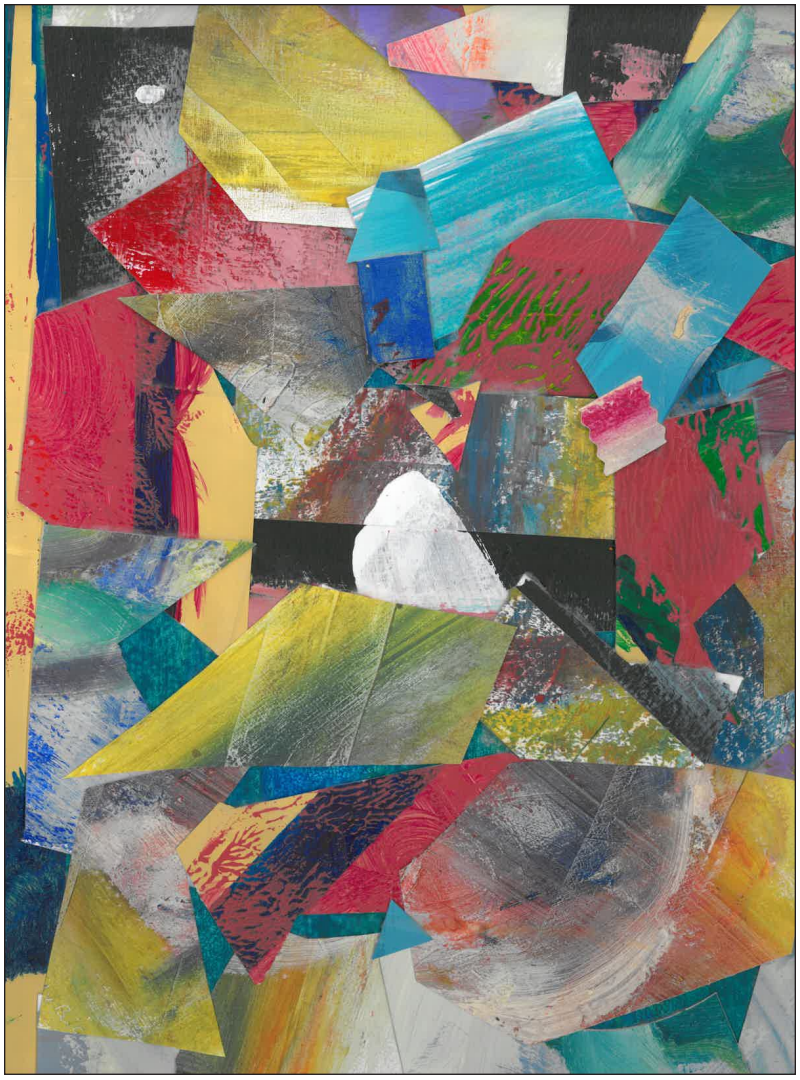
BAR BULLETIN

Official Publication of the State Bar of New Mexico

December 20, 2017 • Volume 56, No. 51



By Randall V. Biggers

Inside This Issue

CLE Planner

Dec. 21

The Lifecycle of a Trial, from a Technology Perspective

5.2 G 1.0 EP

Thursday, Dec. 21 • 9 a.m. – 4:15 p.m.
State Bar Center, Albuquerque

$99 Non-members not seeking CLE credit
$249 Government and legal services attorneys and Paralegal Division members
$279 Standard fee
$279 Webcast fee

From before litigation begins through convincing the jury with trial presentation methods, learn how to succeed in all aspects of the trial lifecycle. E-discovery, special masters and social media included.

Dec. 28

Oil and Gas: From the Basics to In-Depth Topics

6.0 G 1.0 EP

Thursday, Dec. 28 • 8:30 a.m. – 5 p.m.
State Bar Center, Albuquerque

$99 Non-members not seeking CLE credit
$279 Government and legal services attorneys and Paralegal Division members
$309 Standard fee
$309 Webcast fee

In addition to covering basic oil and gas legal principles, the morning program will also delve deeper into specific areas, such as water usage and fracking and prominent title issues affecting New Mexico minerals. The afternoon program will discuss the Oil Conservation Division's duty to prevent waste, regulations and changes in industry technology as well as the Surface Owners Protection Act – how it works, how it affects surface owner's rights and obligations of oil and gas operators. Finally, the afternoon will examine quiet title suits, and the closing hour will explore ethical issues that arise in oil and gas practice.

Dec. 29

The Ethics of Lawyer Advertisements Using Social Media

1.0 EP

Friday, Dec. 29, 2017 • 10:30-11:30 a.m.
State Bar Center, Albuquerque

Presented by William Slease, Disciplinary Board of the New Mexico Supreme Court

$55 Standard fee
$65 Webcast fee

A $20 late fee will be assessed for walk-in registrations (applies to live attendance only).
Registration and payment must be received in advance to avoid the fee.

State Bar of New Mexico
Bar Foundation
Center for Legal Education

Register online at **www.nmbar.org/CLE**
or call 505-797-6020.

STATE BAR of NEW MEXICO

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The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin*, PO Box 92860, Albuquerque, NM 87199-2860.

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address@nmbar.org • www.nmbar.org

December 20, 2017, Vol. 56, No. 51

Table of Contents

Meetings

December

13
Taxation Section Board
11 a.m., teleconference

14
Business Law Section Board
4 p.m., teleconference

15
Family Law Section Board
9 a.m, teleconference

January

3
Employment and Labor Law Section Board
Noon, State Bar Center

9
Appellate Practice Section Board
Noon, teleconference

9
Committee on Women and the Legal Profession
Noon, Modrall Sperling, Albuquerque

Workshops and Legal Clinics

December

20
Family Law Clinic
10 a.m.–1 p.m.,
Second Judicial District Court,
Albuquerque,
1-877-266-9861

January

24
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque,
505-797-6094

February

7
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque,
505-797-6003

28
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque,
505-797-6094

About Cover Image and Artist: Randall V. Biggers is a legal assistant at the Donald Vigil Nick Stiver Law office. He was born in Roswell and is a returned Peace Corp. volunteer (Afghanistan 1974–1976) and served 21 years in the Foreign Service. He has been actively painting for the past 10 years. The majority of his work is non-objective. In addition to painting with acrylics, Biggers makes collages and does photography. Tho schedule a private viewing, email nmvrb2@gmail.com or call 505-366-3525.

Notices

Court News

New Mexico Supreme Court Commission on Access to Justice

Meeting Notice

The next meeting of the Commission on Access to Justice is noon–4 p.m., Jan. 5, 2018, at the State Bar Center in Albuquerque. Interested parties from the private bar and the public are welcome to attend. Further information about the Commission is available at Access to Justice at nmcourts.gov.

Supreme Court Law Library

Hours and Information

The Supreme Court Law Library is open to any individual in the legal community or public at large seeking legal information or knowledge. The Library's staff of professional librarians is available to assist visitors. The Library provides free access to Westlaw, Lexis, NM OneSource and HeinOnline on public computers. Search the online catalog at https://n10045.eos-intl.net/N10045/OPAC/Index.aspx. Visit the Library at the Supreme Court Building, 237 Don Gaspar, Santa Fe NM 87501. Learn more at lawlibrary.nmcourts.gov or by calling 505-827-4850.

Hours of Operation

Monday–Friday 8 a.m.–5 p.m.

Reference and Circulation

Monday–Friday 8 a.m.–4:45 p.m.

New Mexico Court of Appeals

Judicial Notices of Retirement

The New Mexico Court of Appeals announces the retirement of Hon. Jonathan B. Sutin, effective Dec. 29, and Hon. Timothy L. Garcia, effective Feb. 2, 2017. Judicial Nominating Commissions will be convened in Santa Fe in 2018 to interview applicants for these vacancies. Further information on the application process can be found on the Judicial Selection website (http://lawschool.unm.edu/judsel/index.php), along with updates regarding this vacancy and the news releases.

Second Judicial District Court

Destruction of Exhibits

Pursuant to 1.21.2.617 FRRDS (Functional Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy exhibits filed with the Court, the criminal cases for the years of 1979 to the end of 2001 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through Jan. 29, 2018. Those who have cases with exhibits, should verify exhibit information with the Special Services Division, at 505-841-6717, from 10 a.m.–2 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Professionalism Tip

With respect to parties, lawyers, jurors, and witnesses:

Within practical time limits, I will allow lawyers to present proper arguments and to make a complete and accurate record.

Third Judicial District Court

Mass Reassignment

Effective Dec. 18, a mass reassignment of all Division VIII cases previously assigned to Judge Fernando R. Macias will occur pursuant to NMSC Rule 23-109. Judge Conrad F. Perea has been appointed to fill the vacancy in Division VIII. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Dec. 27 to challenge or excuse Judge Conrad F. Perea pursuant to Rule 1-088.1.

Bernalillo County Probate Court

Holiday Closure Notice

The Bernalillo County Probate Court in accordance with the Bernalillo County Government holiday closure schedule will closed the following days: Dec. 22, Dec. 25 and Jan. 1, 2018. The court will resume normal operating hours on Jan. 2, 2018.

U.S. District Court for the District of New Mexico

Udall, Heinrich and Pearce Seek Applicants to Fill Upcoming Vacancy

On Nov. 30, Hon. Robert C. Brack announced his intention to assume senior status after 15 years of distinguished service on the federal bench. Judge Brack's announcement, effective July 25, 2018, will create a vacancy in Las Cruces, N.M., for a U.S. District Judge for the District of New Mexico. In accordance with their constitutional responsibility as senators to provide advice and consent with respect to federal appointments, U.S. Senators Tom Udall and Martin Heinrich, with the assistance of U.S. Representative Steve Pearce, will recommend to the president a short list of qualified candidates for the position. Individuals who are interested in the position must complete and return an application no later than Dec. 31, 2017. Download the application and instructions at www.tomudall.senate.gov/news/press-releases/udall-heinrich-pearce-seek-applicants-to-fill-upcoming-vacancy-on-us-district-court.

State Bar News

Attorney Support Groups

- Jan. 8, 2018, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- Feb. 5, 2018, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month. The January meeting will be skipped due to the New Year's Day holiday.)

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert at 505-242-6845.

Board of Bar Commissioners

Commissioner Vacancy

Third Bar Commissioner District (Los Alamos, Rio Arriba, Sandoval and Santa Fe counties)

A vacancy exists in the Third Bar Commissioner District, representing Los Alamos, Rio Arriba, Sandoval and Santa Fe counties. The Board will make the appointment at its Feb. 23, 2018, meeting to fill the vacancy until the next regular election of Commissioners, and the term will run through Dec. 31, 2018. Active status members with a principal place of

practice located in the Third Bar Commissioner District are eligible to apply. The remaining 2018 Board meetings are scheduled for May 18 in Albuquerque, Aug. 9 at the Hyatt Regency Tamaya Resort in Bernalillo in conjunction with the State Bar of New Mexico Annual Meeting, Oct. 12 in Albuquerque, and Dec. 13 in Santa Fe. Members interested in serving on the Board should submit a letter of interest and resume to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765, by February 9.

Election Results

The 2017 election of commissioners for the Board of Bar Commissioners was held on Nov. 30. The results are as follows: Aja N. Brooks and Robert Lara were elected in the First Bar Commissioner District (Bernalillo County), and Erinna M. Atkins and Jared G. Kallunki were elected in the Sixth Bar Commissioner District (Chaves, Eddy, Lea, Lincoln and Otero counties). Only one nomination petition was received for the two positions in the Third Bar Commissioner District (Los Alamos, Rio Arriba, Sandoval and Santa Fe counties), so Elizabeth J. Travis is elected by acclamation. A notice will be published for the vacancy in the *Bar Bulletin*, and the Board will make the appointment at its Feb. 23, 2018, meeting.

Appointments

New Mexico Legal Aid Board

The Board of Bar Commissioners will make three appointments to the New Mexico Legal Aid Board for three-year terms, with one of the appointments being a member of and recommended by the Indian Law Section. Members who want to serve on the Board should send a letter of interest and brief résumé by Jan. 10, 2018, to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

State Bar of New Mexico Access to Justice Fund Grant Commission

The Board of Bar Commissioners will make two appointments to the newly created State Bar of New Mexico ATJ Fund Grant Commission; the terms will be determined at the first meeting of the Commission. The ATJ Fund Grant Commission will solicit and review grant applications and award grants to civil legal services organizations consistent with the State Plan for the Provision of Civil Legal Services to Low Income New Mexicans. Active status attorneys in New Mexico, not affiliated with a civil legal service organization which would be eligible for grant funding from the ATJ Fund, who are interested in serving on the Commission should send a letter of interest and brief resume by Jan. 10, 2018, to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Young Lawyers Division

Volunteers Needed for UNM Mock Interview Program

YLD is seeking volunteer attorneys to serve as interviewers for its annual UNM School of Law Mock Interview Program at 10:30 a.m., Saturday, Jan. 27, 2018, at the UNM School of Law. The mock interviews and coordinated critiques of résumés assist UNM law students with preparation for job interviews. Judges and attorneys from all practice areas, both public and private sectors, are needed. A brief training session will be held at 10 a.m. at the UNM School of Law preceding the interviews, and breakfast will be provided. To volunteer, sign-up at https://form.jotform.com/72126557703961 by Jan. 13.

UNM School of Law

Law Library Hours

Building and Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.

Other Bars

New Mexico Criminal Defense Lawyers Association

Law Office Management CLE

Join the New Mexico Criminal Defense Lawyers Association for "Ring in the New: Best Practices in Law Office Management" (4.2 G, 2.0 EP) on Jan. 26, 2018, in Albuquerque. Register at 505-992-0050 or info@nmcdla.org.

New Mexico Women's Bar Association

Henrietta Pettijohn Award Nominations

The New Mexico Women's Bar Association invites nominations for the annual Henrietta Pettijohn award, established by the NMWBA board to honor an attorney, female or male, who has, over the previous year(s), done an exemplary job of advancing the causes of women in the legal profession. Previous recipients include Julianna Koob and Hon. Monica Zamora (2013), Congresswoman Michelle Lujan Grisham (2014), Hon. Martha Vázquez (2015), Antonia Roybal-Mack (2016) and Wendy York and Shona Zimmerman (2017). Nominations along with a brief explanation as to why this attorney should be honored with the award should be sent to Peggy Graham at mgraham@pbwslaw.com by Dec. 29.

Other News

Center for Civic Values

Requesting Judges for Gene Franchini High School Mock Trial

Mock trial is an innovative, hands-on experience in the law for high school students of all ages and abilities. Every year hundreds of New Mexico teenagers and their teacher advisors and attorney coaches spend the better part of the school year researching, studying and preparing a hypothetical courtroom trial involving issues that are important and interesting to young people. Mock Trial qualifiers will be held Feb. 16–17, 2018, at the Bernalillo County Metropolitan Court in Albuquerque. CCV needs volunteers for judges (opportunities exist for sitting judges and non-judges). Learn more and register at www.civicvalues.org.

Legal Education

December 2017

20 **Speech Recognition: Using Dragon Legal in a Law Practice**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

20 **2017 Employment and Labor Law Institute**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Fall Elder Law Institute—Hot Topics in Adult Guardianship Law (2017)**
4.5 G, 1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **A Little Planning Now, a Lot Less Panic Later—Practical Succession Planning for Lawyers (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics—2016 Edition**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Handling the Sale of a Business**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
NBI, Inc.
www.nbi-sems.com

21 **The Lifecycle of a Trial, from a Technology Perspective**
5.2 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **60 Legal Tech Tips, Tricks and Websites in 60 Minutes**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Negotiation Strategies for Litigators**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
NBI Inc.
www.nbi-sems.com

22 **Legal Tech Security Measures Every Lawyer Must Take**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

22 **2017 Administrative Law Update**
2.0 G
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Ethics in Drafting Claims**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **2017 How to Become Your Own Cybersleuth: Conducting Effective Internet Investigation & Background Research**
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Oil and Gas: From the Basics to In-Depth Topics**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **How to Protect Yourself and Preserve Confidentiality**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **The Ethics of Lawyer Advertisements Using Social Media**
1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Deposition Practice in Federal Cases (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **New Mexico DWI Cases: From the Initial Stop to Sentencing—Evaluating Your Case**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

January 2018

5 **2018 Legislative Preview**
2.0 G
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **2017 Fair Pay Litigation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **Health Care issues in Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Drafting Distrubtion Provisions in Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

19 **Ethics of Working with Witnesses**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

19 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Arbitration Clauses in Business Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **SALT Online: Understanding State and Local Taxes When Your Client Sells Online**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

30 **ABCs of Choosing and Drafting the Right Trust for Client Goals, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **ABCs of Choosing and Drafting the Right Trust for Client Goals, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

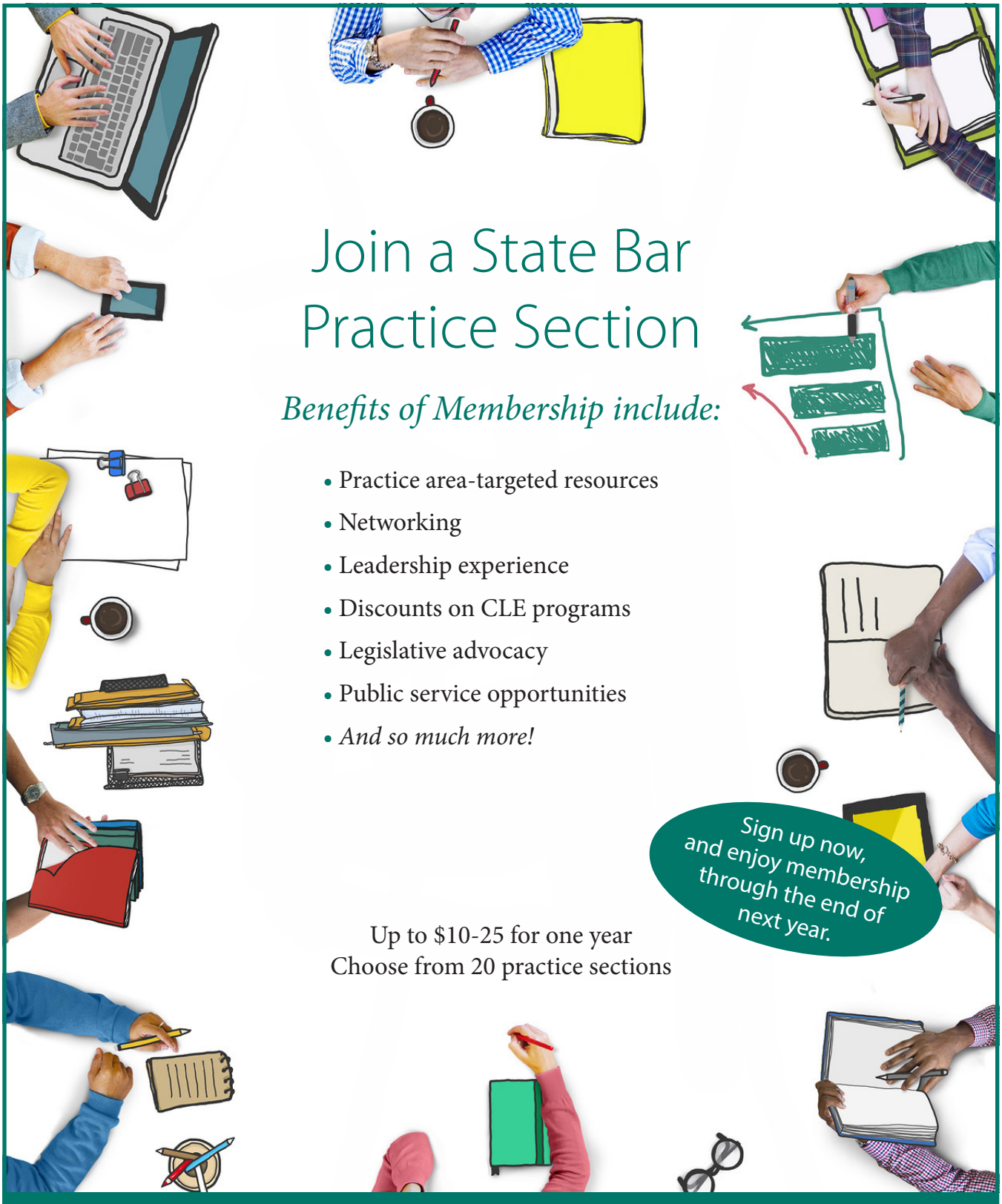
February 2018

9 **Regional Seminar**
20.5 G
Live Seminar, Santa Fe
Trial Lawyers College
307-432-4042

March 2018

1 **Introduction to the Practice of Law in New Mexico (Reciprocity)**
4.5 G, 2.5 EP
Live Seminar, Albuquerque
New Mexico Board of Bar Examiners
www.nmexam.org

Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*



Join a State Bar Practice Section

Benefits of Membership include:

- Practice area-targeted resources
- Networking
- Leadership experience
- Discounts on CLE programs
- Legislative advocacy
- Public service opportunities
- *And so much more!*

Sign up now, and enjoy membership through the end of next year.

Up to $10-25 for one year
Choose from 20 practice sections

Browse sections and join today at **www.nmbar.org/sections**

STATE BAR of NEW MEXICO

2 *in* 5 lawyers report experiencing depression during their legal career, according to a national study in 2015. That's **four times higher** than the general employed U.S. population.

We can help.

Getting help won't sabotage your career. But not getting help can.

No one is completely immune. If you or a colleague experience signs of depression, please reach out.

NEW MEXICO LAWYERS AND JUDGES ASSISTANCE PROGRAM
Confidential assistance—24 hours every day
Lawyers and law students: 505-228-1948 or 800-860-4914
Judges: 888-502-1289
www.nmbar.org/JLAP

Help and support are only a phone call away.

STATE BAR of NEW MEXICO

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective December 8, 2017

PUBLISHED OPINIONS

A-1-CA-35338	Fred Loya Insurance v. T Sweich	Reverse	12/04/2017

UNPUBLISHED OPINIONS

A-1-CA-35641	In Re Protest of Bogle Management	Affirm	12/05/2017
A-1-CA-35729	CYFD v. Joelyne T	Affirm	12/05/2017
A-1-CA-33937	State v. P Calvillo	Reverse/Remand	12/06/2017
A-1-CA-34275	State v. B Chavez	Affirm/Reverse/Remand	12/06/2017
A-1-CA-34851	State v. J Barela	Affirm	12/06/2017
A-1-CA-35676	State v. E Cummings	Affirm	12/06/2017
A-1-CA-36031	State v. D Romero	Affirm	12/06/2017
A-1-CA-35143	R Clark v. NM Dept. of Homeland Security	Affirm	12/07/2017
A-1-CA-36542	State v. J Peacock	Affirm	12/07/2017

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

CLERK'S CERTIFICATE OF ADMISSION

On December 5, 2017:
Amanda S. Angell
John D. Wheeler &
Associates, PC
PO Box 1810
715 E. Tenth Street (88310)
Alamogordo, NM 88311
575-437-5750
575-437-3557 (fax)
asa@jdw-law.com

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On December 5, 2017:
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1550 Seventeenth Street,
Suite 500
Denver, CO 80202
303-892-9400
303-825-0740 (fax)
katie.schroder@dgslaw.com

IN MEMORIAM

As of April 25, 2017:
Frances D. Bratton
524 San Pasquale, SW
Albuquerque, NM 87104

As of October 26, 2017:
George P. Jones III
2041 1/2 S. Plaza Street, NW
Albuquerque, NM 87104

CLERK'S CERTIFICATE OF WITHDRAWAL

Effective December 5, 2017:
Jere C. Corlett
232 Castillo Place
Santa Fe, NM 87501

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS AND CHANGE OF ADDRESS

Effective December 1, 2017:
John Parker Moon
Office of the City Attorney
201 W. Colfax Avenue,
Dept. 1108
Denver, CO 80202
720-913-3217
720-913-3190 (fax)
john.moon@denvergov.org

Effective December 5, 2017:
Christopher Graham Schatzman
980 E. Rising Sun Drive
Oro Valley, AZ 85755
505-438-4511
chris.schatzman1@gmail.com

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective December 20, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2017 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-015	Amended and supplemental pleadings	12/31/2017
1-017	Parties plaintiff and defendant; capacity	12/31/2017
1-053.1	Domestic violence special commissioners; duties	12/31/2017
1-053.2	Domestic relations hearing officers; duties	12/31/2017
1-053.3	Guardians ad litem; domestic relations appointments	12/31/2017
1-079	Public inspection and sealing of court records	03/31/2017
1-088	Designation of judge	12/31/2017
1-105	Notice to statutory beneficiaries in wrongful death cases	12/31/2017
1-121	Temporary domestic orders	12/31/2017
1-125	Domestic Relations Mediation Act programs	12/31/2017
1-129	Proceedings under the Family Violence Protection Act	12/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Rules of Civil Procedure for the Magistrate Courts		
2-105	Assignment and designation of judges	12/31/2017
2-112	Public inspection and sealing of court records	03/31/2017
2-301	Pleadings allowed; signing of pleadings, motions, and other papers; sanctions	12/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-105	Assignment and designation of judges	12/31/2017
3-112	Public inspection and sealing of court records	03/31/2017
3-301	Pleadings allowed; signing of pleadings, motions, and other papers; sanctions	12/31/2017
Civil Forms		
4-223	Order for free process	12/31/2017
4-402	Order appointing guardian ad litem	12/31/2017
4-602	Withdrawn	12/31/2017
4-602A	Juror summons	12/31/2017
4-602B	Juror qualification	12/31/2017
4-602C	Juror questionnaire	12/31/2017
4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017
4-941	Motion to restore right to possess or receive a firearm or Ammunition	12/31/2017
Domestic Relations Forms		
4A-200	Domestic relations forms; instructions for stage two (2) forms	12/31/2017
4A-201	Temporary domestic order	12/31/2017
4A-209	Motion to enforce order	12/31/2017
4A-210	Withdrawn	12/31/2017
4A-321	Motion to modify final order	12/31/2017
4A-504	Order for service of process by publication in a newspaper	12/31/2017
Rules of Criminal Procedure for the District Courts		
5-105	Designation of judge	12/31/2017
5-106	Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
5-123	Public inspection and sealing of court records	03/31/2017
5-204	Amendment or dismissal of complaint, information and Indictment	07/01/2017
5-211	Search warrants	12/31/2017
5-302	Preliminary examination	12/31/2017
5-401	Pretrial release	07/01/2017
5-401.1	Property bond; unpaid surety	07/01/2017
5-401.2	Surety bonds; justification of compensated sureties	07/01/2017
5-402	Release; during trial, pending sentence, motion for new trial and appeal	07/01/2017
5-403	Revocation or modification of release orders	07/01/2017
5-405	Appeal from orders regarding release or detention	07/01/2017
5-406	Bonds; exoneration; forfeiture	07/01/2017
5-408	Pretrial release by designee	07/01/2017
5-409	Pretrial detention	07/01/2017

5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017
5-802	Habeas corpus	12/31/2017

Rules of Criminal Procedure for the Magistrate Courts

6-105	Assignment and designation of judges	12/31/2017
6-114	Public inspection and sealing of court records	03/31/2017
6-202	Preliminary examination	12/31/2017
6-203	Arrests without a warrant; probable cause determination	12/31/2017
6-207	Bench warrants	04/17/2017
6-207.1	Payment of fines, fees, and costs	04/17/2017
6-207.1	Payment of fines, fees, and costs	12/31/2017
6-208	Search warrants	12/31/2017
6-304	Motions	12/31/2017
6-401	Pretrial release	07/01/2017
6-401.1	Property bond; unpaid surety	07/01/2017
6-401.2	Surety bonds; justification of compensated sureties	07/01/2017
6-403	Revocation or modification of release orders	07/01/2017
6-406	Bonds; exoneration; forfeiture	07/01/2017
6-408	Pretrial release by designee	07/01/2017
6-409	Pretrial detention	07/01/2017
6-506	Time of commencement of trial	07/01/2017
6-506	Time of commencement of trial	12/31/2017
6-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
6-703	Appeal	07/01/2017

Rules of Criminal Procedure for the Metropolitan Courts

7-105	Assignment and designation of judges	12/31/2017
7-113	Public inspection and sealing of court records	03/31/2017
7-202	Preliminary examination	12/31/2017
7-203	Probable cause determination	12/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017
7-208	Search warrants	12/31/2017
7-304	Motions	12/31/2017
7-401	Pretrial release	07/01/2017
7-401.1	Property bond; unpaid surety	07/01/2017
7-401.2	Surety bonds; justification of compensated sureties	07/01/2017
7-403	Revocation or modification of release orders	07/01/2017
7-406	Bonds; exoneration; forfeiture	07/01/2017
7-408	Pretrial release by designee	07/01/2017
7-409	Pretrial detention	07/01/2017
7-504	Discovery; cases within metropolitan court trial jurisdiction	12/31/2017
7-506	Time of commencement of trial	07/01/2017
7-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
7-606	Subpoena	12/31/2017
7-703	Appeal	07/01/2017

Rules of Procedure for the Municipal Courts

8-112	Public inspection and sealing of court records	03/31/2017
8-202	Probable cause determination	12/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
8-207	Search warrants	12/31/2017
8-304	Motions	12/31/2017
8-401	Pretrial release	07/01/2017
8-401.1	Property bond; unpaid surety	07/01/2017
8-401.2	Surety bonds; justification of compensated sureties	07/01/2017
8-403	Revocation or modification of release orders	07/01/2017
8-406	Bonds; exoneration; forfeiture	07/01/2017
8-408	Pretrial release by designee	07/01/2017
8-506	Time of commencement of trial	07/01/2017
8-506	Time of commencement of trial	12/31/2017
8-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
8-703	Appeal	07/01/2017

Criminal Forms

9-207A	Probable cause determination	12/31/2017
9-301A	Pretrial release financial affidavit	07/01/2017
9-302	Order for release on recognizance by designee	07/01/2017
9-303	Order setting conditions of release	07/01/2017
9-303A	Withdrawn	07/01/2017
9-307	Notice of forfeiture and hearing	07/01/2017
9-308	Order setting aside bond forfeiture	07/01/2017
9-309	Judgment of default on bond	07/01/2017
9-310	Withdrawn	07/01/2017
9-513	Withdrawn	12/31/2017
9-513A	Juror summons	12/31/2017
9-513B	Juror qualification	12/31/2017

9-513C	Juror questionnaire	12/31/2017
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
9-701	Petition for writ of habeas corpus	12/31/2017
9-702	Petition for writ of certiorari to the district court from denial of habeas corpus	12/31/2017
9-809	Order of transfer to children's court	12/31/2017
9-810	Motion to restore right to possess or receive a firearm or ammunition	12/31/2017

Children's Court Rules and Forms

10-161	Designation of children's court judge	12/31/2017
10-166	Public inspection and sealing of court records	03/31/2017
10-166	Public inspection and sealing of court records	12/31/2017
10-169	Criminal contempt	12/31/2017
10-325	Notice of child's advisement of right to attend hearing	12/31/2017
10-325.1	Guardian ad litem notice of whether child will attend hearing	12/31/2017
10-570.1	Notice of guardian ad litem regarding child's attendance at hearing	12/31/2017
10-611	Suggested questions for assessing qualifications of proposed court interpreter	12/31/2017
10-612	Request for court interpreter	12/31/2017
10-613	Cancellation of court interpreter	12/31/2017
10-614	Notice of non-availability of certified court interpreter or justice system interpreter	12/31/2017

Rules of Appellate Procedure

12-202	Appeal as of right; how taken	12/31/2017
12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017
12-205	Release pending appeal in criminal matters	07/01/2017
12-210	Calendar assignments for direct appeals	12/31/2017
12-307.2	Electronic service and filing of papers	07/01/2017
12-307.2	Electronic service and filing of papers	08/21/2017
12-313	Mediation	12/31/2017
12-314	Public inspection and sealing of court records	03/31/2017
12-502	Certiorari from the Supreme Court to the Court of Appeals	12/31/2017

Uniform Jury Instructions – Civil

13-24 Appx 1	Part A: Sample fact pattern and jury instructions for malpractice of attorney in handling divorce case	12/31/2017
13-2401	Legal malpractice; elements	12/31/2017
13-2402	Legal malpractice; attorney-client relationship	12/31/2017
13-2403	Legal malpractice; negligence and standard of care	12/31/2017
13-2404	Legal malpractice; breach of fiduciary duty	12/31/2017
13-2405	Duty of confidentiality; definition	12/31/2017
13-2406	Duty of loyalty; definition	12/31/2017
13-2407	Legal malpractice; attorney duty to warn	12/31/2017
13-2408	Legal malpractice; duty to third-party intended - No instruction drafted	12/31/2017
13-2409	Legal malpractice; duty to intended beneficiaries; wrongful death	12/31/2017
13-2410	Legal malpractice; expert testimony	12/31/2017
13-2411	Rules of Professional Conduct	12/31/2017
13-2412	Legal malpractice; attorney error in judgment	12/31/2017
13-2413	Legal malpractice; litigation not proof of malpractice	12/31/2017
13-2414	Legal malpractice; measure of damages; general instruction	12/31/2017
13-2415	Legal malpractice; collectability – No instruction drafted	12/31/2017

Uniform Jury Instructions – Criminal

14-240	Withdrawn	12/31/2017
14-240B	Homicide by vehicle; driving under the influence; essential elements	12/31/2017
14-240C	Homicide by vehicle; reckless driving; essential elements	12/31/2017
14-240D	Great bodily injury by vehicle; essential elements	12/31/2017
14-251	Homicide; "proximate cause"; defined	12/31/2017
14-1633	Possession of burglary tools; essential elements	12/31/2017
14-2820	Aiding or abetting; accessory to crime of attempt	12/31/2017
14-2821	Aiding or abetting; accessory to felony murder	12/31/2017
14-2822	Aiding or abetting; accessory to crime other than attempt and felony murder	12/31/2017
14-4201	Money laundering; financial transaction to conceal or disguise property, OR to avoid reporting requirement; essential elements	12/31/2017
14-4202	Money laundering; financial transaction to further or commit another specified unlawful activity; essential elements	12/31/2017
14-4203	Money laundering; transporting instruments to conceal or disguise OR to avoid reporting requirement; essential elements	12/31/2017

14-4204	Money laundering; making property available to another by financial transaction OR transporting; essential elements	12/31/2017
14-4205	Money laundering; definitions	12/31/2017
14-5130	Duress; nonhomicide crimes	12/31/2017

Rules Governing Admission to the Bar

15-103	Qualifications	12/31/2017
15-104	Application	08/04/2017
15-105	Application fees	08/04/2017
15-301.1	Public employee limited license	08/01/2017
15-301.2	Legal services provider limited law license	08/01/2017

Rules of Professional Conduct

16-100	Terminology	12/31/2017
16-101	Competence	12/31/2017
16-102	Scope of representation and allocation of authority between client and lawyer	08/01/2017
16-106	Confidentiality of information	12/31/2017
16-108	Conflict of interest; current clients; specific rules	12/31/2017
16-304	Fairness to opposing party and counsel	12/31/2017
16-305	Impartiality and decorum of the tribunal	12/31/2017
16-402	Communications with persons represented by counsel	12/31/2017
16-403	Communications with unrepresented persons	12/31/2017
16-701	Communications concerning a lawyer's services	12/31/2017
16-803	Reporting professional misconduct	12/31/2017

Rules Governing Discipline

17-202	Registration of attorneys	07/01/2017
17-202	Registration of attorneys	12/31/2017
17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service	07/01/2017

Rules for Minimum Continuing Legal Education

18-203	Accreditation; course approval; provider reporting	09/11/2017

Code of Judicial Conduct

21-004	Application	12/31/2017

Supreme Court General Rules

23-106	Supreme Court rules committees	12/31/2017
23-106.1	Supreme Court rule-making procedures	12/31/2017

Rules Governing the New Mexico Bar

24-110	"Bridge the Gap: Transitioning into the Profession" program	12/31/2017

Rules Governing Review of Judicial Standards Commission Proceedings

27-104	Filing and service	07/01/2017

Local Rules for the Thirteenth Judicial District Court

LR13-112	Courthouse security	12/31/2017

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us.

In The Supreme Court of the State of New Mexico

December 4, 2017

No. 17-8300-031

In the Matter of the Amendment of Local Rule LR2-308 NMRA Governing the Criminal Case Management Pilot Program in the Second Judicial District Court

Order

WHEREAS, this matter came on for consideration by the Court upon recommendation of the Bernalillo County Criminal Justice Coordinating Council to amend local Rule LR2-308 NMRA to revise the criminal case management pilot program (CMO) in the Second Judicial District Court, and the Court having considered the recommendation and being otherwise sufficiently advised, Chief Justice Judith K. Nakamura, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Charles W. Daniels, and Justice Barbara J. Vigil concurring;

NOW, THEREFORE, IT IS ORDERED that amendments to local Rule LR2-308 NMRA are APPROVED;

IT IS FURTHER ORDERED that the amendments to local Rule LR2-308 NMRA shall be **effective for all cases filed or pending on or after January 15, 2018**; and

IT IS FURTHER ORDERED that the Clerk of the Court is authorized and directed to give notice of the above-referenced amendments by posting them on the New Mexico Compilation Commission web site and publishing them in the *Bar Bulletin* and *New Mexico Rules Annotated*.

IT IS SO ORDERED.

WITNESS, Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 4th day of December, 2017.

_____

Joey D. Moya, Chief Clerk of the Supreme Court of the State of New Mexico

Local Rules

LR2-308. Case management pilot program for criminal cases.

A. **Scope; application.** This is a special pilot rule governing time limits for criminal proceedings in the Second Judicial District Court. This rule applies in all criminal proceedings in the Second Judicial District Court but does not apply to probation violations, which are heard as expedited matters separately from cases awaiting a determination of guilt, nor to any other special proceedings in Article 8 of the Rules of Criminal Procedure for the District Courts. The Rules of Criminal Procedure for the District Courts and existing case law on criminal procedure continue to apply to cases filed in the Second Judicial District Court, but only to the extent they do not conflict with this pilot rule. The Second Judicial District Court may adopt forms to facilitate compliance with this rule, including the data tracking requirements in Paragraph [~~N~~]M.

[~~**B. Assignment of cases to case management calendars; special calendar; new calendar.**~~

~~(1) ***Special calendar and new calendar judges.*** Criminal cases filed before July 1, 2014, will be assigned and scheduled as provided for "special calendar" judges under Paragraph M of this rule, except that, where appropriate, the chief judge may designate cases coming off warrant status to be placed in the new calendar. Criminal cases filed on or after July 1, 2014, shall be assigned or reassigned to a "new calendar" judge. The district court judges assigned as new calendar judges shall be determined by separate order of the chief judge, who is authorized to reassign any district judge to be a new calendar judge. Time limits and rules for disposition of cases assigned or reassigned to new calendar judges shall be governed by this rule.~~

~~(2) ***Assignment of cases to new calendar judges.*** For cases filed between July 1, 2014, and the effective date of this rule, a new calendar judge will continue to be assigned to any case previously assigned to that judge. Cases filed on or after July 1, 2014, that were previously assigned to a special calendar judge, shall be reassigned to a new calendar judge. Cases that require reassignment shall be reassigned by order of the chief judge of the district court in the manner best designed to foster expeditious resolution of the cases. Notwithstanding the reassignments provided in this rule, the chief judge of the district court may continue the assignment of a case to the original judge in the interest of expeditious resolution of the case.~~

~~(3) ***Deadline for initial scheduling hearing by new calendar judges in pending cases.*** Beginning on the effective date of this rule, new calendar judges assigned to cases filed before the effective date of the rule shall hold a scheduling hearing within sixty (60) days of the effective date of this rule. The scheduling hearing for pending cases shall comply with Paragraph G of this rule and shall result in assignment of all pending cases to the appropriate track. Thereafter the provisions of this rule shall apply, except that the time limits for disclosures and the commencement of trial in Paragraph G shall start from the effective date of this rule.~~

~~(4) ***Reassignment to new calendar judges; peremptory excusals.*** Upon reassignment of a pending case to a new calendar judge, any party who has not previously exercised a peremptory excusal of a district judge under Rule 5106 NMRA may exercise a peremptory excusal within ten (10) days in the manner provided in Paragraph F of this rule.~~

~~(5) ***Rule governs case administration.*** For cases assigned to a new calendar judge after the effective date of this rule, the provisions of this rule govern case administration until this rule is withdrawn or amended.~~

~~C~~]B. **Arraignment.**

(1) ***Deadline for arraignment.*** The defendant shall be arraigned on the information or indictment within [~~ten (10)~~] fifteen (15) days after the date of the filing of the bindover order, indictment, or the date of the arrest, whichever is later, [~~if the defendant is not in custody and not later than seven (7) days if the defendant is in custody~~] except that the arraignment of a defendant in custody at the Bernalillo Metropolitan Detention Center on the case to be arraigned shall be held not later than seven (7) days after the filing of the bindover order. indictment. or date of arrest, whichever is later.

(2) ***Certification by prosecution required; matters certified.*** At or before arraignment or waiver of arraignment, or upon the filing of a bindover order, the state shall certify that before obtaining an indictment or filing an information the case has been investigated sufficiently to be reasonably certain that

(a) the case will reach a timely disposition by plea or trial within the case processing time limits set forth in this rule;

(b) the court will have sufficient information upon which to rely in assigning a case to an appropriate track at the status hearing provided for in Paragraph [~~G~~]F;

(c) all discovery in the possession of the state or relied upon in the investigation leading to the bindover order, indictment or information [~~has been provided to the defendant~~] will be provided in accordance with Subparagraph (C)(2) of this rule; and

(d) the state understands that, absent extraordinary circumstances, the state's failure to comply with the case processing time lines set forth in this rule will result in sanctions as set forth in Paragraph [~~H~~]H.

(3) ***Certification form.*** The court may adopt a form and require use of the form to fulfill the certification and acknowledgment required by this paragraph.

[~~D~~]C. ***[~~Discovery; disclosure~~] Disclosure by the state; requirement to provide contact information; continuing duty; failure to comply.***

[~~(1) **Initial disclosures; deadline.** The state shall disclose or make available to the defendant all information described in Rule 5501(A)(1)(6) NMRA at the arraignment or within five (5) days of when a written waiver of arraignment is filed under Rule 5303(J) NMRA. In addition to the disclosures required in Rule 5501(A) NMRA, at the same time the state shall provide addresses, and also phone numbers and email addresses if available, for its witnesses that are current as of the date of disclosure, copies of documentary evidence, and audio, video, and audiovideo recordings made by law enforcement officers or otherwise in possession of the state, and a "speed letter" authorizing the defendant to examine physical evidence in the possession of the state.~~]

(1) ***Scope of disclosure by the state.*** The scope of the state's discovery disclosure obligation shall be governed by Rule 5501(A)(1)(6) NMRA. In addition to producing a "speed letter" authorizing the defendant to examine physical evidence in possession of the state. the state shall provide the defendant with physical copies of any documentary evidence and audio, video, and audiovideo recordings made by law enforcement officers or otherwise in possession of the state at the time of the disclosure. As part of its production obligation under Rule 5501(A)(5) NMRA. the state shall provide contact information for its witnesses that is current as of the date of disclosure, including, to the extent available, witness addresses, phone numbers, and email addresses.

(2) ***Deadline for disclosure bv the state.*** If the case is a ten (10)day case as described by Rule 5302(A)(l) NMRA, the state shall make its discovery disclosures to the defendant within five (5) days after arraignment or the filing of a waiver of arraignment under Rule 5303(J) NMRA. If the case is a sixty (60)day case as described by Rule 5302(A)(1) NMRA, the state shall make its initial discovery disclosures to the defendant at arraignment or within five (5) days of when a written waiver of arraignment is filed under Rule 5303(J) NMRA.

([~~2~~]3) ***Motion to withhold contact information for safety reasons.*** A party may seek relief from the court by motion, for good cause shown, to withhold specific contact information if necessary to protect a victim or a witness. If the address of a witness is not disclosed pursuant to court order, the party seeking the order shall arrange for a witness interview or accept at its business offices a subpoena for purposes of deposition under Rule 5503 NMRA.

([~~3~~]4) ***Continuing duty.*** The state shall have a continuing duty to disclose additional information to the defendant, including the names and contact information for newly-discovered witnesses and updated contact information for witnesses already disclosed, within [~~five (5)~~] seven (7) days of receipt of such information, including current contact information for witnesses.

([~~4~~]5) ***Evidence deemed in the possession of the state.*** Evidence is deemed to be in possession of the state for purposes of this rule and Rule 5-501(A) NMRA if such evidence is in the possession or control of any person or entity who has participated in the investigation or evaluation of the case.

([5]6) ***Providing copies; electronic or paper; email addresses for district attorney and public defender required.*** Notwithstanding Rule 5501(B) NMRA or any other rule, the state shall provide to the defendant electronic or printed copies of electronic or printed information subject to disclosure by the state. The Second Judicial District Attorney's Office and the Law Offices of the Public Defender shall provide to each other a single email address for delivery of discovery electronically. In addition to delivering discovery to the given general address for the Law Offices of the Public Defender, the state shall copy such delivery to any attorney for the Law Offices of the Public Defender who has entered an appearance in the case at the time discovery is sent electronically.

([6]7) ***Service of subsequent pleadings.*** Service of pleadings and papers between the parties shall be made to the attorney, or to the party if not represented by counsel, by emailing an electronic scan of the fileendorsed pleading or paper, attachments included, to the attorney or party. If the attachments are too voluminous for emailing, or otherwise cannot be sent by email, the email to the attorney or party will recite this circumstance and certify that the attachments have been mailed or delivered to the attorney's or party's last known address. Service by email is complete upon transmission and, in case of attachments that cannot be emailed, upon mailing or delivery.

[~~E~~]D. **Disclosure by defendant; notice of alibi; entrapment defense; failure to comply.**

(1) ***Initial disclosures; deadline; witness contact information.*** Not less than five (5) days before the scheduled date of the status hearing described in Paragraph [~~G~~]F, the defendant shall disclose or make available to the state all information described in Rule 5502(A)(1)(3) NMRA. At the same time, the defendant shall provide addresses, and also phone numbers and email addresses if available, for its witnesses that are current as of the date of disclosure.

(2) ***Deadline for notice of alibi and entrapment defense.*** Notwithstanding Rule 5508 NMRA or any other rule, not less than ninety (90) days before the date scheduled for commencement of trial as provided in Paragraph [~~G~~]F, the defendant shall serve

upon the state a notice in writing of the defendant's intention to offer evidence of an alibi or entrapment as a defense.

(3) ***Continuing duty.*** The defendant shall have a continuing duty to disclose additional information to the state, including the names and contact information for newly-discovered witnesses and updated contact information for witnesses already disclosed, within [~~five (5)~~] seven (7) days of receipt of such information.

(4) ***Providing copies required; electronic or paper.*** Notwithstanding Rule 5502(B) NMRA or any other rule, the defendant shall provide to the state electronic or printed copies of electronic or printed information subject to disclosure by the defendant. The Second Judicial District Attorney's Office and the Law Offices of the Public Defender shall provide to each other a single email address for delivery of discovery electronically. In addition to delivering discovery to the given general address for the Second Judicial District Attorney's Office, the defendant shall copy such delivery to any attorney for the Second Judicial District Attorney's Office who has entered an appearance in the case at the time discovery is sent electronically.

(5) ***Service of subsequent pleadings.*** Service of pleadings and papers between the parties shall be made to the attorney, or to the party if not represented by counsel, by emailing an electronic scan of the fileendorsed pleading or paper, attachments included, to the attorney or party. If the attachments are too voluminous for emailing, or otherwise cannot be sent by email, the email to the attorney or party will recite this circumstance and certify that the attachments have been mailed or delivered to the attorney's or party's last known address. Service by email is complete upon transmission and, in case of attachments that cannot be emailed, upon mailing or delivery.

[~~F~~]E. **Peremptory excusal of a district judge; limits on excusals; time limits; reassignment.** A party on either side may file one (1) peremptory excusal of any judge in the Second Judicial District Court, regardless of which judge is currently assigned to the case, within ten (10) days of the arraignment or the filing of a waiver of arraignment. If necessary, the case may later be reassigned by the chief judge to any judge in the Second Judicial District Court not excused within ten (10) days of the arraignment or the filing of a waiver of arraignment of the defendant. The chief judge may also reassign the case to a judge pro tempore previously approved to preside over such matters by order of the Chief Justice, who shall not be subject to peremptory excusal.

[~~G~~]F. **Status hearing; witness disclosure; case track determination; scheduling order.**

(1) ***Witness list disclosure requirements.*** Within twentyfive (25) days after arraignment or waiver of arraignment each party shall, subject to Rule 5501(F) NMRA and Rule 5502(C) NMRA, file a list of names and contact information for known witnesses the party intends to call at trial and that the party has verified is current as of the date of disclosure required under this subparagraph, including a brief statement of the expected testimony for each witness, to assist the court in assigning the case to a track as provided in this rule. The continuing duty to make such disclosure to the other party continues at all times prior to trial, requiring such disclosure within five (5) days of when a party determines or should reasonably have determined the witness will be expected to testify at trial.

(2) ***Status hearing; factors for case track assignment.*** A status hearing, at which the defendant shall be present, shall be commenced within thirty (30) days of arraignment or the filing of a waiver of arraignment.

(3) ***Case track assignment required; factors.*** At the status hearing, the court shall determine the appropriate assignment of the case to one of three tracks. Written findings are required to place a case on track 3 and such findings shall be entered by the court within five (5) days of assignment to track 3. Any track assignment under this rule only shall be made after considering the following factors:

(a) the complexity of the case, starting with the assumption that most cases will qualify for assignment to track 1; and

(b) the number of witnesses, time needed reasonably to address any evidence issues, and other factors the court finds appropriate to distinguish track 1, track 2, and track 3 cases.

(4) ***Defendants detained pending trial.*** When the defendant is detained pending trial, the case shall be given the highest priority for trial scheduling.

([~~4~~]5) ***Scheduling order required.*** After hearing argument and weighing the above factors, the court shall, before the conclusion of the status hearing, issue a scheduling order that assigns the case to one of three tracks and identifies the dates when events required by that track shall be scheduled, which are as follows for tracks 1, 2, and 3:

(a) *Track 1; deadlines for commencement of trial and other events.* For track 1 cases, the scheduling order shall have trial commence within two hundred ten (210) days of arraignment, the filing of a waiver of arraignment, or other applicable triggering event identified in Paragraph [~~H~~]G, whichever is the latest to occur. The scheduling order shall also set dates for other events according to the following requirements for track 1 cases:

(i) Track 1 deadline for plea agreement. A plea agreement entered into between the defendant and the state shall be submitted to the court substantially in the form approved by the Supreme Court not later than ten (10) days before the trial date. A request for the court to approve a plea agreement less than ten (10) days before the trial date shall not be accepted by the court except upon a written finding by the assigned district judge of extraordinary circumstances. A defendant may plead guilty, the state may dismiss charges, and the parties may recommend a sentence but the court shall not agree to comply with a plea agreement in this circumstance absent a written finding of extraordinary circumstances;

(ii) Track 1 deadline for pretrial conference. The final pretrial conference, including any hearing on any remaining pretrial motions if needed, shall be scheduled fifteen (15) days before the trial date. Each party shall file their final trial witness list on or before this date. The defendant shall be present for the final pretrial conference;

(iii) Track 1 deadline for notice of need for court interpreter. All parties shall identify by filing notice with the court any requirement for language access services at trial by a party or witness fifteen (15) days before the trial date;

(iv) Track 1 deadline for pretrial motions hearing. A hearing for resolution of pretrial motions shall be set not less than thirtyfive (35) days before the trial date;

(v) Track 1 deadline for pretrial motions. Pretrial motions shall be filed not less than fifty (50) days before the trial date;

(vi) Track 1 deadline for responses to pretrial motions. Written responses to any pretrial motions shall be filed within ten (10) days of the filing of any pretrial motions and in any case not less than forty (40) days before the trial date. Failure to file a written response shall be deemed, for purposes of deciding the motion, an admission of the facts stated in the motion;

(vii) Track 1 [~~deadline~~] deadlines for requesting and completion of witness interviews. Witness

interviews shall be completed not less than sixty (60) days before the trial date. Absent agreement by the parties or order of the court the state shall be responsible for scheduling pretrial witness interviews of the state's witnesses, and the defendant shall be responsible for scheduling pretrial witness interviews of the defendant's witnesses. A party wishing to interview witnesses of the other party's initial witness list shall request those interviews no later than fourteen (14) days after the issuance of the scheduling order. The requesting party shall give dates of availability for witness interviews during the thirty (30) days following the request and the party receiving the request shall make reasonable efforts to schedule the requested interviews during that thirty (30)day period. If a party files a new witness list adding new witnesses, any requests to interview those new witnesses shall be made no later than seven (7) days after the new witness list is served upon the requesting party. At all times the parties shall act diligently and in good faith in requesting, scheduling, and, as necessary, rescheduling witness interviews. The court shall not consider failure to conduct pretrial interviews of witnesses as the basis of any sanction unless the party moving for sanctions followed the requirements of this subparagraph in requesting those interviews; and

(viii) Track 1 deadline for disclosure of scientific evidence. All parties shall produce the results of any scientific evidence, if not already produced, not less than one hundred twenty (120) days before the trial date. In a case where justified by good cause, the court may but is not required to provide for production of scientific evidence less than one hundred twenty (120) days before the trial date. In no case shall the order provide for production of scientific evidence less than ninety (90) days before the trial date;

(b) *Track 2; deadlines for commencement of trial and other events.* For track 2 cases, the scheduling order shall have trial commence within three hundred (300) days of arraignment, the filing of a waiver of arraignment, or other applicable triggering event identified in Paragraph [~~H~~]G, whichever is the latest to occur. The scheduling order shall also set dates for other events according to the following requirements for track 2 cases:

(i)Track 2 deadline for plea agreement. A plea agreement entered into between the defendant and the state shall be submitted to the court substantially in the form approved by the Supreme Court not later than ten (10) days before the trial date. A request for the court to approve a plea agreement less than ten (10) days before the trial date shall not be accepted by the court except upon a written finding by the assigned district judge of extraordinary circumstances. A defendant may plead guilty, the state may dismiss charges, and the parties may recommend a sentence but the court shall not agree to comply with a plea agreement in this circumstance absent a written finding of extraordinary circumstances;

(ii) Track 2 deadline for pretrial conference. The final pretrial conference, including any hearing on any remaining pretrial motions if needed, shall be scheduled fifteen (15) days before the trial date. Each party shall file their final trial witness list on or before this date. The defendant shall be present for the final pretrial conference;

(iii) Track 2 deadline for notice of need for court interpreter. All parties shall identify by filing notice with the court any requirement for language access services at trial by a party or witness fifteen (15) days before the trial date;

(iv) Track 2 deadline for pretrial motions hearing. A hearing for resolution of pretrial motions shall be set not less than thirtyfive (35) days before the trial date;

(v) Track 2 deadline for pretrial motions. Pretrial motions shall be filed not less than sixty (60) days before the trial date;

(vi) Track 2 deadline for responses to pretrial motions. Written responses to any pretrial motions shall be filed within ten (10) days of the filing of any pretrial motions and in any case not less than fortyfive (45) days before the trial date. Failure to file a written response shall be deemed, for purposes of deciding the motion, an admission of the facts stated in the motion;

(vii) Track 2 [~~deadline~~] deadlines for requesting and completion of witness interviews. Witness interviews shall be completed not less than seventy-five (75) days before the trial date. Absent agreement by the parties or order of the court, the state shall be responsible for scheduling pretrial witness interviews of the state's witnesses, and the defendant shall be responsible for scheduling pretrial witness interviews of the defendant's witnesses. A party wishing to interview witnesses of the other party's initial witness list shall request those interviews no later than twenty-one (21) days after the issuance of the scheduling order. The requesting party shall give dates of availability for witness interviews during the forty-five (45) days following the request and the party receiving the request shall make reasonable efforts to schedule the requested interviews during that forty-five (45)day period. If a party files a new witness list adding new witnesses, any requests to interview those new witnesses shall be made no later than seven (7) days after the new witness list is served upon the requesting party. At all times the parties shall act diligently and in good faith in requesting, scheduling, and, as necessary, rescheduling witness interviews. The court shall not consider failure to conduct pretrial interviews of witnesses as the basis of any sanction unless the party moving for sanctions followed the requirements of this subparagraph in requesting those interviews; and

(viii) Track 2 deadline for disclosure of scientific evidence. All parties shall produce the results of any scientific evidence, if not already produced, not less than one hundred twenty (120) days before the trial date. In a case where justified by good cause, the court may but is not required to provide for production of scientific evidence less than one hundred twenty (120) days before the trial date. In no case shall the order provide for production of scientific evidence less than ninety (90) days before the trial date; and

(c) *Track 3; deadlines for commencement of trial and other events.* For track 3 cases, the scheduling order shall have trial commence within four hundred fiftyfive (455) days of arraignment, the filing of a waiver of arraignment, or other applicable triggering event identified in Paragraph [~~H~~]G, whichever is the latest to occur, except that no case may be set past three hundred sixty-five (365) days where the defendant is detained pending trial except upon consent by defense counsel or upon a finding of exceptional circumstances beyond the control of the parties. The scheduling order shall also set dates for other events according to the following requirements for track 3 cases:

(i)Track 3 deadline for plea agreement. A plea agreement entered into between the defendant and the state shall be submitted to the court substantially in the form approved by the Supreme Court not later than ten (10) days before the trial date. A request for the court to approve a plea agreement less than ten (10) days before the trial date shall not be accepted by the court except upon a written finding by the assigned district judge of extraordinary circumstances. A defendant may plead guilty, the state may dismiss charges, and

the parties may recommend a sentence but the court shall not agree to comply with a plea agreement in this circumstance absent a written finding of extraordinary circumstances;

(ii) Track 3 deadline for pretrial conference. The final pretrial conference, including any hearing on any remaining pretrial motions if needed, shall be scheduled twenty (20) days before the trial date. Each party shall file their final trial witness list on or before this date. The defendant shall be present for the final pretrial conference;

(iii) Track 3 deadline for notice of need for court interpreter. All parties shall identify by filing notice with the court any requirement for language access services at trial by a party or witness fifteen (15) days before the trial date;

(iv) Track 3 deadline for pretrial motions hearing. A hearing for resolution of pretrial motions shall be set not less than fortyfive (45) days before the trial date;

(v) Track 3 deadline for pretrial motions. Pretrial motions shall be filed not less than seventy (70) days before the trial date;

(vi) Track 3 deadline for responses to pretrial motions. Written responses to any pretrial motions shall be filed within ten (10) days of the filing of any pretrial motions and in any case not less than fiftyfive (55) days before the trial date. Failure to file a written response shall be deemed, for purposes of deciding the motion, an admission of the facts stated in the motion;

(vii) Track 3 [~~deadline~~] deadlines for requesting and completion of witness interviews. Witness interviews shall be completed not less than one hundred (100) days before the trial date. Absent agreement by the parties or order of the court the state shall be responsible for scheduling pretrial witness interviews of the state's witnesses, and the defendant shall be responsible for scheduling pretrial witness interviews of the defendant's witnesses. A party wishing to interview witnesses of the other party's initial witness list shall request those interviews no later than twenty (21) days after the issuance of the scheduling order. The requesting party shall give dates of availability for witness interviews during the sixty (60) days following the request and the party receiving the request shall make reasonable efforts to schedule the requested interviews during that sixty (60)day period. If a party files a new witness list adding new witnesses, any requests to interview those new witnesses shall be made no later than seven (7) days after the new witness list is served upon the requesting party. At all times the parties shall act diligently and in good faith in requesting, scheduling, and, as necessary, rescheduling witness interviews. The court shall not consider failure to conduct pretrial interviews of witnesses as the basis of any sanction unless the party moving for sanctions followed the requirements of this subparagraph in requesting those interviews; and

(viii) Track 3 deadline for disclosure of scientific evidence. All parties shall produce the results of any scientific evidence, if not already produced, not less than one hundred fifty (150) days before the trial date. In a case where justified by good cause, the court may but is not required to provide for production of scientific evidence less than one hundred fifty (150) days before the trial date. In no case shall the order provide for production of scientific evidence less than one hundred twenty (120) days before the trial date.

([5]6) ***Form of scheduling order; additional requirements and shorter deadlines allowed.*** The court may adopt upon order of the chief judge of the district court a form to be used to implement the time requirements of this rule. Additional requirements may be included in the scheduling order at the discretion of the assigned judge and the judge may alter any of the deadlines described in Subparagraph [~~(G)(4)~~](F)(5) of this rule to allow for the case to come to trial sooner.

([6]7) ***Extensions of time; cumulative limit.*** In the scheduling order the court may shorten the deadlines for the parties to request pretrial interviews set forth in Subparagraphs (F)(5)(a)(vii), (F)(5)(b)(vii), and (F)(5)(c)(vii) of this rule. The court may, for good cause, grant any party an extension of the time requirements imposed by an order entered in compliance with Paragraph [~~G~~]F of this rule. In no case shall a party be given time extensions that in total exceed thirty (30) days for track 1 cases, sixty (60) days for track 2 cases, and ninety (90) days for track 3 cases. Unless required by good cause, such extensions of time [~~for up to a total of thirty (30) days to any party~~] shall not result in delay of the date scheduled for commencement of trial. Substitution of counsel alone ordinarily shall not constitute good cause for an extension of time. A stipulated request for extension of time in order to consolidate and resolve multiple cases against the same defendant under one plea agreement shall ordinarily be considered good cause for an extension of time.

[H]G. **Time limits for commencement of trial.** The court may enter an amended scheduling order whenever one of the following triggering events occurs to extend the time limits for commencement of trial consistent with the deadlines in Paragraph [~~G~~]F as deemed necessary by the court:

(1) the date of arraignment or the filing of a waiver of arraignment of the defendant;

(2) if an evaluation of competency has been ordered, the date an order is filed in the court finding the defendant competent to stand trial;

(3) if a mistrial is declared by the trial court, the date such order is filed in the court;

(4) in the event of a remand from an appeal, the date the mandate or order is filed in the court disposing of the appeal;

(5) if the defendant is arrested [~~for failure to appear~~] on any valid warrant in the case or surrenders in this state [~~for failure to appear~~] on any valid warrant in the case, the date of the arrest or surrender of the defendant;

(6) if the defendant is arrested [~~for failure to appear~~] or surrenders in another state or country[~~for failure to appear~~], the date the defendant is returned to this state;

(7) if the defendant has been referred to a preprosecution or court diversion program, the date a notice is filed in the court that the defendant has been deemed not eligible for, is terminated from, or is otherwise removed from the preprosecution or court diversion program;

(8) if the defendant's case is severed from a case to which it was previously joined, the date from which the cases are severed, except that the nonmoving defendant or at least one of the nonmoving defendants shall continue on the same basis as previously established under these rules for track assignment and otherwise;

(9) if a defendant's case is severed into multiple trials, the date from which the case is severed into multiple trials, except that [~~at least one of the trials shall continue on the same basis as previously established under this rule for track assignment and otherwise~~] the court shall continue at least one of the previously-joined defendants on the original track assignment, which defendant shall be determined by the court upon consideration of the complexity of the now-severed cases;

(10) if a judge enters a recusal and the newlyassigned judge determines the change in judge assignment reasonably requires additional time to bring the case to trial, the date the recusal is entered;

(11) if the court grants a change of venue and the court determines the change in venue reasonably requires additional time to bring the case to trial; or

(12) if the court grants a motion to withdraw defendant's plea.

[~~H~~]H. **Failure to comply.**

(1) If a party fails to comply with any provision of this rule or the time limits imposed by a scheduling order entered under this rule, the court shall impose sanctions as the court may deem appropriate in the circumstances and taking into consideration the reasons for the failure to comply.

(2) In considering the sanction to be applied the court shall not accept negligence or the usual press of business as sufficient excuse for failure to comply. If the case has been refiled following an earlier dismissal, dismissal with prejudice is the presumptive outcome for a repeated failure to comply with this rule, subject to the provisions in Subparagraph [~~(4)~~](6) of this paragraph.

(3) A motion for sanctions for failure to comply with this rule or any of the Rules of Criminal Procedure must be made in writing, except that an oral motion may be made during a setting scheduled for another purpose if the basis of the motion was not and reasonably could not have been known prior to that setting.

([~~3~~]4) The sanctions the court may impose under this paragraph include, but are not limited to, the following:

(a) a reprimand by the judge;

(b) prohibiting a party from calling a witness or introducing evidence;

(c) a monetary fine imposed upon a party's attorney or that attorney's employing office with appropriate notice to the office and an opportunity to be heard;

(d) civil or criminal contempt; and

(e) dismissal of the case with or without prejudice, subject to the provisions in Subparagraph [~~(4)~~](6) of this paragraph.

(5) The court shall not impose any sanction against the State for violation of this rule if an incustody defendant was not at a court setting as a result or a failure to transport, except that the court may impose a sanction if the failure to transport was attributable to the prosecutor's failure to properly prepare and serve a transportation order if so required.

([~~4~~]6) The sanction of dismissal, with or without prejudice, shall not be imposed under the following circumstances:

(a) the state proves by clear and convincing evidence that the defendant is a danger to the community; and

(b) the failure to comply with this rule is caused by extraordinary circumstances beyond the control of the parties.

Any court order of dismissal with or without prejudice or prohibiting a party from calling a witness or introducing evidence shall be in writing and include findings of fact regarding the moving party's proof of and the court's consideration of the above factors.

[~~J~~]I. **Certification of readiness prior to pretrial conference or docket call.** Both the prosecutor and defense counsel shall submit a certification of readiness form [~~five (5)~~] three (3) days before the final pretrial conference or docket call, indicating they have been unable to reach a plea agreement, that both parties have contacted their witnesses and the witnesses are available and ready to testify at trial, and that both parties are ready to proceed to trial. This certification may be by stipulation. If either party is unable to proceed to trial, it shall submit a written request for extension of the trial date as outlined in Paragraph [~~K~~]J of this rule. If the state is unable to certify the case is ready to proceed to trial and does not meet the requirements for an extension in Paragraph [~~K~~]J of this rule, it shall prepare and submit notice to the court that the state is not ready for trial and the court shall dismiss the case.

[~~K~~]J. **Extension of time for trial; reassignment; dismissal with prejudice; sanctions.**

(1) ***Extending date for trial; good cause or exceptional circumstances; reassignment to available judge for trial permitted; sanctions.*** The court may extend the trial date for a total of up to thirty (30) days for a track 1 case, forty-five (45) days for a track 2 case, and sixty (60) days for a track 3 case, upon showing of good cause which is beyond the control of the parties or the court. To grant such an extension [~~of up to thirty (30) days~~] the court shall enter written findings of good cause. If on the date the case is set or reset for trial the court is unable to hear a case for any reason, including a trailing docket, the case may be reassigned for immediate trial to any available judge or judge pro tempore, in the manner provided in Paragraph [~~L~~]K of this rule. If the court is unable to proceed to trial and must grant an extension [~~for up to thirty (30) days~~]for reasons the court does not find meet the requirement of good cause, the court shall impose sanctions as provided in Paragraph [~~I~~]H of this rule, which may include dismissal of the case with prejudice subject to the provisions in Subparagraph [~~(I)(4)~~](H)(6). Without regard to which party requests any extension of the trial date, the court shall not extend the trial date more than [~~thirty (30)~~] sixty (60) days beyond the original date scheduled for commencement of trial without a written finding of exceptional circumstances approved in writing by the chief judge or a judge, including a judge pro tempore previously approved to preside over such matters by order of the Chief Justice, that the chief judge designates.

(2) ***Requirements for extension of trial date for exceptional circumstances.*** When the chief judge or the chief judge's designee accepts the finding by the trial judge of exceptional circumstances, the chief judge shall approve rescheduling of the trial to a date certain. The order granting an extension to a date certain for extraordinary circumstances may reassign the case to a different judge for trial or include any other relief necessary to bring the case to prompt resolution.

(3) ***Requirements for multiple requests.*** Any extension sought beyond the date certain in a previously granted extension will again require a finding by the trial judge of exceptional circumstances approved in writing by the chief judge or designee with an extension to a date certain.

(4) ***Rejecting extension request for exceptional circumstances; dismissal required.*** In the event the chief judge or designee rejects the trial judge's request for an extension based on exceptional circumstances, the case shall be tried within the previously ordered time limit or shall be dismissed with prejudice if it is not, subject to the provisions in Subparagraph [~~(I)(4)~~](H)(6).

[~~L~~]K. **Assignment calendar for cases[~~new calendar cases; assignments and reassignments to new calendar judges~~].**

(1) ***Scheduling by event categories; trailing docket; functional overlap among [~~new calendar~~] judges.*** The presiding judge of the criminal division shall establish an assignment calendar for all [~~new calendar~~] judges. The assignment calendar shall identify the weeks or other time periods when each [~~new calendar~~] judge will schedule events in the following categories: trials; motions and sentencing; arraignments, pleas and miscellaneous matters. Each [~~new calendar~~] judge may schedule an event in the week or other time period set aside for that event category, on a trailing docket. The assignment calendar shall include functional overlap so that more than one judge is always scheduled to hear matters

in each event category on any given day. In the scheduled weeks or other time periods, the [~~new calendar~~]judges shall schedule events within the time requirements of Paragraph [~~G~~]F of this rule. [~~The presiding judge of the criminal division may organize the new calendar judges into teams of three (3) and four (4) judges or other appropriate groups to most efficiently accomplish case disposition within the requirements of this rule.~~]

(2) ***Reassignments permitted.*** If on or before the date of a scheduled event the assigned [~~new calendar~~] judge is or will be unable to preside over the scheduled event for any reason, including a trailing docket, vacation, or illness, the case may be reassigned by order of the presiding judge of the criminal division to another judge on the assignment calendar who is scheduled that day to hear that category of scheduled event and who is not subject to a previously exercised peremptory excusal, except that a judge who presided at trial shall conduct the sentencing. The court may adopt a form of order to expedite such reassignments.

(3) ***Reassignment for scheduled event; case returns to original judge.*** If another judge scheduled on the assignment calendar for the type of scheduled event is not available to immediately preside over the scheduled event, the assigned judge may designate any other new calendar judge, or a judge pro tempore previously approved by order of the Chief Justice and designated by the chief judge for this purpose, to preside over the scheduled hearing, trial, or other scheduled event. Upon conclusion of the hearing, trial, or other scheduled event, the case shall again be assigned to the original [~~new calendar~~] judge without requirement of further order, except when the reassignment was for trial in which case the judge who presided over the trial shall also preside over sentencing.

L. **A probable cause determination need not be repeated for refiled charges.** If a probable cause determination has been made by preliminary hearing or grand jury and a nolle prosequi or dismissal without prejudice is filed in the case, the same charges may be refiled by information without requiring a new probable cause determination.

[~~M.**Special calendar; assignments and procedures; master calendar judge.** All criminal cases filed on or before June 30, 2014, shall by order of the chief judge be assigned or reassigned to a special calendar. District court judges shall be assigned as special calendar judges by separate order of the chief judge, who is authorized to reassign any district judge to be a special calendar judge. Among the special calendar judges, the chief judge shall designate a "master calendar" special calendar judge. Time limits and rules for disposition of cases assigned or reassigned to special calendar judges shall be governed by the following:~~

~~(1) The master calendar judge shall request that the Second Judicial District Attorney's Office and Law Offices of the Public Defender assign attorneys to only special calendar cases until the special calendar is concluded and any remaining special calendar cases are absorbed into the new calendar. The master calendar judge shall request that attorneys assigned by the Second Judicial District Attorney's Office and Law Offices of the Public Defender to the special calendar have authority to negotiate binding resolution of the special calendar cases assigned to them;~~

~~(2) In consultation with the special calendar judges, the master calendar judge shall assign all cases filed on or before June 30, 2014, among the special calendar judges as follows:~~

~~(a) After assignment of a case to a special calendar judge, the judge shall hold a status hearing as provided in Paragraph G of this rule. Before conclusion of the status hearing, the special calendar judge shall enter an order establishing dates by which events shall occur leading to resolution of the case. This order may, but is not required to, assign the case to track 1, 2, or 3 as provided in Paragraph G of this rule; and~~

~~(b) No party shall acquire any right of peremptory excusal for cases assigned to a special calendar judge. Unless a special calendar judge was excused prior to the effective date of this rule, any special calendar judge may act in any case on the special calendar; and~~

~~(3) The master calendar judge may establish, upon written approval of the chief judge, any process for case assignment or reassignment that will result in the efficient administration of cases on the special calendar. This may follow the process or a modification of the process provided for in Paragraph G of this rule, may be a process similar to that proposed to the Bernalillo County Criminal Justice Review Commission by the Law Offices of the Public Defender, or may be otherwise. The process shall be established in writing and approved by the chief judge as follows:~~

~~(a) The court shall provide reasonable notice of at least thirty (30) days to special calendar case parties of assignment of the parties' case to the special calendar and of the process to be applied to special calendar cases; and~~

~~(b) The chief judge shall monitor progress of special calendar cases to resolution. When in the determination of the chief judge there has been sufficient progress toward disposition of a sufficient number of cases assigned to the special calendar, the chief judge shall notify the Supreme Court and request modification of this rule. Modification shall include reassignment of special calendar judges to the new calendar schedule, and may include any changes to the new calendar process deemed appropriate based on the outcome of case processing under the new calendar and special calendar processes.~~]

[~~N~~]M. **Data reporting to the Supreme Court required.** [~~Until this paragraph is amended or withdrawn, the~~] The chief judge, district attorney, and public defender shall [~~cause a monthly~~] provide statistical [~~report to be provided~~] reports to the Supreme Court[~~, in a form approved by the Supreme Court, for cases on the new and special calendars containing data~~] as directed[~~ by the Supreme Court~~].

[Adopted by Supreme Court Order No. 148300025, effective for all cases pending or filed on or after February 2, 2015; as amended by Supreme Court Order No. 168300001, effective for new cases filed and for pending cases in which a track assignment is made on or after February 2, 2016; LR2400 recompiled and amended as LR2308 by Supreme Court Order No. 168300015, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order 17-8300-031, effective for all cases pending or filed on or after January 15, 2018.]

Certiorari Denied, July 6, 2017, No. S-1-SC-36486

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-074

No. A-1-CA-35194 (filed April 25, 2017)

STATE OF NEW MEXICO
Plaintiff-Appellant,
v.
KAREN SIQUEIROS-VALENZUELA,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF CIBOLA COUNTY
PEDRO G. RAEL, District Judge

CARLOS RUIZ DE LA TORRE
RUIZ DE LA TORRE LAW FIRM
Albuquerque, New Mexico
for Appellee

HECTOR H. BALDERAS,
ATTORNEY GENERAL
Santa Fe, New Mexico

STEVEN H. JOHNSTON,
ASSISTANT ATTORNEY GENERAL
Albuquerque, New Mexico
for Appellant

Opinion

Timothy L.Garcia, Judge

{1} The State of New Mexico appeals from an order of the district court suppressing evidence discovered following a traffic stop based on a violation of NMSA 1978, Section 66-7-317(A) (1978) (failure to maintain a lane). We conclude that the district court was correct in its determination. The traffic stop was not supported by reasonable suspicion, and the officer who subsequently discovered the evidence of criminal activity did so only after he stopped Defendant in violation of the Fourth Amendment to the United States Constitution. Accordingly, we affirm.

BACKGROUND

{2} On March 20, 2013, at approximately 7:00 p.m., Officer Joseph Garcia of the New Mexico State Police was driving eastbound on Interstate 40 near Grants, New Mexico when he observed the car driven by Defendant make a legal lane change from the right lane into the left lane of this multi-lane interstate highway. As Defendant attempted to pass two semi-trucks that were in the right lane, her vehicle's left tires touched the yellow shoulder line of the left passing lane. This incident was recorded on the dash cam video of Officer Garcia's police vehicle. Once Defendant passed the semi-trucks, she then made a legal lane change back into the right lane. Other than Officer Garcia's observation of Defendant's movement in relation to the shoulder line, he "did not observe any other driving violations, erratic driving, or weaving of the vehicle within its own lane[.]" However, based on his perception that Defendant violated Section 66-7-317(A), Officer Garcia pulled Defendant over. Officer Garcia testified at the suppression hearing that "he regularly pulls over drivers for . . . a single touching [or crossing] of a lane line."

{3} Although not of particular relevance to the issue on appeal, given the district court's suppression solely on the basis of the traffic stop, we provide the following facts for background. Upon making the traffic stop, Officer Garcia made contact with Defendant and her passenger, ran a warrant check on both, and spoke with Defendant for approximately twenty minutes before writing her two citations, one for failure to maintain a lane and one for driving without a driver's license. Once the citations were written and issued, Officer Garcia then asked Defendant if he could ask her a couple more questions. The renewed questioning went on for an additional fifteen minutes and included the questioning of the passenger. Sometime during the additional questioning—approximately twenty-seven minutes after the initial stop—Officer Garcia noted that Defendant and the passenger gave inconsistent answers to his questions. Officer Garcia then obtained consent from Defendant and the passenger to search the vehicle. Ultimately, the search of the vehicle resulted in the discovery of four bundles of methamphetamine, leading to felony charges against Defendant for trafficking of controlled substances (methamphetamine) (possession with intent to distribute) and conspiracy to commit trafficking of methamphetamine.

{4} Defendant moved to suppress the evidence, arguing that (1) the initial stop violated the Fourth Amendment and Article II, Section 10 of the New Mexico Constitution, and (2) Officer Garcia impermissibly expanded the scope of the traffic stop. The district court held a hearing on Defendant's motion. The only issue addressed by the district court was whether Officer Garcia had reasonable suspicion that Defendant violated Section 66-7-317(A). In pertinent part, Section 66-7-317(A) provides:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:
>
> A. a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety[.]

{5} Officer Garcia testified at the hearing that he saw the tires on Defendant's vehicle touch the yellow line of the shoulder. However, according to the district court, Officer Garcia's dash cam video—admitted into evidence at the hearing without objection—showed that the tires on Defendant's vehicle touched, but did not cross, the yellow line, and only did so once. The district court, based upon its own observation of the incident via the dash cam video, specifically found that the only potential violation of Section 66-7-317(A) was the single touching of the shoulder line.

Additionally, although Officer Garcia testified that Defendant's action "could have" constituted "some type" of safety risk to herself and her passenger, the district court found the evidence of a safety concern to be insufficient, especially where the video evidence showed nothing on the left-hand side of the vehicle, and the vehicle only touched the shoulder line momentarily.

{6} At the conclusion of the suppression hearing, the district court decided that the one, brief touching of the left yellow shoulder line, where Defendant was in the process of passing two semi-trucks on the interstate, did not provide Officer Garcia with justification to conduct a traffic stop. Specifically, the district court indicated that Section 66-7-317(A)'s requirement that a driver maintain a single lane "as nearly as practicable" appears "to allow some slack" and that it is reasonable—and safe—for a driver to move as far to the left as possible when passing a semi-truck at seventy-five miles per hour. Consequently, the district court suppressed the evidence discovered as a result of the stop. This appeal by the State followed.

DISCUSSION

{7} On appeal, the State contends that "[t]he district court erred as a matter of law in determining that the statute governing driving on roadways laned for traffic[, Section 66-7-317,] permits drivers to cross or touch the lane line once without violating the statute." The State also argues that there was reasonable suspicion to believe that Defendant was driving while impaired.

{8} Initially, we are not persuaded by the State's alternative argument based on impairment. We note the issue of Defendant's impairment was not argued by the State below, either in its response to Defendant's motion to dismiss or during the suppression hearing. Officer Garcia specifically testified that he stopped Defendant based solely on the violation of Section 66-7-317(A), and the district court made a point of emphasizing that its ruling was based entirely on its determination that under the factual circumstances presented, there was no a violation of Section 66-7-317(A). As a result, we are not convinced that this issue was ever presented to the district court for a ruling or preserved for appeal. *See State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 ("In order to preserve an error for appeal, it is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked." (internal quotation marks and citation omitted)); *State v. Lucero*, 1999-NMCA-102, ¶ 45, 127 N.M. 672, 986 P.2d 468 (refusing to address arguments that were not made in the district court and no assertion of fundamental error is made on appeal). Therefore, we will only address the question of whether the district court's determination that Officer Garcia did not have reasonable suspicion to stop Defendant for a violation of Section 66-7-317(A) was error.

I. Standard of Review

{9} In reviewing a district court's suppression ruling, this Court draws all reasonable inferences in favor of the ruling and defers to the district court's findings of fact as long as they are supported by substantial evidence. *See State v. Jason L.*, 2000-NMSC-018, ¶¶ 10-11, 129 N.M. 119, 2 P.3d 856. We "review de novo the district court's application of the law to those facts." *State v. King*, 2013-NMSC-014, ¶ 4, 300 P.3d 732.

{10} Statutory construction is a matter of law that is also reviewed de novo. *See State v. Rivera*, 2004-NMSC-001, ¶ 9, 134 N.M. 768, 82 P.3d 939. When we construe a statute, our "guiding principle is that we should determine and effectuate the Legislature's intent when it enacted the statute." *State ex rel. Brandenburg v. Sanchez*, 2014-NMSC-022, ¶ 4, 329 P.3d 654. "In discerning the Legislature's intent, [the appellate courts] are aided by classic canons of statutory construction[] and . . . look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Delfino v. Griffo*, 2011-NMSC-015, ¶ 12, 150 N.M. 97, 257 P.3d 917 (internal quotation marks and citation omitted).

II. Analysis

{11} The stop of a vehicle for the purpose of investigating a traffic violation is an investigative seizure under the Fourth Amendment and must be justified at its inception. *See State v. Leyva*, 2011-NMSC-009, ¶ 10, 149 N.M. 435, 250 P.3d 861. Justification consists of an officer having reasonable, articulable suspicion that a particular individual is breaking or has broken the law. *See Jason L.*, 2000-NMSC-018, ¶ 20 (setting forth the standard for reasonable suspicion); *see also State v. Duran*, 2005-NMSC-034, ¶ 23, 138 N.M. 414, 120 P.3d 836 (stating that New Mexico courts apply a reasonable suspicion analysis for investigatory traffic stops), *overruled on other grounds by Leyva*, 2011-NMSC-009. This includes reasonable suspicion that a traffic law has been violated. *State v. Prince*, 2004-NMCA-127, ¶ 9, 136 N.M. 521, 101 P.3d 332.

{12} To reiterate, Section 66-7-317(A), in relevant part, requires that whenever any roadway has been divided into two or more clearly marked lanes for traffic, "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety[.]"

{13} The substance of the State's argument on appeal is based on the proper construction of the portion of Section 66-7-317(A) requiring a driver—before moving from a single lane—to "ascertain[] that such movement can be made with safety." In making its argument, the State focuses on two opinions, *Archibeque v. Homrich*, 1975-NMSC-066, 88 N.M. 527, 543 P.2d 820, and *Aragon v. Speelman*, 1971-NMCA-161, 83 N.M. 285, 491 P.2d 173, each interpreting the previous version of Section 66-7-317, albeit in the context of civil litigation. The State also spends a portion of its brief in chief analyzing our unpublished opinion, *City of Farmington v. Fordyce*, No. 30,638, mem. op. (N.M. Ct. App. Nov. 21, 2011) (non-precedential). At its heart, the State's argument is essentially that our appellate courts have improperly required that a driver create a threat to safety before finding a violation of Section 66-7-317(A). The State asserts that the appropriate analysis should focus on whether the driver in fact "ascertained" that his or her movement from the lane can be made with safety. However, given the evidence, the argument at the suppression hearing, and the district court's ultimate decision, any additional ruling based upon what a driver "ascertained" appears to be a question for another day.

{14} Specifically, our review of the suppression hearing reveals that the safety aspect of this particular case played only an inferential part in the district court's overall decision. Instead, it is clear that the dispute in the district court regarding the constitutionality of the traffic stop addressed the proper construction of the portion of the statute requiring that a vehicle be driven "as nearly as practicable . . . within a single lane." Section 66-7-317(A).

A. "As Nearly as Practicable"

{15} Arguing against suppression, the State asserted that this case is a "carbon copy" of *United States v. Bassols*, 775 F. Supp. 2d 1293 (D. N.M. 2011), a federal

district court case interpreting Section 66-7-317(A), and urged the district court to find that the touching of the shoulder line by Defendant justified the traffic stop. In *Bassols*, however, the federal district court recognized that "[b]ecause no published New Mexico court opinion has addressed whether a driver violates Section 66-7-317 by making contact with the lane boundary line, [it] must make an *Erie*-guess as to how the New Mexico [appellate courts] would rule." 775 F. Supp. 2d at 1300. In the present case, the district court disagreed with the State's characterization of the holding in *Bassols*—establishing a strict per se violation of the statute whenever a driver drives on, or touches, a lane line—and concluded that the statute's "as nearly as practicable" language "allow[s] some slack" depending on the factual circumstances. Consequently, after taking into account the factual circumstances of this case, the district court found that Defendant's single, momentary touching of the shoulder line did not constitute a violation of Section 66-7-317(A).

{16} The question of what it means to drive a vehicle "as nearly as practicable" within a single lane is an issue that has not been authoritatively defined by New Mexico appellate courts. In order to determine the meaning of the phrase, it is necessary for this Court to engage in a statutory construction analysis of Section 66-7-317(A). In doing so, we look first to the plain language used by the Legislature. *See State v. Young*, 2004-NMSC-015, ¶ 5, 135 N.M. 458, 90 P.3d 477 (stating that we first look to the statute's plain language, which is "the primary indicator of legislative intent" (internal quotation marks and citation omitted)). "When a term is not defined in a statute, we must construe it, giving those words their ordinary meaning absent clear and express legislative intention to the contrary." *State v. Tsosie*, 2011-NMCA-115, ¶ 19, 150 N.M. 754, 266 P.3d 34 (internal quotation marks and citation omitted). Our courts often use dictionary definitions to ascertain the ordinary meaning of words that form the basis of statutory interpretation inquiries. *See State v. Boyse*, 2013-NMSC-024, ¶ 9, 303 P.3d 830.

{17} In determining the ordinary meaning of the phrase "as nearly as practicable," we observe that "nearly" is defined as "[a]lmost but not quite[; i]n a close manner." *The American Heritage Dictionary of the English Language* 1177 (5th ed. 2011). "Practicable" means "[c]apable of being effected, done, or put into practice; feasible." *Id.* at 1383. Thus, expressing the phrase in its ordinary terms, the statute requires a driver to maintain his or her vehicle in a single lane—as closely as feasible—by utilizing good judgment and taking into account the safety considerations of a particular situation.

{18} The very nature of this feasibility and safety qualification appears to indicate a "legislative intent to avoid penalizing brief, momentary, and minor deviations outside the marked lines." *State v. Livingston*, 75 P.3d 1103, 1106 (Ariz. Ct. App. 2003); *see id.* (interpreting the " 'as nearly as practicable' " language in Arizona's similar version of Section 66-7-317(A)). To construe the statute otherwise, in the strict "bright line" manner the State argued to the district court—that a driver always violates the statute when, absent a legal lane change, he or she fails to maintain the vehicle inside the single lane lines on a multi-lane road—would render the "as nearly as practicable" language mere surplusage, which we are generally unwilling to do. *See Rivera*, 2004-NMSC-001, ¶ 18 ("We are generally unwilling to construe one provision of a statute in a manner that would make other provisions null or superfluous."). We hold, therefore, that the plain language of Section 66-7-317(A)—including the "as nearly as practicable" qualification—recognizes and contemplates circumstances under which a driver may momentarily leave his or her lane of travel without violating the statute.

{19} With this qualification in mind, the question remains how we are to determine whether a driver has indeed driven as nearly as practicable within a single lane. The Tenth Circuit, interpreting Utah's version of Section 66-7-317(A), rejected the argument that a "single instance of crossing over the fog line can never violate the statute." *United States v. Alvarado*, 430 F.3d 1305, 1309 (10th Cir. 2013). Instead, the Tenth Circuit reiterated its holding in *United States v. Gregory*, 79 F.3d 973, 1978 (10th Cir. 1996), that the statute's " 'as nearly as practicable' " qualification "require[s] a fact-specific inquiry into the particular circumstances present during the incident in question to determine whether the driver could reasonably be expected to maintain a straight course at that time in that vehicle on that roadway." *Alvarado*, 430 F.3d at 1309; *see United States v. Cline*, 349 F.3d 1276, 1287 (10th Cir. 2003) (stating that "the particular facts and circumstances of each case determine the result"); *United States v. Ozbirn*, 189 F.3d 1194, 1198 (10th Cir. 1999) (construing the Kansas version of Section 66-7-317(A), and concluding that the "use of the phrase 'as nearly as practicable' in the statute precludes . . . absolute standards, and requires a fact-specific inquiry"). This totality of the circumstances analysis takes into account whether there were any weather conditions, road features, or other circumstances that could have affected or interfered with a driver's ability to keep his or her vehicle in a single lane. *See Alvarado*, 430 F.3d at 1309.

{20} Of particular note is the fact that the court in *Bassols*—after rejecting the defendant's argument that *touching* the lane line, as opposed to *crossing* the lane line, cannot ever constitute a violation of Section 66-7-317(A)—went on to apply the *Alvarado* totality of the circumstances analysis and concluded that "[i]n the complete absence of adverse driving conditions, there was not a single objective factor that might have made it impracticable for [the defendant] to stay entirely within a single lane." *Bassols*, 775 F. Supp. 2d at 1303. Thus, although the defendant's single departure from his lane in *Bassols* was not a per se violation of Section 66-7-317(A), the federal district court decided that the single touching of the lane line, under the circumstances presented in that case, was sufficient to give the officer reasonable suspicion to make the traffic stop. *Bassols*, 775 F. Supp. 2d at 1303.

{21} Here, the State devotes only a handful of sentences in its brief in chief to the "as nearly as practicable" language. Notably, the State appears to have abandoned its reliance on *Bassols*, apparently in recognition that the case does not support the argument made by the State in the district court that touching the lane line is a strict per se violation of the statute.[1] However, instead of directly challenging

[1]We recognize that the specific question raised in *Bassols*—whether a vehicle must actually cross the lane line, as opposed to simply touching the lane line, in order for a driver to be in violation of Section 66-7-317(A)—has not yet been answered by our appellate courts. However, neither party in the present case squarely raised this issue below, and all participants, including the district court, appear to have assumed that touching the lane line is sufficient to support a potential violation of the statute. We proceed with that assumption in mind, without deciding the issue at this time.

the district court's interpretation of Section 66-7-317(A)—which bears a striking resemblance to the *Alvarado* totality of the circumstances analysis—or its application to the facts of this case, the State simply refers to the lack of any "obstruction" that would have made it impracticable for Defendant to stay in her lane. We do not adopt such a limited view of the qualification language, and we conclude that a totality of the circumstances analysis, as utilized by the district court, is the appropriate means to gauge whether a driver has maintained his or her lane "as nearly as practicable."

{22} Critically, the State does not address whether the totality of the circumstances of this case, as found and relied upon by the district court—Defendant was traveling on the interstate at seventy to seventy-five miles per hour, she was passing two semi-trucks in the left-hand passing lane, common driving experience advises leaving as much room as possible for safety when passing a semi-truck, and the entirety of the incident consisted of the vehicle's single, brief touching of the left-hand yellow shoulder line while passing the second semi-truck—are sufficient for the fact-finder to determine that Defendant safely maintained her lane of travel as nearly as practicable. Effectively, the district court determined that Defendant's slight touching of the lane line was feasibly and safely executed under the totality of the circumstances. This factual determination by the district court is also supported by the statutory directive that a vehicle overtaking another vehicle proceeding in the same direction shall pass on the left "at a safe distance[.]" NMSA 1978, § 66-7-310(A) (1978). In the absence of a persuasive argument to the contrary, we agree with the district court that, under the circumstances, the evidence supports its ruling that Defendant safely maintained her lane as nearly as practicable.

B. Safety Concerns

{23} The district court also found that there was insufficient evidence to support a safety concern on the part of Officer Garcia. As indicated earlier in this opinion, while this finding generated no argument at the suppression hearing, the State seizes upon the issue in its brief in chief. One portion of the statute requires that a driver "ascertain[]" whether movement from a single lane can be done "with safety[.]" Section 66-7-317(A). The State argues on appeal that Defendant here did not in fact ascertain whether her single, momentary touching of the shoulder line was indeed safe. The State claims that the facts also support its argument that Defendant "absently drifted" onto the shoulder line. According to the State, the failure on Defendant's part to ascertain the safety of her movement constituted a violation of the statute, regardless of the fact that no actual safety issue occurred.

{24} We first note that this distinction, between a driver's "ascertaining" whether a movement was safe and the factual establishment of a safety concern, was not raised or argued by the State below. As a result, it was not specifically addressed by the district court outside its ruling that the evidence of a safety concern was insufficient. Additionally, the district court could reasonably infer that Defendant did in fact ascertain the safety of her movement by driving to the far left side of her lane while passing the semi-trucks—it provided a safer distance than driving in the middle of her lane during this passing maneuver. *See* § 66-7-310(A).

{25} Given our determination that sufficient evidence was presented to support the district court's determination that Defendant safely maintained her lane as nearly as practicable, we need not further consider the State's alternative theories regarding obstructions or the practicability of passing maneuvers. To do so in the context of this case would be to speculate and render an advisory opinion. *See State v. Ordunez*, 2012-NMSC-024, ¶ 22, 283 P.3d 282 ("It is not within the province of an appellate court to decide abstract, hypothetical or moot questions in cases wherein no actual relief can be afforded." (alteration, internal quotation marks, and citation omitted)).

{26} In summary, we conclude that under the totality of the circumstances found to exist by the district court, Defendant's isolated, momentary touching the left shoulder line did not give rise to a reasonable suspicion of a violation of Section 66-7-317(A). Consequently, because the stop here was not predicated on reasonable suspicion, the traffic stop was invalid.[2]

III. Suppression

{27} "It is established law that evidence discovered as a result of the exploitation of an illegal seizure must be suppressed unless it has been purged of its primary taint." *State v. Portillo*, 2011-NMCA-079, ¶ 25, 150 N.M. 187, 258 P.3d 466. The State did not argue in the district court, nor does it argue on appeal, that the evidence was somehow purged of the taint from the illegal traffic stop. Thus, we cannot say that the district court erred in suppressing the evidence discovered in Defendant's vehicle.

CONCLUSION

{28} For the foregoing reasons, we conclude that substantial evidence was presented to support the district court's determination that the traffic stop of Defendant's vehicle, for a violation of Section 66-7-317(A), was invalid. We further conclude that the evidence discovered as a result of the traffic stop was the fruit of the illegal stop, and therefore suppression was proper. Accordingly, we affirm the district court.

{29} IT IS SO ORDERED.
TIMOTHY L. GARCIA, Judge

WE CONCUR:
MICHAEL E. VIGIL, Judge
JULIE J. VARGAS, Judge

[2]Having decided that the traffic stop was invalid under the Fourth Amendment, we need not address Defendant's argument under Article II, Section 10 of the New Mexico Constitution. *See State v. Rowell*, 2008-NMSC-041, ¶ 12, 144 N.M. 371, 188 P.3d 95 (recognizing that "[b]ecause both the United States and the New Mexico Constitutions provide overlapping protections against unreasonable searches and seizures, we apply our interstitial approach" (citing *State v. Gomez*, 1997-NMSC-006, ¶¶ 19-23, 122 N.M. 777, 932 P.2d 1)); *see also Gomez*, 1997-NMSC-006, ¶ 19 (stating that the interstitial approach requires that we consider first "whether the right being asserted is protected under the federal constitution[,]" and if it is protected, "then the state constitutional claim is not reached").

Certiorari Denied, October 19, 2017, No. S-1-SC-36563

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-075

No. A-1-CA-35175 (filed June 21, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JUAN TORRES SANTOS,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
CHARLES W. BROWN, District Judge

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Opinion

Michael E. Vigil, Judge

{1} Following a jury trial, Defendant Juan Torres Santos appeals his conviction of one count of sexual exploitation of children (possession), commonly referred to as "possession of child pornography," a fourth degree felony, contrary to NMSA 1978, Section 30-6A-3(A) (2007, amended 2016).[1] He raises two issues, which we have reorganized and address as follows: (1) whether there was sufficient evidence to support the jury's finding that he "intentionally possessed" child pornography; and (2) whether the district court abused its discretion by allowing the State to show video evidence to the jury after Defendant offered to stipulate that the material proposed to be shown was child pornography. We affirm.

I. BACKGROUND

{2} On March 21, 2014, Special Agent Owen Peña for the New Mexico Internet Crimes Against Children Task Force conducted an undercover online investigation searching for individuals involved with child pornography on the Ares peer-to-peer, file-sharing network. Agent Peña, the State's first witness, was qualified as an expert in peer-to-peer networks and explained that the Ares file-sharing network does not operate unless there is material to share in a share folder. In order for a user to be able to download files, the user must be sharing files. While conducting his investigation, Agent Peña connected to a certain Internet protocol (IP) address, later traced to Defendant, and Agent Peña discovered that the user of that IP address had "four files of investigative interest" that may contain child pornography in a publicly shared file. Agent Peña successfully downloaded two videos from Defendant's computer that were available to download. After downloading the videos to his computer, Agent Peña reviewed the videos and burned the files to a disc. Through further investigation, Agent Peña determined that the physical address associated with the IP address was in Albuquerque, New Mexico. He then referred the case to Detective Kyle Hartsock of the Bernalillo County Sheriff's Department.

{3} The State's next witness, Detective Hartsock, testified about his investigation and was qualified as an expert in computer networks and computer forensics. He determined that Defendant and Defendant's wife lived at the address associated with the IP address. After obtaining a warrant to search the residence, Detective Hartsock and other law enforcement officers executed the search warrant. Detective Hartsock spoke with Defendant and informed him that they were conducting a child pornography investigation. Defendant admitted that he had been downloading child pornography to research "how lesions might appear" on child victims in sexual assault cases. He explained that he was a pediatrician, he had practiced medicine in other states, and he was awaiting a medical license in New Mexico. Defendant also told the detective that he would delete the files "almost immediately" after he watched them, and Defendant admitted that he would get physically aroused when he watched the videos.

{4} Three laptops, an internal hard drive, and two external hard drives were seized from Defendant's residence and taken to the New Mexico Regional Computer Forensics Laboratory in Albuquerque for forensic examination. Detective Hartsock testified that he found the following on Defendant's laptop: the Ares peer-to-peer file-sharing software; child pornographic videos in the recycle bin folder; child pornographic search terms in unallocated space; and "CCleaner" scrubbing software "designed to clear out files that might have already been deleted, and also it will empty your recycle bin." Eight video files in the recycle bin appeared to be child pornography, and 531 files had been downloaded through Ares into Defendant's shared folder. Although most of the actual files were no longer in the shared folder or

[1]We note that Section 30-6A-3(A) was amended in early 2016 to increase the penalties for sexual exploitation of children. *Compare* Section 30-6A-3(A) (2007), *with* Section 30-6A-3(A) (2016). All references to Section 30-6A-3(A) in this opinion are to the 2007 version of the statute.

on the computer, the names of these files were still listed in history. According to Detective Hartsock, most of the file names were "pornography-related, and most of that pornography ha[d] file names that [the detective] commonly see[s] in child pornography investigations." Two other witnesses also testified on behalf of the State regarding their computer forensic examinations in this case.

{5} At the close of the State's case, the district court directed a verdict of acquittal as to the two counts of distribution of child pornography against Defendant. The only charge that remained was for one count of possession of child pornography.

{6} Defendant testified on his own behalf and stated that he was from Peru, went to medical school in Peru, did training in Puerto Rico, and had previously worked as a pediatrician in the United States. After he moved to Albuquerque with his wife, who is also a physician, he started looking for employment. He was not successful in finding employment and decided to look at child pornography for research purposes. It was his contention that he downloaded and watched child pornography for research purposes because the medical publications did not sufficiently depict how lesions are formed on child victims of sexual abuse. During the relevant time period, Defendant did not have any patients and was depressed.

{7} Defendant admitted that he had previously installed the Ares software onto his computer to listen to music, then to watch adult videos, and "eventually child pornography." He said that he "found these kind of videos like on accident," and he claimed that he deleted the videos after he watched them. He further testified that he used "CCleaner" to erase all archives and make his computer faster because he liked to watch television stations from Peru on his computer. When asked if he was familiar with the recycle bin on his computer, he said he was familiar with it, he explained that he put things in the recycle bin that he no longer wanted, and he said that he knew how to take things out of the recycle bin. When asked if he had ever taken anything out of the recycle bin, he responded, "Yes. Obviously. Yeah."

{8} During cross-examination, Defendant admitted that he searched for "PTHC" for child pornography, which means "preteen hardcore," and he searched for "the Gracel Series, which was a series depicting a mom, a dad, and a child having sexual intercourse[.]" He also said that he did not discuss his research with any colleagues because he "didn't know any other physician[s] here." He further testified that he did not think it was necessary to tell his physician wife because his research was "to increase [his] knowledge. That's it."

{9} Defendant's trial defenses were that he downloaded child pornography for research purposes and that he did not "intentionally possess" child pornography because he deleted the videos after he watched them. The jury was not convinced and found Defendant guilty of possession of child pornography. It is from this conviction that Defendant now appeals.

II. DISCUSSION

A. Sufficiency of the Evidence

{10} Defendant asserts that there was insufficient evidence to support his conviction of possession of child pornography. "Evidence is sufficient to sustain a conviction when there exists substantial evidence of a direct or circumstantial nature to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Smith*, 2016-NMSC-007, ¶ 19, 367 P.3d 420 (internal quotation marks and citation omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Largo*, 2012-NMSC-015, ¶ 30, 278 P.3d 532 (internal quotation marks and citation omitted). "In reviewing whether there was sufficient evidence to support a conviction, we resolve all disputed facts in favor of the State, indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary." *Id.* (internal quotation marks and citation omitted).

{11} The jury was instructed that to convict Defendant of possession of child pornography, the State was required to prove the following four elements beyond a reasonable doubt: (1) "[D]efendant intentionally possessed obscene visual or print medium depicting any prohibited sexual act or simulation of such an act;" (2) "[D]efendant knew or had reason to know that the obscene medium depicted any prohibited sexual act or simulation of such act;" (3) "[D]efendant knew or had reason to know that one or more participants in that act is a child under eighteen years of age;" and (4) "This happened in New Mexico on or between March 21, 2014, and May 13, 2014." *See* § 30-6A-3(A) ("It is unlawful for a person to intentionally possess any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age."). The district court further instructed the jury that

> [a] person is in possession of obscene visual or print medium when he knows it is on his person, or in his presence, and he exercises control over it. Even if the obscene visual or print medium is not in his physical presence, he is in possession if he knows where it is, and he exercises control over it. Two or more people can have possession of obscene visual or print medium at the same time. A person's presence in the vicinity of obscene visual or print medium or his knowledge of the existence of the location of the obscene visual or print medium, is not, by itself, possession.

See UJI 14-130 NMRA Use Note 1 ("This instruction is designed to be used in any case where 'possession' is an element of the crime and is in issue.").

{12} Defendant challenges only the sufficiency of the evidence with respect to whether he "intentionally possessed" child pornography that was found on his computer. While he admits that "there [was] a pattern of watching a video and then deleting it[,]" he claims that it is not illegal to watch child pornography, and that because he deleted the files after he watched them, there was insufficient evidence to establish that he intentionally possessed child pornography. *But see* 18 U.S.C. § 2252(a)(4)(B) (2012) (criminalizing "knowingly accesses [child pornography] with intent to view"); *United States v. Haymond*, 672 F.3d 948, 954 n.14 (10th Cir. 2012) (explaining that § 2252 was amended in 2008 and discussing the same). It is Defendant's contention that "[d]eleting the materials shows the intent to get rid of the materials"—not an intent to possess the materials.

{13} The State, on the other hand, contends that Defendant's argument fails because eight videos were found on his personal laptop, still under his control and accessible to him, which is consistent with the jury instruction given in this case. *See State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883 ("Jury instructions

become the law of the case against which the sufficiency of the evidence is to be measured."). In support of this argument, the State points out that the videos were found in the recycle bin folder, Defendant acknowledged that moving a file into the recycle bin does not permanently delete it, and Defendant admitted that he has recovered files from the recycle bin in the past.

{14} We agree with the State that there was sufficient evidence to show that Defendant possessed child pornography. By downloading, viewing, and deleting videos on his computer, Defendant possessed those videos. We note that this conclusion is consistent with our discussion in *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976, *rev'd on other grounds by State v. Olsson*, 2014-NMSC-012, ¶ 47, 324 P.3d 1230. In *Ballard*, this Court considered whether the defendant's conviction for twenty-five counts of possession of child pornography violated double jeopardy. *Id.* ¶¶ 1-2, 15-32. In discussing the double jeopardy issue, we stated that "initial possession started at the point [the d]efendant completed each digital file download of one or more illicit images." *Id.* ¶ 28, We further stated that "[the d]efendant's possession continued as long as the image remained on his computer or on any external hard drive. The process of downloading and the manner of storage of the files does not complicate the possession analysis." *Id.*

{15} However, "for possession of child pornography to be 'knowing,' a defendant must know the charged images exist." *Haymond*, 672 F.3d at 955. "[D]efendants cannot be convicted for having the ability to control something that they do not even know exists." *United States v. Dobbs*, 629 F.3d 1199, 1207 (10th Cir. 2011). To convict Defendant of possession of child pornography, the State was required to prove that he *intentionally* possessed the videos at issue. *See State v. Wasson*, 1998-NMCA-087, ¶ 12, 125 N.M. 656, 964 P.2d 820 ("A defendant's knowledge or intent generally presents a question of fact for a jury to decide.").

{16} Defendant argues that the State failed to meet this burden because the evidence showed that he intended to delete the videos from his computer. Defendant relies on *Dobbs*, 629 F.3d 1199, and *United States v. Bass*, 411 F.3d 1198 (10th Cir. 2005), to support his argument. In *Dobbs*, the defendant was convicted of "knowingly receiving and attempting to receive child pornography in violation of 18 U.S.C. § 2252(a)(2)." *Dobbs*, 629 F.3d at 1200. In the *Dobbs* case, unlike the present case, the defendant's conviction was based on images found exclusively in the cache file of his computer. *Id.* at 1201. The forensic specialist in that case testified that "when a person visits a website, the web browser automatically downloads the images of the web page to the computer's cache . . . regardless of whether they are displayed on the computer's monitor." *Id.* Thus, "a user does not necessarily have to see an image for it to be captured by the computer's automatic-caching function." *Id.* Although there was sufficient evidence to indicate that the defendant in *Dobbs*—or at least his computer—had "received" child pornography, the Tenth Circuit Court of Appeals reversed the defendant's conviction because there was insufficient evidence to establish that he did so "knowingly." *Id.* at 1204, 1209; *see also Haymond*, 672 F.3d at 955-56 (discussing *Dobbs*). Unlike the facts in *Dobbs*, there was sufficient evidence presented in this case that Defendant intentionally downloaded the videos, watched them, and deleted them.

{17} In *Bass*, the Tenth Circuit upheld the defendant's convictions of five counts of knowing possession of child pornography in violation of 18 U.S.C. § 2252(a)(5)(B), despite the defendant's contention that he did not know images were being automatically saved to his computer. *Bass*, 411 F.3d at 1200-02; *see id* at 1206 (Kelly, J., concurring in part and dissenting in part). In the *Bass* case, the defendant admitted that he had used two software programs to permanently delete the images because he did not want his mother to see them. *Id.* at 1201. The Tenth Circuit held that the jury could have reasonably inferred that the defendant knew child pornography was automatically saved to his mother's computer because there was evidence that he attempted to remove the images. *Id.* at 1202. Likewise, here, a jury could have reasonably inferred that Defendant intentionally possessed child pornography because there was evidence that he attempted to delete the videos.

{18} Defendant's reliance on *Dobbs* and *Bass* is unavailing. The facts in *Dobbs* are distinguishable, and *Bass* supports upholding Defendant's conviction in this case. The facts in the present case are much more analogous to those in *Haymond*, a case that neither the State nor Defendant discussed in their briefs.

{19} In *Haymond*, the Tenth Circuit affirmed the defendant's conviction for one count of possession or attempted possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). *Haymond*, 672 F.3d at 950. In the *Haymond* case, the defendant admitted to searching for and downloading child pornography using LimeWire, "a peer-to-peer file sharing program that allows users to trade computer files over the Internet" *id*.; there was evidence presented that downloading from LimeWire does not occur automatically; the LimeWire program was found on the defendant's computer; and the government introduced three images of child pornography that an FBI agent found in the defendant's shared LimeWire folder. *Id.* at 956. Similar to the facts in this case, the agent in *Haymond* testified that the defendant "admitted to a pattern of searching for, downloading, and then deleting child pornography from his computer." *Id.* at 952. The defendant in *Haymond* explained that he deleted the images or " 'wipe[d]' them by reformatting his hard drive and reinstalling the operating system." *Id.* The Tenth Circuit considered the defendant's sufficiency of the evidence challenge on appeal and held: "this type of volitional downloading entails 'control' sufficient to establish actual possession[,]" and "the evidence . . . was sufficient to permit a reasonable jury to conclude beyond a reasonable doubt that [the defendant] 'knowingly possessed' the charged images." *Id.* at 956-57.

{20} In the present case, there was ample evidence for a reasonable jury to infer that Defendant knew child pornography was on his computer. Just like the defendant in *Haymond*, Defendant admitted that he searched for, downloaded, watched, and deleted the videos at issue, and Defendant does not dispute that the videos were found in his recycle bin, which does not permanently delete files. Viewing the evidence in the light most favorable to the verdict, we conclude that there was sufficient evidence to permit a reasonable jury to conclude beyond a reasonable doubt that Defendant intentionally possessed child pornography.

B. Stipulation

{21} Defendant argues that the district court abused its discretion by allowing the State to show pornographic videos found on his computer to the jury despite his offer to stipulate to the fact that the material constituted child pornography. He claims that he objected to the State's request to show the videos to the jury, and instead, offered to stipulate that the

videos contained child pornography. He contends that there was no need to inflame the jury by having them watch the videos. The State, however, argues that abuse of discretion is not the proper standard of review in this case. It is the State's position that, although Defendant offered to stipulate that the contents were child pornography, he never objected to having the videos played for the jury. Therefore, the State asks this Court to apply a fundamental error standard of review. *See* Rule 12-216(A) NMRA (2015) (recompiled and amended as 12-321 effective Dec. 31, 2016) ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]").

{22} The record reflects that, during Agent Peña's testimony, the State offered State's Exhibit 1 into evidence—a disc with the two videos downloaded by Agent Peña from Defendant's Ares shared folder. When asked if there was any objection, defense counsel stated, "No, Your Honor." The State then asked for permission to publish State's Exhibit 1 to the jury, and the district court asked defense counsel if he had any objection. At that time, counsel stated, "The defense [was] prepared to stipulate that the [disc] and the other videos [the State was] intending to show [were], in fact, pornography, within the meaning of the statute." The State did not accept the stipulation, and the district court permitted the State to show the videos to the jury. Similarly, during Detective Hartsock's testimony, defense counsel did not object to the admission of State's Exhibit 2—the disc the forensics laboratory prepared, which included the eight videos found on Defendant's laptop. Additionally, there was no objection to publishing State's Exhibit 2. Because Defendant failed to preserve this issue, "we will reverse only if any error rose to the level of fundamental error." *State v. Herrera*, 2014-NMCA-007, ¶ 4, 315 P.3d 343.

{23} "Fundamental error only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand." *State v. Cunningham*, 2000-NMSC-009, ¶ 13, 128 N.M. 711, 998 P.2d 176 (internal quotation marks and citation omitted). To determine whether fundamental error exists, we first determine whether an error occurred, and if so, we then determine whether that error was fundamental to the fairness of the conviction. *See State v. Astorga*, 2015-NMSC-007, ¶ 14, 343 P.3d 1245.

{24} "[W]e do not limit the State's presentation of evidence to the narrow question of what a defendant has expressly put in issue." *State v. Otto*, 2005-NMCA-047, ¶ 30, 137 N.M. 371, 111 P.3d 229 (Pickard, J., dissenting), *rev'd on other grounds*, 2007-NMSC-012, 141 N.M. 443, 157 P.3d 8. In reversing this Court's opinion in *Otto*, 2005-NMCA-047, our Supreme Court agreed with the view expressed in Judge Pickard's dissent. *See Otto*, 2007-NMSC-012, ¶¶ 8, 11-13. "[W]e routinely uphold the admission of gory photographs even though a defendant concedes that the victim is dead or died in a particular way. Moreover, we apply this principle in the context of the admission of Rule 11-404(B) [NMRA] evidence." *Otto*, 2005-NMCA-047, ¶ 30 (Pickard, J., dissenting) (citations omitted).

{25} The content of the videos was relevant to Defendant's charges in this case. *See* Rule 11-401 NMRA ("Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence, and . . . the fact is of consequence in determining the action."). In order to convict Defendant for possession of child pornography, the State was required to prove beyond a reasonable doubt that the videos were obscene, they depicted a prohibited sexual act, and the participants were children under the age of eighteen. *See* NMSA 1978, § 30-6A-2(A), (E) (2001) (defining "prohibited sexual act" and "obscene"). To establish these elements, the State sought permission to show brief sections of three videos—one during Agent Peña's testimony and two during Detective Hartsock's testimony. As for the first video, only two to three minutes of an eleven-minute video were shown. As for the second and third videos, the State played brief portions while Detective Hartsock described the ages of the children based on their body structure.

{26} While the district court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice," *see* Rule 11-403 NMRA, we "give much leeway to trial judges who must fairly weigh probative value against probable dangers." *State v. Sena*, 2008-NMSC-053, ¶ 16, 144 N.M. 821, 192 P.3d 1198 (internal quotation marks and citation omitted); *see also State v. Rojo*, 1999-NMSC-001, ¶ 48, 126 N.M. 438, 971 P.2d 829 ("Determining whether the prejudicial impact of evidence outweighs its probative value is left to the discretion of the trial court." (alteration, internal quotation marks, and citation omitted)).

{27} In the instant case, the videos—though graphic in nature—were probative to show Defendant's intent and to refute Defendant's claim that he was viewing the videos for medical research. *See, e.g.*, *Sena*, 2008-NMSC-053, ¶ 17 ("Without hearing the grooming evidence, the jury was more likely to believe that [the d]efendant touched [the c]hild simply for medicinal purposes and less likely to believe that he did so with a sexual intent."). Defendant insisted that he was researching how lesions were formed from sexual intercourse between an adult and a child; however, the portions of the videos that were played for the jury included oral sex between two adults and two girls, oral sex between a young man and a boy, and a close up of a girl's genitalia and her riding a man's shoulders. *See* § 30-6A-2(E) (defining "obscene" as "any material, when the content if taken as a whole: (1) appeals to a prurient interest in sex, as determined by the average person applying contemporary community standards; (2) portrays a prohibited sexual act in a patently offensive way; and (3) lacks serious literary, artistic, political or scientific value").

{28} Given the probative value of the video evidence offered to show Defendant's intent, we cannot characterize the district court's admission of brief portions of the videos "as clearly untenable or unjustified by reason." *Sena*, 2008-NMSC-053, ¶ 17. Therefore, we hold that the district court did not abuse its discretion in allowing the State to show the jury these videos under Rule 11-403. Having determined that the district court did not err in admitting the video evidence, we need not undertake a fundamental error analysis. *See Astorga*, 2015-NMSC-007, ¶ 14.

III. CONCLUSION

{29} The judgment and sentence is affirmed.

{30} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
JONATHAN B. SUTIN, Judge

Attorneys Needed for Metro Court Legal Clinic

The State Bar Legal Services & Programs Committee along with the **Bernalillo County Metropolitan Court** would like to **recognize** and **thank** the following volunteers for helping to make the 2017 Legal Clinics a success:

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