or to any other agent authorized by appointment, by law or by this rule to receive service of process. If the agent is one authorized by law to receive service and the statute so requires, by also mailing a copy to the unincorporated association.

(2) . . . If none of the persons mentioned is available, service may be made by delivering a copy of the process or other papers to be served at the principal office or place of business during regular business hours to the person in charge.

(3) Service may be made on a person or entity described in [this section] by mail or commercial courier service

Rule 1-004(G) NMRA (2015).

C) **Foreign corporation.** N.M. STAT. ANN. § 38-1-6 (2014) governs service of process against foreign corporations. The statute provides:

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.

* * *

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.

D) **Waiver.** Rule 1-004(A)(2) NMRA (2015) provides that “[a]ny defendant may waive the issuance or service of summons.”

E) **Upon a minor, incompetent person, guardian or fiduciary.** Rule 1-004(I)(1)(a) NMRA (2015) provides that if there is a conservator of an estate or guardian of a minor or incompetent person, a personal representative, guardian conservator, trustee or other fiduciary, service should be provided by serving a copy of the process to the conservator or guardian in the manner and priority for individual or corporate service as may be appropriate. Furthermore,

[i]f no conservator or guardian has been appointed for the minor, service shall be made on the minor by serving a copy of the process on each person who has legal authority over the minor. If no person has legal authority over the minor, process may be served on a person designated by the court.

Rule 1-004(I)(1)(a) NMRA (2014) .

- F) **General provisions for service of process.** Rule 1-004(J) NMRA (2015) provides that “[u]pon motion, without notice, and showing by affidavit that service cannot reasonably be made as provided by [the New Mexico rules], the court may order service by any method or combination of methods, including publication, that is reasonably calculated under all of the circumstances to apprise the defendant of the existence and pendency of the action and afford a reasonable opportunity to appear and defend.”

Statutes of Limitations

New Mexico’s statutes of limitations are generally set out in N.M. STAT. ANN. §§ 37-1-1 to -30 (as amended).

- A) **Construction.** New Mexico has a ten-year statute of limitations for construction claims. N.M. STAT. ANN. § 37-1-27.
- B) **Oral contracts.** New Mexico has a four-year statute of limitations for oral contracts. N.M. STAT. ANN. § 37-1-4.
- C) **Written contracts.** New Mexico has a six-year statute of limitations for written contracts. N.M. STAT. ANN. § 37-1-3.
- D) **Contribution.** N.M. STAT. ANN. §§ 41-3-1 to -8 is the Uniform Contribution Among Tortfeasors Act. While this Act does not provide a specified limitations period for actions to accrue, under N.M. STAT. ANN. § 37-1-4, there is a general provision that a claim must be brought within four years from the date liability is fixed.
- E) **Employment.** In actions for wage and hour violations, a civil action shall be commenced within three years after a last violation occurs. N.M. STAT. ANN. § 37-1-5.
- F) **Fraud.** New Mexico has a four-year statute of limitations for acts of fraud. N.M. STAT. ANN. § 37-1-4 .
- G) **Governmental entities.** New Mexico’s statute of limitations for bringing suit against government entities for torts is two years and is governed by the New Mexico’s Tort Claims Act. N.M. STAT. ANN. § 41-4-1 to -30.

“Governmental entities are granted immunity from actions based on contract, except actions based on a valid written contract,” for which the statute of limitations is two years. N.M. STAT. ANN. § 37-1-23.

- H) **Improvements to realty.** New Mexico’s statute of limitations for improvements to realty is governed by N.M. STAT. ANN. § 37-1-27. This statute provides that:

[n]o action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of a physical improvement to real property, nor any action for contribution or indemnity for damages so sustained, against any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction of such improvement to real property, and on account of such activity, shall be brought after *ten years* from the date of substantial completion of such improvement; provided this limitation shall not apply to any action based on a contract, warranty or guarantee which contains express terms inconsistent herewith. The date of substantial completion shall mean the date when construction is sufficiently completed so that the owner can occupy or use the improvement for the purpose for which it was intended, or the date on which the owner does so occupy or use the improvement, or the date established by the contractor as the date of substantial completion, whichever date occurs last.

N.M. STAT. ANN. § 37-1-27 (emphasis added).

- I) **Personal injury.** New Mexico’s statute of limitations for personal injury claims is three years. N.M. STAT. ANN. § 37-1-8.

- J) **Professional liability.** N.M. STAT. ANN. § 41-5-13:

No claim for malpractice arising out of an act of malpractice which occurred subsequent to the effective date of the Medical Malpractice Act [N.M. STAT. ANN. § 41-5-1 to -29] may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred except that a minor under the full age of six years shall have until his ninth birthday in which to file.

- K) **Property damage.** New Mexico’s statute of limitations for property damage is four years. N.M. STAT. ANN. § 37-1-4.

- L) **Wrongful death.** Every action instituted by virtue of the provisions of the New Mexico Wrongful Death Act, N.M. STAT. ANN. 4-2-1 to -4 must be brought within “three years after the cause of action accrues. The cause of action accrues as of the date of death.” N.M. STAT. ANN. § 41-2-2 .

Statute of Repose

New Mexico’s only statute of repose is in the construction context, which provides a ten-year statute of repose. N.M. STAT. ANN. § 37-1-27.

Venue Rules

Pursuant to N.M. STAT. ANN. § 38-3-1,

[a]ll 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.

...

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.

NEGLIGENCE

Comparative Fault/Contributory Negligence

New Mexico has adopted a system of pure comparative fault. *Scott v. Rizzo*, 1981-NMSC-021, ¶ 30, 96 N.M. 682, 634 P.3d 1234, *superseded in part by statute as stated in Reichert v. Atler*, 1992-NMCA-134, ¶ 34, 117 N.M. 628, 875 P.2d 384. *See* N.M. STAT. ANN. § 41-3A-1.

Exclusive Remedy—Workers' Compensation

New Mexico's Worker's Compensation Act does provide for an exclusive remedy; however, there are exceptions for certain intentional harms to employees. *See* N.M. STAT. ANN. § 52-1-9(C); *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-34, ¶ 5, 26, 131 N.M. 272, 34 P.3d 1148.

Joint and Several Liability

- A) **Definition.** Under the theory of joint and several liability, “each tortfeasor is liable for the entire injury, regardless of proportional fault, leaving it to the defendants to sort out among themselves individual responsibility based on theories of proportional indemnification or contribution.” *Payne v. Hall*, 2006-NMSC-29, ¶ 11, 139 N.M. 659, 137 P.3d 599 (under several liability, the liability of each tortfeasor is limited to the dollar amount that is equal to the ratio of that tortfeasor's comparative responsibility).
- B) **Applicability.** New Mexico has, by and large, eliminated the doctrine of joint and several liability; however, there are statutory exceptions, set forth in N.M. STAT. ANN. § 41-3A-1(C). Joint and several liability continues to apply:
- (1) to any person or persons who acted with the intention of inflicting injury or damage;
 - (2) to any persons whose relationship to each other would make one person vicariously liable for the acts of the other, but only to that portion of the total liability attributed to those persons;
 - (3) to any persons strictly liable for the manufacture and sale of a defective product, but only to that portion of the total liability attributed to those persons; or
 - (4) to situations not covered by any of the foregoing and having a sound basis in public policy.

N.M. STAT. ANN. § 41-3A-1(C).

Strict Liability

- A) **Product liability.** New Mexico has adopted strict liability in product liability actions. *Stang v. Hertz Corp.*, 83 N.M. 730, 497 P.2d 732 (1972).
- B) **Learned intermediary.** New Mexico has adopted a learned intermediary doctrine relating to the sale of prescription pharmaceuticals and devices. *Perfetti v. McGhan Med.*, 1983-NMCA-032, ¶¶ 15, 20, 99 N.M. 645, 662 P.2d 646; *but see Rimbart v. Eli Lilly & Co.*, 577 F. Supp. 2d 1174 (D.N.M. 2008).

Willful and Wanton Conduct

Punitive damages are available for direct liability in New Mexico where the plaintiff proves the conduct of a party was malicious, willful, reckless, wanton, fraudulent or in bad faith. Similarly, punitive damages are available for vicarious liability in New Mexico where the plaintiff proves the conduct of an agent or employee of the party on whose conduct vicarious liability is based was malicious, willful, reckless, wanton, fraudulent or in bad faith and that they were acting in the scope of employment and the employer had sufficient discretionary policy-making authority to speak and act with regard for the conduct at issue or in some other way authorized the conduct of the employee. The Uniform Jury Instructions provide that willful conduct is the intentional doing of an act with knowledge that harm may result and wanton conduct is the doing of an act with utter indifference to or conscious disregard for a person's rights and/or safety. UJI 13-1827 NMRA (2015).

DISCOVERY

Electronic Discovery Rules

In 2009, the New Mexico Rules of Civil Procedure for the District Courts Committee incorporated, with few exceptions, various amendments to the federal rules concerning discovery of electronically stored information. Relevant changes to the New Mexico Rules can be found in Rules 1-026, 1-033, 1-034, 1-037 and 1-045. The amendments generally serve to incorporate electronically stored information into the traditional scope of the rules. In some instances, such as in Rules 1-034 and 1-045, electronically stored information may require unique procedures such as specific forms in which requested or subpoenaed information is to be produced.

Rules 1-026, -033, -034, -037, -045 NMRA (2015).

Expert Witnesses

Forms of disclosure—reports required. New Mexico's discovery rules do not require the preparation of a federal-style expert report, although individual judges frequently do.

- A) **Rebuttal Witnesses.** The use of expert witnesses as rebuttal witnesses depends upon a court's scheduling order for the particular case.
- B) **Discovery of expert work product.** Rule 1-026 NMRA (2015) does not have the same provisions as FED. R. CIV. P. 26 relating to the discovery of expert work product. Rule 1-026 NMRA (2015) generally protects work product of a non-testifying expert unless there is a showing of "exceptional circumstances." Rule 1-026(B)(6)(C) NMRA (2015). In relation to testifying experts, a party may discover the opinions to which the expert is expected to testify as well as the grounds and substance of any such opinions. Rule 1-026(B)(6)(C) NMRA (2015).

Non-Party Discovery

- A) **Subpoenas.** Subpoenas are governed by Rule 1-045 NMRA (2015). An attorney authorized to practice law in New Mexico may issue and sign a subpoena on behalf of the court. The issuance of a subpoena to a nonparty commands that person to appear and, if ordered, to produce documents or other tangible items within the scope and matter at a specified time and place. A deponent, or witness, who is subpoenaed, is ordered by the law to obey it. Furthermore,

[a] party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

- B) **Respondent.** Rule 1-045(D) NMRA (2015) states that,

[a] person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

...

When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

- C) **Time frames for responses.** Rule 1-045(C)(2)(b)(ii) NMRA (2015) provides that any party may, within fourteen (14) days after service of the subpoena serve upon all parties written objection to or a motion to quash inspection or copying of any or all of the designated materials or inspection of the premises.

Privileges

- A) **Attorney-client privilege.** New Mexico's attorney-client privilege is codified in Rule 11-503 NMRA (2015).
- B) **Work product.** New Mexico's work product rule is generally codified in Rule 1-026(B) NMRA (2015).
- C) **Self-critical analysis.** No New Mexico cases have decided whether self-critical analysis is available in New Mexico.
- D) **Other privileges for consideration.** Rule 11-501 to -514 NMRA (2015) govern other forms of privileged communications. These communications include:
- 1) Physician-patient and psychotherapist-patient privilege. Rule 11-504 NMRA (2015).

- 2) Husband-wife privileges. Rule 11-505 NMRA (2015).
- 3) Communications to clergy. Rule 11-506 NMRA (2015).
- 4) Political vote. Rule 11-507 NMRA (2015).
- 5) Trade secrets. Rule 11-508 NMRA (2015).
- 6) Communication to juvenile probation officers and social services workers. Rule 11-509 NMRA (2015).
- 7) Identity of informer. Rule 11-510 NMRA (2015).
- 8) Waiver of privilege by voluntary disclosure. Rule 11-511 NMRA (2015).
- 9) Comment upon inference from claim of privilege; instruction. Rule 11-513 NMRA (2015).
- 10) News media-confidential source or information privilege. Rule 11-514 NMRA (2015).

Requests to Admit

Rule 1-036 NMRA (2015) provides for requests for admissions, and is similar to FED. R. CIV. P. 36.

After a Request to Admit is sent, matters in it are deemed admitted if the responding party fails to respond within thirty days. All admissions are considered to be conclusively established. Rule 1-036 NMRA (2015).

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

Accident Reconstruction reports and testimony are generally admissible in New Mexico trial courts.

Appeal

- A) **When permitted.** Appeal is permitted only from final orders pursuant to Rule 1-054 and 12-201, -202 NMRA (2015). Interlocutory appeal, which are appeals that occur while a case is still pending, are allowed pursuant to Rule 12-203 NMRA (2015), N.M. STAT. ANN. §§ 39-3-3, -4 and N.M. STAT § 34-5-14; *State v. Smallwood*, 2007-NMSC-005, ¶ 6, 141 N.M. 178, 152 P.3d 821.

- B) **Timing.** If the appeal is filed from a decision or order suppressing or excluding evidence or requiring the return of seized property, the notice of appeal must be filed within ten days after the decision is filed. For all other appeals, notice of appeal must be filed within thirty days after the judgment or order is filed. Rule 12-201(A) NMRA (2015).

An application for interlocutory appeal is due fifteen days after entry of the order. Rule 12-203(A) NMRA (2015).

Biomechanical Testimony

Biomechanical testimony is admissible subject to challenge under New Mexico's version of *Daubert*. See *State v. Alberico*, 1993-NMSC-047, ¶ 45, 116 N.M. 156, 861 P.2d 192; Rule 11-702 NMRA (2015).

Collateral Source Rule

New Mexico has adopted a collateral source rule for calculation of damages in civil litigation. See *McConal Aviation, Inc. v. Commercial Aviation Ins. Co.*, 1990-NMSC-093, ¶ 17, 110 N.M. 697, 799 P.2d 133 (1990). The collateral source rule bars evidence that a plaintiff received compensation or benefits for his or her injury from collateral sources such as insurance. *Id.* *McConal* was later limited to "situations where there are no facts showing that the parties were jointly liable for the damages caused to the plaintiff." See *Summit Props., Inc. v. Pub. Serv. Co. of N.M.*, 2005-NMCA-090, ¶ 46, 138 N.M. 208, 118 P.3d 716 (citing *Sanchez v. Clayton*, 1994-NMSC-064, ¶ 10, 117 N.M. 761, 877 P.2d 567).

Convictions

Criminal convictions are admissible to some extent, as under the Federal Rules of Civil Procedure. See Rule 11-609 NMRA (2015). Criminal convictions are admissible to impeach a witness if the witness has been convicted of a felony or any crime involving dishonesty in the last ten years. *Id.*

Dead Man's Statute

New Mexico has repealed its Dead Man's statute.

Medical Bills

Medical bills are generally admissible under New Mexico's Rules of Evidence; however, testimony is required regarding their reasonableness and necessity. See *Romero v. Mervyn's*, 1989-NMSC-081, ¶ 38, 109 N.M. 249, 784 P.2d 992. It is an open question under New Mexico law whether the plaintiff can recover written-off amounts.

Offers of Judgment

Offers of judgment are provided for by Rule 1-068 NMRA (2015). Offers of judgment require a party losing at trial to pay the winning party's costs subsequent to a rejected settlement offer if the losing party had previously rejected a settlement offer that was more favorable to it than the outcome of the trial.

Offers of Proof

Offers of proof are expected in certain circumstances when evidence has been excluded. To preserve an issue for appeal when a judge has excluded evidence, the attorney making the offer of proof must "make[] known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and if a party has no opportunity to object to a ruling or order at the time it is made the absence of an objection does not thereafter prejudice him." Rule 1-046 NMRA (2012).

Prior Accidents

NMRA, R. 11-404(b) is essentially the same as the FED. R. EVID. 404(b) (2011). Both provisions exclude evidence of prior accidents to show that a defendant was negligent. Rule 11-404(b) NMRA (2015).

Relationship to the Federal Rules of Evidence

In relationship to the Federal Rules of Evidence, New Mexico's rules are patterned after, but not identical to the Federal Rules of Evidence.

Seat Belt and Helmet Use Admissibility

Evidence that a party was not using a seatbelt is not admissible in civil litigation. New Mexico courts recognize that

. . . the common law of New Mexico does not impose any duty to wear seat belts, and the statutory duty imposed on front seat occupants cannot form the basis for either liability or apportioning damages in a civil lawsuit . . . [and] the specific evidence of the nonuse of seat belts is simply inadmissible in New Mexico's civil trials.

Norwest Bank N.M., N.A. v. Chrysler Corp., 1999-NMCA-070, ¶ 26, 127 N.M. 397, 981 P.2d 1215.

Spoilation

New Mexico recognizes a cause of action for intentional spoliation of evidence. *Coleman v. Eddy Potash, Inc.*, 1995-NMSC-063, ¶ 12, 120 N.M. 645, 905 P.2d 185, *overruled on other grounds by Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148. New Mexico has adopted a standard for spoliation of evidence as follows: In order to

prevail on an intentional spoliation of evidence theory, a plaintiff must allege and prove the following:

(1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) the destruction, mutilation, or significant alteration of potential evidence; (4) intent on part of the defendant to disrupt or defeat the lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages.

Id. ¶ 13. Under certain circumstances, sanctions may be imposed for negligent spoliation of evidence. *Id.* ¶¶ 16-20.

Subsequent Remedial Measures

Rule 11-407 NMRA (2017) provides that

[w]hen measures are taken by a defendant that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove the following: negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or -- if disputed -- proving ownership, control, or the feasibility of precautionary measures.

Use of Photographs

The use of photographs is generally admissible; however, testimony is required regarding the circumstances under which the photograph was taken. *See* Rule 11-1007 NMRA (2015).

DAMAGES

Caps on Damages

New Mexico has adopted caps on damages in two instances: (1) medical malpractice claims are limited to \$600,000.00 and actions against “qualified healthcare providers;” (2) certain tort claims against the state of New Mexico. N.M. STAT. ANN. § 41-5-6 (2012)

Calculation of Damages

- A) **Past medical bills.** Past medical bills are available in personal injury actions in New Mexico. NMRA, UJI 13-1804 (2012).
- B) **Future medical bills.** Future medical bills may be recovered in personal injury actions in New Mexico. NMRA, UJI 13-1804 (2012).
- C) **Loss of Enjoyment of Life.** The loss of the enjoyment of life, experienced as a result of the injury, may be recovered in personal injury actions in New Mexico. NMRA, UJI 13-

- 1807A (2015). No fixed standard currently exists for determining these damages, and the jury may be instructed to decide a reasonable amount to compensate the plaintiff. *Id.*
- D) **Loss of Services of Spouse.** The reasonable value of services provided by a husband or wife, which a family has been deprived of and that the family is reasonably certain to be deprived of in the future may be recovered in personal injury actions in New Mexico. NMRA, UJI 13-1810 (2015).
 - E) **Increased risk of harm.** Increased risk of harm may be compensable under New Mexico law. *See Madrid v. Lincoln Cnty. Med. Ctr.*, 1996-NMSC-049, 122 N.M. 269, 923 P.2d 1154 (allowing a negligent infliction of emotional distress claim after an employee was exposed to what she initially thought was HIV-exposed blood even though it was later learned the blood was not HIV-exposed).
 - F) **Disfigurement.** Disfigurement damages may be recovered in personal injury actions in New Mexico. NMRA, UJI 13-1806 (2015).
 - G) **Disability.** Disability damages may be recovered in personal injury actions in New Mexico. *See* NMRA, UJI 13-1806 (2015).
 - H) **Past pain and suffering.** Past pain and suffering may be recovered in personal injury actions in New Mexico. *See* NMRA, UJI 13-1807 (2015).
 - I) **Future pain and suffering.** Future pain and suffering may be recovered in personal injury actions in New Mexico. *See* NMRA, UJI 13-1807 (2015).
 - J) **Loss of society.** Loss of society (referred to as “loss of consortium”) damages may be recovered in personal injury actions in New Mexico. NMRA, UJI 13-1810(A) (2015).
 - K) **Lost income, wages, earnings.** Lost income, wages and earnings may be recovered in personal injury actions in New Mexico. NMRA, UJI 13-1803 (2015). This can include the present cash value of future earnings which are reasonably certain to be lost. *Id.*
 - L) **Non-medical expenses.** Non-medical expenses, which have been incurred as the result of the injury may be recovered in personal injury actions in New Mexico. NMRA, UJI 13-1805 (2015).
 - M) **Damages to Personal Property.** Damages to personal property is measured as the smaller value of either (1) “the reasonable expense of necessary repairs to the property which was damaged,” or (2) “the difference between the fair market value of the damaged personal property immediately before the occurrence and its fair market value immediately after the occurrence.” *State v. Barreras*, 2007-NMCA-067, ¶ 7, 141 N.M. 653, 655, 159 P.3d 1138, 1140; NMRA, UJI 13-1813 (2015); NMRA (2015), UJI 13-1814 (2015). Depreciation, if any, may be awarded to a plaintiff when damages are based on the reasonable expense of repairs. NMRA, UJI 13-1815 (2015).

- N) **Loss of Use of Personal Property.** Damages for the loss of use of cars and other personal property are recoverable in New Mexico. However, the New Mexico courts limit damages to either total loss of a vehicle or repair costs plus loss of use. *Cress v. Scott*, 1994-NMSC-008, 117 N.M. 3, 868 P.2d 648.
- O) **Damages to Real Property.** Damages to real property are generally determined in New Mexico by the difference between the value of the property immediately before the incident and the value of the property immediately after the incident. NMRA, UJI 13-1819 (2015).
- P) **Repair and Remediation of Real Property.** Damages for repairs and remediation to real property may be awarded in New Mexico. *McNeill v. Burlington Res. Oil & Gas Co.*, 2008-NMSC-0022, 143 N.M. 740, 182 P.3d 121.

Lost Opportunity Doctrine

New Mexico courts have recognized “loss of chance” claims. *Alberts v. Schultz*, 1999-NMSC-015, 126 N.M. 807, 975 P.2d 1279. “A claim for loss of chance is predicated upon the negligent denial by a healthcare provider of the most effective therapy for a patient's presenting medical problem The essence of the patient's claim is that, prior to the negligence, there was a chance that he or she would have been better off with adequate care. Because of the negligence, that chance has been lost.” *Id.* at ¶ 11; *see also* NMRA, UJI 13-1802A (2015).

Mitigation

Mitigation is expected of a plaintiff in civil litigation in New Mexico. NMRA, UJI 13-1811 and 13-1830 (2015). Mitigation refers to a plaintiff's reasonable attempt to avoid additional loss as a result of the defendant's negligent act. Plaintiff must exercise ordinary care to minimize his/her damages.

Punitive Damages

When may be brought. Punitive damages are available when the plaintiff has proven the defendant's conduct to be malicious, willful, reckless, wanton, fraudulent or in bad faith. NMRA, UJI 13-1827 (2015).

- A) **Standard.** Punitive damages are available when the plaintiff has proven the defendant's conduct to be malicious, willful, reckless, wanton, fraudulent or in bad faith. NMRA, UJI 13-1827 (2015).
- B) **Insurability.** The New Mexico Supreme Court has determined that punitive damages are “as much a part of the potential award under the uninsured motorist statute as damages

for bodily injury,” and held that punitive damages cannot be contracted away. *Stinbrink v. Farmers Ins. Co.*, 1990-NMSC-108, ¶ 5,111 N.M. 179, 180, 803 P.2d 664, 665.

- C) **Caps.** There are no caps on punitive damages in personal injury actions in New Mexico, other than constitutional limitations.

Recovery and Pre- and Post-Judgment Interest

In New Mexico, post-judgment interest is available by statute, N.M. STAT. ANN. §§ 56-8-3, -4 (2014), and prejudgment interest is available under certain circumstances. N.M. STAT. ANN. § 56-8-4 (2014) provides that unless the judgment is based on unpaid child support, the court in its discretion may allow interest of up to ten percent from the date the complaint is served upon the defendant after considering, among other things: “(1) if the plaintiff was the cause of unreasonable delay in the adjudication of the plaintiff’s claims; and (2) if the defendant had previously made a reasonable and timely offer of settlement to the plaintiff.”

Taxation of Costs

New Mexico follows the rule that a prevailing party in civil litigation is entitled to recover its taxable costs. N.M. STAT. ANN. § 44-3-11 (2012), Rule 1-054(D)(4) NMRA (2015). Local rules typically govern those costs which are recoverable. *See, e.g.*, N.M. L.D.R. Dist. 3 LR 3-217, Cost Bills.

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.