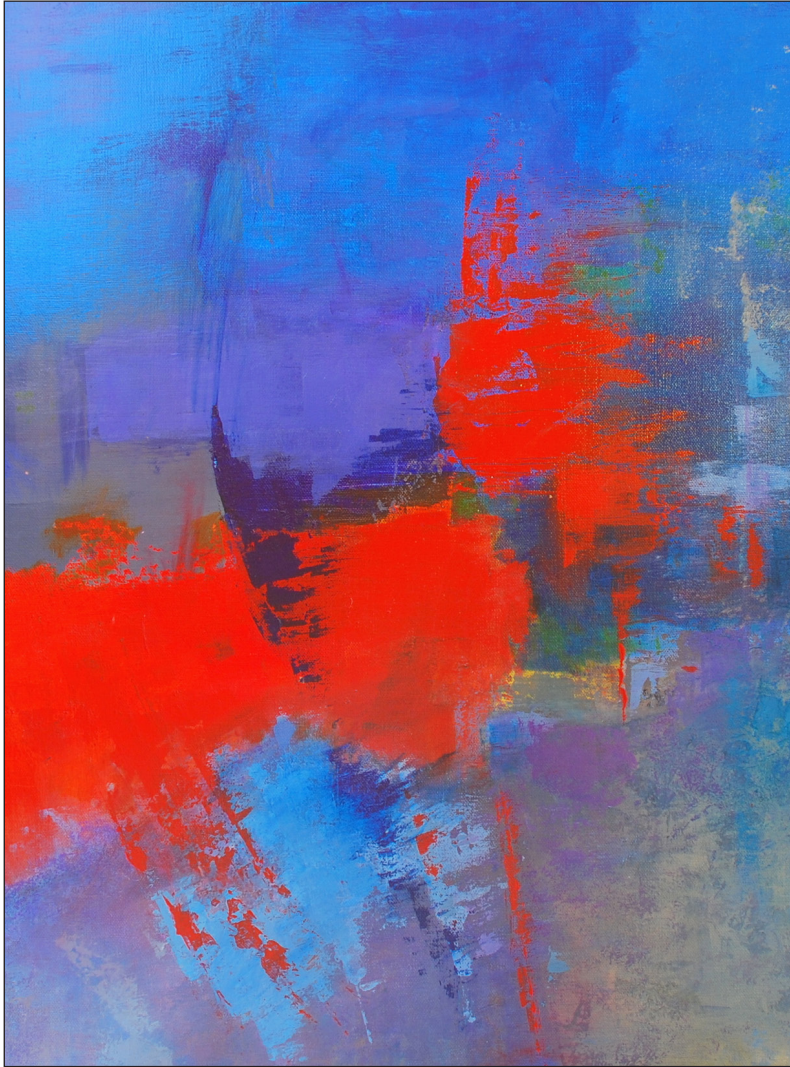


# BAR BULLETIN

May 15, 2019 • Volume 58, No. 10



*Crescendo*, by Linda Holland

[www.lindahollandstudio.com](http://www.lindahollandstudio.com)

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# 2019 ANNUAL MEETING

Aug. 1-3, 2019 • HOTEL ALBUQUERQUE at Old Town *and* HOTEL CHACO

*Registration Now Open!*

Early bird discounts are available through July 1.

To register and for a preliminary schedule, visit  
[www.nmbar.org/AnnualMeeting](http://www.nmbar.org/AnnualMeeting)



WE ARE PROUD TO WELCOME OUR  
*Keynote Speaker*

**Dan Abrams, Chief Legal Affairs Anchor at ABC News  
and Founder of Abrams Media**

Abrams will present "Covering the Courts: The Convergence of Law and Media in Today's Highest Profile Cases." Don't miss his fascinating discussion of the media's impact on how we view the legal system and today's headline cases.

*Sponsorships and Exhibitor Booths are available!*

Learn how you can support the Annual Meeting and promote your firm and company to our attendees.

**Lodging:** Rooms start at \$159 at Hotel Albuquerque and \$179 at Hotel Chaco. Reserve your room by July 10.

*Note: We have secured room blocks at both hotels, but Annual Meeting events will take place at Hotel Albuquerque.*

For more information on speakers, sponsorships/exhibitor booths, lodging and more, visit [www.nmbar.org/AnnualMeeting](http://www.nmbar.org/AnnualMeeting)



**RED RAIDER HOSPITALITY LOUNGE**

The Texas Tech University School of Law continues to show their support for the State Bar of New Mexico as the proud sponsor of the 2019 Red Raider Hospitality Lounge!



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## Meetings

### May

- 16**  
**Public Law Section Board**  
Noon, Legislative Finance Committee,  
Santa Fe
- 17**  
**Family Law Section Board**  
9 a.m., teleconference
- 18**  
**Young Lawyers Division Board**  
10 a.m., State Bar Center
- 22**  
**Natural Resources, Energy and  
Environmental Law Section Board**  
Noon, teleconference
- 23**  
**Cannabis Law Section Board**  
9 a.m., State Bar Center
- 24**  
**Immigration Law Section Board**  
Noon, teleconference
- 30**  
**Trial Practice Section Board**  
Noon, State Bar Center

## Workshops and Legal Clinics

### May

- 16**  
**Common Legal Issues for Senior Citizens**  
Workshop Presentation 10–11:15 a.m.,  
Betty Ehart Senior Center, Los Alamos,  
1-800-876-6657
- 22**  
**Common Legal Issues for Senior Citizens**  
Workshop Presentation 10–11:15 a.m.,  
Placitas Community Center, Placitas,  
1-800-876-6657
- 22**  
**Consumer Debt/Bankruptcy**  
Workshop 6–9 p.m., State Bar Center,  
Albuquerque, 505-797-6094

### June

- 5**  
**Divorce Options Workshop**  
6–8 p.m., State Bar Center, Albuquerque,  
505-797-6022
- 5**  
**Civil Legal Clinic**  
10 a.m.–1 p.m., Second Judicial District  
Court, Albuquerque, 1-877-266-9861

**About Cover Image and Artist:** Linda Holland layers and blends color, intuitively responding to shades and textures which evoke patinas of urban and natural realms. Gesture and motion flow from martial arts and musical rhythms. Her abstract sculptures and paintings have been featured in numerous solo and two-person shows in New Mexico as well as juried regional group exhibits. In addition to corporate and private collections, several of her works have been selected for state, municipal and university art collections. Other paintings can be viewed at [www.lindahollandstudio.com](http://www.lindahollandstudio.com).

# Notices

## COURT NEWS

### Administrative Office of the Courts

#### Notice of Online Dispute Resolution

The New Mexico Judiciary plans to implement online dispute resolution in debt and money due cases in early June in district and magistrate courts in the Sixth and Ninth Judicial Districts. The pilot program will expand to the Second Judicial District Court and the Bernalillo County Metropolitan Court later in June. The free service allows the parties to negotiate online to quickly resolve debt and money due cases without appearing in court. If a resolution is reached, the ODR system will prepare a stipulated settlement agreement and electronically file it in court. The plaintiff's attorney or a self-represented plaintiff will receive an email notification to begin ODR after the defendant files an answer to the complaint. Once the plaintiff makes an offer for possibly settling the dispute, an email goes to the defendant with an opportunity to respond. During the first two weeks of negotiations, the parties can request the help of a trained online mediator. If no agreement is reached after 30 days, the case will move forward in court. ODR notices will be emailed to the parties from [no-reply@newmexicocourtsdmd.modria.com](mailto:no-reply@newmexicocourtsdmd.modria.com). The parties should check their inbox, spam and junk mailboxes to ensure they receive the ODR notices.

#### Second Judicial District Court Children's Court Abuse and Neglect Brown Bag

The Second Judicial District Court Children's Court Abuse and Neglect Brown Bag will be held at noon on May 17 in the Chama Conference Room at the Juvenile Justice Center, 5100 2nd Street NW, Albuquerque. Attorneys and practitioners working with families involved in child protective custody are welcome to attend. Call 505-841-7644 for more information.

#### Investiture Ceremony for Judges Allison, Baker, Chavez and O'Connell

The judges and employees of the Second Judicial District Court cordially invite members to attend the investiture ceremony of Hon. Joshua A. Allison, Hon. Amber Chavez Baker, Hon. Lisa Chavez Ortega and Hon. Erin B. O'Connell at 4

## Professionalism Tip

### With respect to other judges:

In all written and oral communications, I will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.

p.m., May 17, at the National Hispanic Cultural Center, 1701 4th Street SW, Albuquerque. Reception to immediately follow. Judges who want to participate in the ceremony, should bring their robes and arrive by 3:30 p.m.

#### Judicial Swearing-In and Reception for Judges Gallegos and Ramczyk

Previously invested Judges Daniel J. Gallegos and Daniel E. Ramczyk invite members to a swearing-in ceremony marking their recent appointments to the Second Judicial District Court of New Mexico. The ceremony will begin at noon on May 22 in Courtroom 338, Second Judicial District Courthouse, 400 Lomas Blvd., NW. An informal reception will follow. All are welcome to attend.

#### Third Judicial District Court Volunteer Attorneys Needed at Self Help Center

The Self Help Center at the Third Judicial Court, is currently seeking volunteer attorneys from the Dona Ana County area, to assist with our monthly legal clinics. The Self Help Center hosts a legal clinic every Wednesday from 1-4 p.m. for pro se litigants dealing with issues in family law. Additionally, clinics are held on the second and last Tuesday of the month for civil issues. The clinics are set up to assist pro se litigants with legal advice and guidance that is outside the scope of the services the court may provide. The clinics are set up to respect the time of our volunteers and limit each clinic from seven to ten individuals. If interested in assisting the Self Help Division, contact David D. Vandenberg at [lcrdexv@nmcourts.gov](mailto:lcrdexv@nmcourts.gov) or call 575-528-8399.

#### Sixth Judicial District Court Notice of Right to Excuse Judge

As of March 25, Hon. James B. Foy is now the District Judge for Division III of the Sixth Judicial District Court. Grant County: 50 percent of all pending and reopened criminal and extradition cases previously assigned to the vacant position of Division III shall be reassigned to the

Hon. Thomas F. Stewart, District Judge for Division I, and 50 percent shall be reassigned to the Hon. Jarod K. Hofacket, District Judge for Division IV. All pending civil, domestic, emancipation, adoption, miscellaneous sequestered, probate and guardianship/conservatorship cases previously assigned to the vacant position of Division III shall be assigned to the Hon. James B. Foy, District Judge for Division III. All reopened cases of the above case types shall be reassigned fifty percent to the Hon. Thomas F. Stewart, District Judge for Division I, and fifty percent to the Hon. James B. Foy, District Judge for Division III. All pending and reopened domestic violence cases previously assigned to the vacant position of Division III shall be reassigned to the Hon. James B. Foy, District Judge for Division III. All pending and reopened delinquency, youthful offender, competency, abuse and neglect, lower court appeal previously assigned to the vacant position of Division III shall be reassigned to the Hon. Thomas F. Stewart, District Judge for Division I. Hidalgo County: All pending and reopened domestic cases previously assigned to the Hon. Jarod K. Hofacket, District Judge for Division IV, or previously assigned to the vacant position of Division III shall be assigned to the Hon. James B. Foy, District Judge for Division III. All pending and reopened civil, domestic violence, abuse and neglect, adoption and probate cases previously assigned to the vacant position of Division III shall be assigned to the Honorable James B. Foy, District Judge for Division III. All pending and reopened delinquency, youthful offender, criminal, extradition, lower court appeal, and competency cases previously assigned to the vacant position of Division III shall be assigned to the Hon. Jarod K. Hofacket, District Judge, Division IV. Fifty percent of all reopened sequestered miscellaneous cases shall be reassigned to the Hon. James B. Foy, District Judge for Division III, and fifty percent shall be reassigned to the Hon. Jarod K. Hofacket, District Judge for Division IV. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will

have 10 days to excuse Judge Foy, Judge Hofacket or Judge Stewart.

### **Eighth Judicial District Court Notice of Mass Case Reassignment**

Gov. Michelle Lujan-Grisham announced the appointment of Melissa A. Kennelly to fill the vacancy of Division II of the Eighth Judicial District Court. Effective May 6, a mass reassignment of cases occurred. All cases in Colfax and Union Counties previously assigned to Judge Emilio J. Chavez, Division I, are reassigned to Judge Melissa A. Kennelly, Division II. Parties who have not previously exercised their right to challenge or excuse will have ten days from May 29 to challenge or excuse Judge Melissa A. Kennelly, Division II pursuant to NMRA 1-088.1.

### **U.S. District Court, District of New Mexico Reappointment of Incumbent U.S. Magistrate Judge**

The current term of office of U. S. Magistrate Judge Stephan M. Vidmar is due to expire on Dec. 26, 2019. The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term. The duties of a magistrate judge in this court include the following: (1) conducting most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conducting various pretrial matters and evidentiary proceedings on delegation from a district judge, and (4) trial and disposition of civil cases upon consent of the litigants. Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be addressed as follows: U.S. District Court, ATTN: Magistrate Judge Merit Selection Panel c/o Human Resources – CONFIDENTIAL, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102. Comments must be received by June 10.

### **Proposed Amendments to Local Rules of Civil Procedure**

Proposed amendments to the Local Rules of Civil Procedure of the U.S. District Court for the District of New Mexico are being considered. A “redlined”

version (with proposed additions underlined and proposed deletions stricken out) and a clean version of these proposed amendments are posted on the Court’s website at [www.nmd.uscourts.gov](http://www.nmd.uscourts.gov). Members of the bar may submit comments by email to [kelsie\\_kloepfer@nmd.uscourts.gov](mailto:kelsie_kloepfer@nmd.uscourts.gov) or by mail to U.S. District Court, Clerk’s Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, Attn: Kelsie Kloepfer, no later than May 31.

### **STATE BAR NEWS Board of Bar Commissioners May 17 Meeting Agenda**

The next meeting of the Board of Bar Commissioners will be held on May 17 at the State Bar Center in Albuquerque. For a copy of the agenda, visit [www.nmbar.org/nbardocs/aboutus/governance/meetings/BBCAgenda-0519.pdf](http://www.nmbar.org/nbardocs/aboutus/governance/meetings/BBCAgenda-0519.pdf). For more information, contact Kris Becker at 505-797-6038 or [kbecker@nmbar.org](mailto:kbecker@nmbar.org).

### **New Mexico Judges and Lawyers Assistance Program Attorney Support Groups**

- May 20, 5:30 p.m.  
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- June 3, 5:30 p.m.  
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (The group normally meets the first Monday of the month.)
- June 10, 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 available. Dial 1-866-640-4044 and enter code 7976003#.

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

### **UNM SCHOOL OF LAW Law Alumni/ae Association 17th Annual Law Scholarships Golf Classic**

The UNM School of Law Alumni/ae Association presents the 17th annual Law Scholarships Golf Classic on Friday, June 7, which benefits full-tuition merit

scholarships at the Law School. If you’re not a golfer, that’s alright! You can still support by sponsoring students to play, sponsoring a hole/tee, and more. Register and learn more at <http://lawschool.unm.edu/alumni/events/golf.html>.

### **Law Library Hours Summer 2019**

Through Aug. 18

#### *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          | Closed.        |

#### *Reference*

|               |               |
|---------------|---------------|
| Monday–Friday | 9 a.m.–6 p.m. |
|---------------|---------------|

#### *Closures*

|                           |
|---------------------------|
| May 27 (Memorial Day)     |
| July 4 (Independence Day) |
| July 5 (Independence Day) |

### **OTHER BARS New Mexico Criminal Defense Association**

#### **Litigating in the 21st Century CLE**

Digital evidence is well known for its effectiveness at damaging the defense, but what if there was a way to turn that around? “Litigating in the 21st Century” will show what evidence to focus on gathering for attorney defense and how to keep the government’s out at trial, update on State and Federal search and seizure of data, explain the Foreign Intelligence Surveillance Act, and more. Stay sharp in this electronic age and reserve a spot. NMCDLA members, families and friends are invited to the annual membership party and silent auction on June 7. Visit [www.nmcdla.org](http://www.nmcdla.org) to join NMCDLA and register.

### **New Mexico Defense Lawyers Association**

#### **2019 Young Lawyers Seminar**

Join the New Mexico Defense Lawyers Association for its Young Lawyers Seminar on May 31 at Modrall Sperling in Albuquerque. This half-day program is designed to teach associates and junior partners useful skills they can apply to their daily practice and provide opportunities to network and develop business

*Continued on page 7.*

# REPORT BY DISCIPLINARY COUNSEL

# DISCIPLINARY QUARTERLY REPORT

Reporting Period: January 1, 2019 – March 31, 2019

## Final Decisions

Final Decisions of the NM Supreme Court ..... 3

*Matter of Eric D. Dixon, Esq.*, (No. S-1-SC-37204). The New Mexico Supreme Court issued an Opinion on January 17, 2019 in connection with its November 9, 2018 Order.

*Matter of Jennie Deden Behles, Esq.*, (No. S-1-SC-37393). The New Mexico Supreme Court issued an order on March 5, 2019 permanently disbarring Respondent from the practice of law effective March 31, 2019 for violations of Rules 16-105, 16-115, and 16-804(D). The Court issued an Order on March 29, 2019 extending the effective date of disbarment to April 30, 2019. The Court entered an Order on April 22, 2019 denying Respondent's request for rehearing. The Court further ordered that Respondent pay restitution to Dubalouche LLC and pay costs to the Disciplinary Board.

*Matter of J. Marcos Perales Pina, Esq.* (No. S-1-SC-37402). The New Mexico Supreme Court issued an order on March 8, 2019 suspending Respondent from the practice of law effective March 15, 2019 for a period of one (1) year for violations of Rules 16-101, 16-801, 16-804(C), and 16-804(D). The Court issued other requirements that Respondent must meet before seeking reinstatement. The Court also required Respondent to pay costs to the Disciplinary Board.

## Summary Suspensions

Total number of attorneys summarily suspended ..... 0

## Administrative Suspensions

Total number of attorneys administratively suspended..... 1

*Matter of Keith G. Findlay, Esq.* (No. S-1-SC-37400). The New Mexico Supreme Court entered an order on January 25, 2019 administratively suspending Respondent from the practice of law for the failure to cooperate with Disciplinary Counsel.

## Disability Inactive Status

Total number of attorneys placed on disability inactive states  
0

## Charges Filed

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to act with reasonable diligence and promptness in representing a client; failing to expedite litigation; and engaging in conduct prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to promptly notify a third party that funds were received; failing to hold the amount to which there was a dispute in the IOLTA until the dispute was resolved; and refusing to release funds or make

payments to third party.

Charges were filed against an attorney for allegedly failing to provide competent representation; engaging in representation where there is a concurrent conflict of interest; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to act with reasonable diligence and promptness in representing a client; failing to communicate with his client and failing to obtain the client's consent to settle; failing to promptly disburse the settlement funds; engaging in conduct involving misrepresentation; and engaging in conduct prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly making a false statement in connection with a disciplinary proceeding; engaging in conduct involving fraud, dishonesty, deceit, or misrepresentation; and engaging in conduct prejudicial to the administration of justice.

## Injunctive Relief

Total number of injunctions prohibiting the unauthorized practice of law ..... 0

## Reciprocal Discipline

Total number of attorneys reciprocally disciplined ..... 1

*Matter of Burt Lee Burnett, Esq.*, (No. S-1-SC-37318). The New Mexico Supreme Court issued an Order on January 7, 2019 disbarring Respondent from the practice of law following a petition for reciprocal discipline from Texas.

## Reinstatement from Probation

Petitions for reinstatement filed ..... 0

## Formal Reprimands

Total number of attorneys formally reprimanded ..... 1

*Matter of Johanna Cox, Esq.* (Disciplinary No. 2017-03-4336) a Formal Reprimand was issued at the Disciplinary Board meeting of January 18, 2019, for the violation of Rule 16-115, failing to safe keep and hold another's property separately; and Rule 16-804, engaging in conduct prejudicial to the administration of justice. The Formal Reprimand was published in the State Bar Bulletin issued February 6, 2019.

## Informal Admonitions

Total number of attorneys admonished ..... 2

An attorney was informally admonished for failing to provide full disclosure and obtain written consent of the client regarding representation on a loan and for providing financial assistance to a client in connection with pending or contemplated litigation in

violation of Rule 16-108(A) and (E) of the Rules of Professional Conduct.

An attorney was informally admonished for using means that have no substantial purpose other than to embarrass, delay or burden a third person in violation of Rule 16-404(A) of the Rules of Professional Conduct.

**Letters of Caution**

Total number of attorneys cautioned ..... 19

Attorneys were cautioned for the following conduct: (1) lack of competence; (2) disruption of a tribunal (3 letters of caution issued); (3) failure to communicate (3 letters of caution issued); (4) excessive or improper fees (2 letters of caution issued); (5) trust account violations (4 letters of caution issued); (6) lack of diligence (3 letters of caution issued); (7) ex parte contact with represented party; (8) improper means; and (9) meritless claims or defenses.

| <i>Complaints Received</i>               |                          |
|--|--------------------------|
| <b>Allegations.....</b>                  | <b>No. of Complaints</b> |
| Trust Account Violations.....            | 7                        |
| Conflict of Interest.....                | 7                        |
| Neglect and/or Incompetence.....         | 63                       |
| Misrepresentation or Fraud.....          | 6                        |
| Relationship with Client or Court.....   | 31                       |
| Fees.....                                | 3                        |
| Improper Communications.....             | 2                        |
| Criminal Activity.....                   | 1                        |
| Personal Behavior.....                   | 5                        |
| Other.....                               | 26                       |
| Total number of complaints received..... | 151                      |

# Notices

*Continued from page 5.*

relationships. Visit [www.nmdla.org](http://www.nmdla.org) to register and for more information.

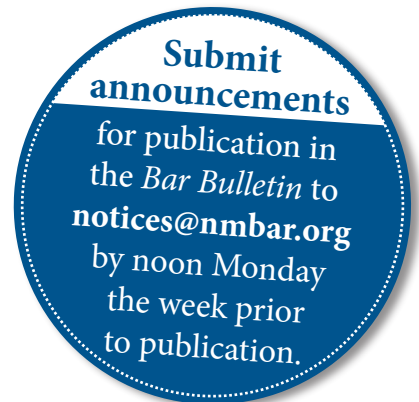
Albuquerque, NM 87125-7198; or faxed to 505-841-6813.

**OTHER NEWS**  
**New Mexico Workers’ Compensation Administration Request for Comments**

The acting director of the Workers’ Compensation Administration, Verily A. Jones, is considering the reappointment of Judge Leonard Padilla to a second five-year term pursuant to NMSA 1978, §52-5-2 (2004). Judge Padilla’s term expires on Aug. 31. Anyone wishing to submit written comments concerning Judge Padilla’s performance may do so until 5 p.m., June 3. All written comments submitted per this notice shall remain confidential. Comments may be addressed to WCA Acting Director Verily A. Jones, P.O. Box 27198,

**Vilendrer Law, PC National Survey on Dispute Resolution**

Vilender Law PC has commissioned a study on the correlation between client outcomes and various litigation variables. The goal for this research is to help attorneys obtain better litigation and settlement outcomes for their clients. The survey takes approximately 2 minutes and is confidential. The survey can be accessed at <https://www.vilendrerlaw.com/survey/>. Aggregated results of the survey will be shared at the conclusion of the study.



# Legal Education

## May

- |    |  |    |  |    |  |
|----|--|----|--|----|--|
| 16 | <b>Annual WCA of NM Conference</b><br>8.0 G, 1.0 EP<br>Live Seminar, Albuquerque<br>Workers Compensation Association<br>of New Mexico                      | 20 | <b>Basic Practical Regulatory Training for the Natural Gas Local Distribution Industry</b><br>27.5 G<br>Live Seminar, Albuquerque<br>Center for Public Utilities NMSU      | 22 | <b>Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204</b><br>1.0 EP<br>Live Webinar<br>Center for Legal Education of NMSBF<br>www.nmbar.org |
| 17 | <b>Ethics of Shared Law Offices, Working Remotely and Virtual Offices</b><br>1.0 EP<br>Teleseminar<br>Center for Legal Education of NMSBF<br>www.nmbar.org | 20 | <b>Basic Practical Regulatory Training for the Electric Industry</b><br>28.5 G<br>Live Seminar, Albuquerque<br>Center for Public Utilities NMSU                            | 24 | <b>Ethical Issues in Contract Drafting</b><br>1.0 EP<br>Teleseminar<br>Center for Legal Education of NMSBF<br>www.nmbar.org  |
| 17 | <b>34th Annual Bankruptcy Year in Review Seminar</b><br>6.0 G, 1.0 EP<br>Live Replay, Albuquerque<br>Center for Legal Education of NMSBF<br>www.nmbar.org  | 22 | <b>How to Practice Series: Divorce Law in New Mexico</b><br>4.5 G, 2.0 EP<br>Live Replay, Albuquerque<br>Center for Legal Education of NMSBF<br>www.nmbar.org              | 30 | <b>Ethical Issues and Implications on Lawyers' Use of LinkedIn</b><br>1.0 EP<br>Live Webinar<br>Center for Legal Education of NMSBF<br>www.nmbar.org                   |
| 17 | <b>Pretrial Practice in Federal Court (2018)</b><br>2.5 G, 0.5 EP<br>Live Replay, Albuquerque<br>Center for Legal Education of NMSBF<br>www.nmbar.org      | 22 | <b>The Lifecycle of a Trial, from a Technology Perspective (2017)</b><br>4.3 G, 1.0 EP<br>Live Replay, Albuquerque<br>Center for Legal Education of NMSBF<br>www.nmbar.org | 31 | <b>2019 Young Lawyers Seminar</b><br>3.0 G<br>Live Seminar, Albuquerque<br>New Mexico Defense Lawyers Association  |
| 17 | <b>Basic Guide to Appeals for Busy Trial Lawyers (2018)</b><br>3.0 G,<br>Live Replay, Albuquerque<br>Center for Legal Education of NMSBF<br>www.nmbar.org  |    |  |    |  |

## June

- |   |  |    |   |    |   |
|---|--|----|---|----|---|
| 3 | <b>Smartphones, Tablets and Other Devices in the Workplace</b><br>1.0 G<br>Teleseminar<br>Center for Legal Education of NMSBF<br>www.nmbar.org | 6  | <b>2019 Ethics in Civil Litigation, Part 2</b><br>1.0 EP<br>Teleseminar<br>Center for Legal Education of NMSBF<br>www.nmbar.org                 | 14 | <b>2018 Family Law Institute: Hot Topics in Family Law Day 1</b><br>5.0 G, 1.5 EP<br>Live Replay, Albuquerque<br>Center for Legal Education of NMSBF<br>www.nmbar.org |
| 5 | <b>2019 Ethics in Civil Litigation, Part 1</b><br>1.0 EP<br>Teleseminar<br>Center for Legal Education of NMSBF<br>www.nmbar.org                | 14 | <b>Ethics in Negotiations- Boasts, Shading and Impropriety</b><br>1.0 EP<br>Teleseminar<br>Center for Legal Education of NMSBF<br>www.nmbar.org | 14 | <b>Common Tax Pitfalls for Small Business Attorneys (2019)</b><br>3.0 G<br>Live Replay, Albuquerque<br>Center for Legal Education of NMSBF<br>www.nmbar.org           |



## June

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| <p><b>14</b>    <b>Bankruptcy Fundamentals for the Non-Bankruptcy Attorney (2018)</b><br/>3.0 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                           | <p><b>19</b>    <b>Disorder in the Court: An Attorney's Guide to Judicial Misconduct</b><br/>1.0 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                             | <p><b>28</b>    <b>What Starbucks Teaches Us About Attracting Clients the Ethical Way (2018)</b><br/>3.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>              |
| <p><b>18</b>    <b>Ethics of Co-Counsel and Referral Relationships</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>24</b>    <b>How to Avoid Potential Malpractice Pitfalls in the Cloud and in Everyday Law Office Computing</b><br/>1.0 G<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>28</b>    <b>Abuse and Neglect in Children's Court (2019))</b><br/>3.0 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   |
| <p><b>18</b>    <b>Staying Out of the News: How to Avoid Making Techno-Ethical Mistakes that Put You on the Front Page</b><br/>1.0 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>28</b>    <b>Fifth Annual Symposium on Diversity and Inclusion (2019)</b><br/>5.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                  | <p><b>28</b>    <b>Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204</b><br/>1.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |

## July

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|--|---|--|
| <p><b>7</b>    <b>Litigating in the 21st Century CLE</b><br/>5.7 G<br/>Live Seminar, Albuquerque<br/>New Mexico Criminal Defense Lawyers Association<br/>www.nmcdla.org</p>    | <p><b>10</b>    <b>Your Client Wants to Sell on the Web: What You Need to Know Pt 2</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>24</b>    <b>Employee Leave Law</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                                    |
| <p><b>9</b>    <b>Your Client Wants to Sell on the Web: What You Need to Know Pt 1</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>18</b>    <b>Ethics and New Clients: Inadvertent Clients, Intake and More</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>    | <p><b>25</b>    <b>Mediating the Political Divide</b><br/>2.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |

Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. 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 type, course provider and registration instructions.



Your Exclusive Source for Official NM Laws

## *An Historic Transformation of the Delivery of the State's Laws*

Effective May 1, 2019

Publishing the laws on a free public access website and through print, DVD and online subscriptions has been the commitment of the New Mexico Compilation Commission in its role as the state's official legal publisher. Much has changed since 2004 when the state determined that it would self-publish its laws to control quality, subsidize pricing, maintain its rigorous publication schedule and protect the state's copyrights and trademarks. **On May 1, 2019, access to the state's annotated official laws through NMOneSource.com® will be available free to everyone.**

**NMOneSource.com 2.0** ([www.nmonesource.com](http://www.nmonesource.com)) utilizes a proprietary cloud-based legal publishing solution, developed by Lexum (<https://lexum.com>). The trusted, authoritative content includes:

- **Constitutions of United States and State of New Mexico**
- **Territorial Laws and Treaties of New Mexico**
- **New Mexico Statutes Annotated 1978**—current through the Second Session of the Fifty-Third Legislature (2018). 2019 laws will be published on their effective dates. Historical archives from 1989.
- **New Mexico Rules Annotated**—included rules and downloadable court forms effective February 1, 2019 with historical archives from 1989. Forms in Word format for downloading are coming soon.
- **New Mexico Appellate Reports**—Supreme Court of New Mexico and New Mexico Court of Appeals formal opinions released for publication from 1852
- **Slip Opinions of the Supreme Court of New Mexico and New Mexico Court of Appeals** when released by the Chief Clerk of the Supreme Court
- **Unreported Decisions and Memorandum Opinions** of the Supreme Court of New Mexico and Court of Appeals, respectively—from January 2009
- **Supreme Court of New Mexico, Judicial Reprimands**—from 1999
- **New Mexico Session Laws**—from 1993
- **New Mexico Attorney General Opinions and Advisory Letters**—from 1909

Some of the new features important to the bench and bar include:

- ✓ **Slip opinions.** **NMOneSource.com 2.0** is now the official repository of slip opinions of the appellate courts. Slip opinions are no longer posted on the Commission's agency site.
- ✓ **My.NMOneSource.com for user personalization and current awareness – for legal professionals only.** Save searches, get alerts to new content that is responsive to your saved search, view your search history, organize research in folders, email links to contacts, and more. Register by accessing [my.NMOneSource.com](http://my.nmonesource.com) in your browser, or wherever you see the "Browse [my.NMOneSource.com](http://my.nmonesource.com)" menu on **NMOneSource.com**. The Compilation Commission has taken care of the associated fees for lawyers and judges to have the benefits of this important tool.
- ✓ **Create custom PDFs and E-Pubs.** Select articles, sections, court rules, with or without annotations, to create a PDF or e-pub for court submissions, emailing, printing or offline access.
- ✓ **Cited content and noteup features.** See a list with links to all cited content in an appellate court opinion. Search for every document that cites your document.
- ✓ **New or amended court rules.** Rules with future effective dates will be included in italics below the court rule currently in effect in the same manner as statutes with future effective dates are treated.
- ✓ **Mobile access on smartphones and tablets.** A responsive design mobile site is available by typing [www.nmonesource.com](http://www.nmonesource.com) in the browser of the mobile device.
- ✓ **One-hour live webinar training.** Three live webinar sessions remain available. You must register to attend. Simply call the Compilation Commission at (505) 827-4821 or email Maria Perez at [maria.perez@nmcompcomm.us](mailto:maria.perez@nmcompcomm.us) to register and receive a WebEx invitation with instructions on how to attend. You will learn how to search by citation, word search, leverage the citator and note-up features, create customized PDFs, use the power tools, access the mobile site, and more. The webinar schedule is as follows:

**May 16 | 1:30 p.m. • May 22 | 9:30 a.m. • May 30 | 9:30 a.m.**

- ✓ **YouTube Channel for on-demand training.** The Commission's YouTube channel is available through the **Search Laws** page of the Commission's new agency site at [www.nmcompcomm.us](http://www.nmcompcomm.us). There is also a link to the instructional videos on the home page of [www.nmonesource.com](http://www.nmonesource.com). The videos include a recorded webinar for those who could not make a live session and five brief "how-to" videos for the basics. Additional videos will be added based on demand.

### Expanding Traditional Print Titles with E-Books and Mobile Applications

Print publications remain important to our rural state in areas of limited internet access and to those lawyers and judges who rely on print with online services. The familiar *New Mexico Statutes Annotated 1978™*, *New Mexico Rules Annotated*, *New Mexico Criminal and Traffic Law Manual™* and *New Mexico Selected Taxation and Revenue Laws and Regulations Manual™* will continue to be available.

### What's new?

The New Mexico Compilation Commission no longer sells print products. Effective May 3, 2019, the official print publications of the Compilation Commission will be distributed by Blue360° Media ([www.blue360media.com](http://www.blue360media.com)) through an exclusive content license. Blue360° Media is a legal publishing company serving over 40 state law enforcement communities.

The *New Mexico Statutes Annotated 1978™* in the loose-leaf red binder format will be replaced by an easier-to-manage annual total replacement softbound cover format. This new format of statutes is now available for pre-ordering from Blue360° Media. The *New Mexico Statutes Annotated 1978* will also be available in downloadable mobile app or ebook formats for use in areas of limited internet availability.

E-book versions of the print *New Mexico Rules Annotated*, *Criminal and Traffic Law and Taxation Manuals*, along with additional e-books that Blue360° Media envisions, will be offered soon with notation and other features available only through digital publishing.

Now, through Blue360° Media, you may customize your order, pay online and maintain your customer account. Visit <https://www.nmcompcomm.us/books-ebooks/> or call 1-844-599-2887 for personal service.

### 2019 State Bar Annual Meeting—See you there!

Join Ivan Mokanov, Lexum President, and me on Friday, August 2 at 11:15 a.m. for an hour program focused on live demonstrations of the new features and benefits of **NMOneSource.com**. Lexum will host an exhibit that showcases not only **NMOneSource.com** but also its newest technologies and capabilities for information publishing. Blue360° Media is the State Bar's Presenting Sponsor with an exhibit of the Commission's publications in various formats. Learn about e-books, mobile apps and product bundles to customize to your preferences and individual needs. The Compilation Commission will be sponsoring the Bar's popular Annual Meeting app.

As Governor Michelle Lujan Grisham said, "Equal access to the law is an unassailable right of every New Mexico citizen. I'm proud we will lead the country in the breadth and depth of free online access to laws and court opinions. As a practical matter, this change also represents a genuine cost-savings to our state agencies while providing them with the tools to better assist the public they serve."

"The public deserves easy access to the law, and judges need the most current information when making decisions. With these changes, all lawyers and self-represented litigants will have the same unfettered access to the most up-to-date versions of New Mexico's statutes and rules and will be able to download court-approved forms without charge," Supreme Court Chief Justice Judith Nakamura said. "The Supreme Court strongly supports the Compilation Commission's move to free and accessible online delivery of New Mexico's statutes, rules and appellate court opinions and the Commission's recognition of the need for printed materials."

"The New Mexico Legislature relies exclusively on the official compilation of laws published by the New Mexico Compilation Commission. The reasons are clear and convincing. There is only one official compilation of annotated statutes. The Commission goes the extra mile to serve lawyers and judges by updating **NMOneSource.com** with new or amended laws on their effective dates and publishes relevant case annotations by its New Mexico distinguished lawyer editor each month. There is only one official body of appellate case law and court rules, also updated on their effective dates. Other sources may be reputable, but no other source carries the distinguished caliber of the official," explains Raúl E. Burciaga, Director of the New Mexico Legislative Council Service.

The New Mexico Compilation Commission is proud to provide this public service to the legal community. Should you have comments or questions, email Brenda Castello, Executive Director, of the New Mexico Compilation Commission at [brenda.castello@nmcompcomm.us](mailto:brenda.castello@nmcompcomm.us) or call at (505) 827-4821.



**New Mexico**  
**Compilation Commission**  
Official Legal Publisher of State 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 April 26, 2019

### PUBLISHED OPINIONS

|              |                               |        |            |
|--------------|-------------------------------|--------|------------|
| A-1-CA-35888 | Los Alamos Nat v. G Velasquez | Affirm | 04/25/2019 |
|--------------|-------------------------------|--------|------------|

### UNPUBLISHED OPINIONS

|              |                                |                |            |
|--------------|--------------------------------|----------------|------------|
| A-1-CA-34704 | State v. E Jasper              | Affirm         | 04/23/2019 |
| A-1-CA-37362 | CYFD v. Dustin G               | Affirm         | 04/23/2019 |
| A-1-CA-35146 | R Gurule v. Board of Education | Reverse/Remand | 04/25/2019 |
| A-1-CA-35752 | State v. D Mateo               | Affirm         | 04/25/2019 |
| A-1-CA-36361 | R Murrietta v. W Marable       | Affirm         | 04/25/2019 |
| A-1-CA-37327 | CYFD v. Nicole C               | Reverse/Remand | 04/25/2019 |
| A-1-CA-37620 | State v. A Otero               | Affirm         | 04/25/2019 |

## Effective May 3, 2019

### PUBLISHED OPINIONS

|              |                                  |                      |            |
|--------------|----------------------------------|----------------------|------------|
| A-1-CA-35208 | State v. D Gonzales              | Affirm/Vacate/Remand | 05/02/2019 |
| A-1-CA-35474 | Belen Consolidated v. Valencia   | Reverse/Remand       | 05/02/2019 |
| A-1-CA-37081 | G Nash v. Board of Commissioners | Affirm               | 05/02/2019 |
| A-1-CA-37442 | Human Services v. H Toney        | Affirm/Remand        | 05/02/2019 |

### UNPUBLISHED OPINIONS

|              |   |                |            |
|--------------|---|----------------|------------|
| A-1-CA-37425 | State v. W Whitehead                        | Reverse/Remand | 04/29/2019 |
| A-1-CA-37855 | State v. P Littlefield                      | Affirm         | 04/29/2019 |
| A-1-CA-35569 | Z Nauman v. D Mather                        | Affirm         | 04/30/2019 |
| A-1-CA-35619 | State v. S Teague                           | Reverse/Remand | 04/30/2019 |
| A-1-CA-37652 | T Bloom v. M Boadwine                       | Affirm/Remand  | 04/30/2019 |
| A-1-CA-37689 | K Cowley v. W Cowley                        | Vacate/Remand  | 05/01/2019 |
| A-1-CA-37190 | Community 1st Bank Las Vegas v. C Gutierrez | Affirm         | 05/02/2019 |
| A-1-CA-37214 | Wells Fargo Bank v. R Dordoni               | Affirm         | 05/02/2019 |

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  
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## CLERK'S CERTIFICATE OF DISBARMENT

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## CLERK'S CERTIFICATE OF SUSPENSION

---

Effective May 2, 2019:

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**Tamra F. Karl**  
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## CLERK'S CERTIFICATE OF ADMISSION

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On April 29, 2019:

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As of October 20, 2018:  
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**CLERK'S CERTIFICATE OF WITHDRAWAL AND CHANGE OF ADDRESS**

Effective April 26, 2019:  
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**CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS**

Effective February 1, 2019:  
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Effective March 1, 2019:  
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Effective March 29, 2019:  
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Effective April 1, 2019:  
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# 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 May 15, 2019

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## PENDING PROPOSED RULE CHANGES OPEN FOR COMMENT:

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*There are no proposed rule changes open for comment.*

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## RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2019 NMRA:

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Effective Date

### Rules of Civil Procedure for the District Courts

- |   |            |
|---|------------|
| 1-004.1 Guardianship and conservatorship proceedings; process   | 01/14/2019 |
| 1-140 Guardianship and conservatorship proceedings; mandatory use forms   | 01/14/2019 |
| 1-142 Guardianship and conservatorship proceedings; proof of certification of professional guardians and conservators | 07/01/2019 |

### Civil Forms

|                                    |            |
|------------------------------------|------------|
| 4-999 Notice of hearing and rights | 01/14/2019 |
|------------------------------------|------------|

### Local Rules for the Sixth Judicial District Court

|                                      |            |
|--------------------------------------|------------|
| LR6-213 Electronic filing authorized | 09/01/2019 |
|--------------------------------------|------------|

### Local Rules for the Twelfth Judicial District Court

|                                       |            |
|---------------------------------------|------------|
| LR12-201 Electronic filing authorized | 09/01/2019 |
|---------------------------------------|------------|

### Local Rules for the Thirteenth Judicial District Court

|                                       |            |
|---------------------------------------|------------|
| LR13-208 Electronic filing authorized | 09/01/2019 |
|---------------------------------------|------------|

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>.



# Advance Opinions

<http://www.nmcompcomm.us/>

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

**Opinion Number: 2019-NMCA-008**

No. A-1-CA-35621 (filed October 22, 2018)

NEW MEXICO MILITARY INSTITUTE,  
Plaintiff-Appellee,

v.

NMMI ALUMNI ASSOCIATION, INC.,  
a New Mexico non-profit corporation,  
Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY**

Jane Shuler Gray, District Judge

RICHARD E. OLSON  
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Roswell, New Mexico  
for Appellee

JEFFREY A. DAHL  
MICHAEL G. SMITH  
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Albuquerque, New Mexico  
for Appellant

## Opinion

**Emil J. Kiehne, Judge**

{1} The New Mexico Military Institute (NMMI) sued the New Mexico Military Institute Alumni Association, Inc. (the Association), claiming that the Association breached its contractual obligation to maintain a proper financial accounting system and also alleging that the Association was NMMI's agent. NMMI asked that the Association be made to turn over donations it received while acting as NMMI's agent. After a bench trial, the district court found that the Association had not breached its contractual obligations to NMMI, but it also found that the contract between the Association and NMMI was terminable at will, that the Association was NMMI's agent, and that NMMI had legally terminated the contract and revoked the Association's authority to act as its agent. Based upon its latter findings, the district court imposed a constructive trust over donations that the Association received while acting as NMMI's agent.

{2} The Association appeals, claiming that: (1) NMMI lacked standing to bring its claims against the Association; (2) the district court's ruling that the contract was terminable at will should be reversed

because NMMI did not raise that theory until after trial; (3) the district court's agency determination was not supported by substantial evidence; (4) imposition of a constructive trust was improper; and (5) requiring the Association to turn over donations that it received to NMMI violated the donors' intent. We hold that NMMI had standing, we affirm the district court's agency finding and the imposition of the constructive trust, and we reject the Association's claim that the constructive trust violates the donors' intent. Because we conclude that NMMI had a right to terminate its agency relationship with the Association regardless of the existence of the contract between them, we do not reach the questions of whether the contract was terminable at will or whether NMMI appropriately terminated the contract.

### BACKGROUND

{3} NMMI is a state-funded school that provides students with up to four years of high school and two years of junior college instruction. The Association is a non-profit corporation whose purpose, as stated in its articles of incorporation, is "to promote the interest and welfare of [NMMI]. . . ; to afford a permanent means of contact between [NMMI] and its alumni; to create, establish and maintain scholarships and student loan funds; and to collect and administer trust funds and endowments for

the use and benefit of [NMMI]; and to do generally any and all things which may be deemed advisable, necessary or desirable in the interest of the [NMMI], its students and faculty." The Association's bylaws also describe its purposes as being, among other things, "[t]o promote the interest and welfare of the [NMMI,]" to "foster[] lifelong connections between its Alumni and [NMMI,]" and to "help establish and maintain scholarships, in conjunction with the New Mexico Military Institute Foundation (the NMMI Foundation), for deserving cadets to attend [NMMI.]"

{4} The Association was incorporated in 1964 and was originally staffed by NMMI employees. In 1993 the Association and NMMI entered into a Memorandum of Agreement (MOA), and the staffers handling alumni communication and coordination left the employment of NMMI and became employees of the Association. The employees' duties did not change. NMMI continued to provide office space and utilities to the Association free of charge. The Association staff also used NMMI phone lines and email servers, and used "@nmimi.edu" email addresses.

{5} The Association and NMMI entered into a series of agreements between 1993 and 2013. The first was the 1993 MOA referenced above. In 2001 the Association and NMMI entered into a new MOA (the 2001 MOA). They entered into a third MOA in 2012 (the 2012 MOA). The 2001 MOA contained a number of affirmative covenants requiring the Association to do a number of things unless excused in writing by NMMI. These included maintaining the Association's status as a 501(c)(3) corporation; maintaining the composition of the membership of its board of directors in accordance with its bylaws; employing an executive secretary selected by its board of directors; and retaining advisory and other professional services as deemed necessary to perform its primary function of supporting NMMI; serving as the primary repository of records relating to NMMI alumni; providing NMMI publications to alumni, cadets, and patrons; maintaining a database with continued updates of all alumni to be used by NMMI for fundraising programs; and receiving donations and disbursing those funds in conformity with any conditions imposed by the donors and in accordance with NMMI rules and regulations governing financial aid to cadets.

{6} The 2012 MOA contained the same affirmative covenants. The 2012 MOA also contained language stating that NMMI had reviewed the Association's articles and bylaws and "found them acceptable" and that any proposed amendments would be provided to NMMI for consideration and comment. All three MOAs contained provisions obligating the Association to manage, document and track its financial activity and provide financial information to NMMI. The 1993 and 2001 MOAs contained language stating that the Association was not NMMI's agent. The 2012 MOA, however, did not contain this language and did not say anything about whether an agency relationship existed between the parties.

{7} NMMI, the Association, and the NMMI Foundation, a non-profit foundation that provides primarily financial support to NMMI, provided financial support to the Association, and holds scholarship funds for students of NMMI, also entered into an "Alliance Agreement" to coordinate fundraising efforts. The Alliance Agreement outlined the duties of each party relating to fundraising. This agreement required that the Association supply an annual budget to the Alliance Committee, a group made up of representatives from the NMMI Foundation, NMMI, and the Association for approval.

{8} The Association held funds given to it by donors for the purpose of providing scholarships to NMMI students. Some of these funds had donor-imposed restrictions. The scholarship committee, which consisted of representatives from NMMI, the Association, and the NMMI Foundation, met each February to award scholarships from those funds. Students seeking scholarships would contact NMMI's financial aid office, and if a scholarship was awarded to a student using the Association's funds, NMMI would bill the Association at the end of the academic year.

{9} In July 2009, NMMI hired a new president and superintendent, Major General Jerry Grizzle. General Grizzle reviewed the agreements between NMMI and the Association that were then in force, including the 2001 MOA and the Third Amended Alliance Agreement. General Grizzle believed that the 2001 MOA was outdated and wanted to update it to reflect "current processes, procedures, titles." General Grizzle also became concerned about the Association's operations and believed it was "in violation of every condition" in the

2001 MOA. Beginning in 2010, General Grizzle had discussions with successive board presidents of the Association about his concerns. General Grizzle's primary concern was his belief that the Association was not complying with the MOA's provisions governing financial accounting and management of its finances. These efforts resulted in the parties signing the 2012 MOA.

{10} The Association, however, still did not provide any audited financial statements to NMMI, and it appeared to General Grizzle that the Association was not likely to file a timely, audited tax return. Thus, on February 21, 2013, NMMI's Board of Regents sent a letter to the Association stating that it intended to terminate the 2012 MOA because the Association had not maintained an adequate financial accounting system and had not provided NMMI with a copy of its annual audit, and asking it to cure these problems within thirty days. The Association did not respond to this letter. In April 2013, NMMI sent a final notice to the Association that it was terminating the relationship between NMMI and the Association. On this same date, NMMI removed the Association from its offices on NMMI property.

{11} NMMI brought suit against the Association in June 2013 claiming that the Association breached its contractual obligation to maintain an adequate financial accounting system, and that the Association was in possession of funds that it received on behalf of NMMI while acting as NMMI's agent. It asked the district court to: freeze the Association's accounts; prohibit the Association from using NMMI's name, logos, and trademarks; impose a constructive trust on funds in the Association's custody; appoint a receiver; order the Association to account for funds it received while an agent of NMMI; and order the Association to transfer all funds received for the benefit of NMMI or its cadets to an appropriate custodian.

{12} The district court held a one-week bench trial. Most of the evidence and argument focused on the Association's allegedly inadequate accounting system, but the parties also tried the issue of whether the Association was NMMI's agent. After the trial, the district court issued an initial set of findings of fact and conclusions of law, finding that the Association acted as NMMI's agent, that the Association did not breach the 2012 MOA, and that NMMI had improperly terminated the 2012 MOA. The district court then issued a

judgment and order, imposing a constructive trust over funds in the Association's custody, and stating that because the Association was NMMI's agent, it had a duty to convey these funds to NMMI or the NMMI Foundation if NMMI so directed. After post-trial motions filed by both parties, the district court issued supplemental findings of fact and conclusions of law, reiterating that the Association had acted as NMMI's agent, and stating that "NMMI, as the principal, [could] terminate the Association's authority to act as its agent for any reason." The district court also found that the 2012 MOA was terminable at will. The court issued an amended judgment reiterating its agency finding and the creation of a constructive trust over funds in NMMI's custody. The Association appeals from the district court's ruling and its imposition of a constructive trust.

## DISCUSSION

### A. NMMI had standing to sue the Association

{13} New Mexico's standing doctrine requires litigants to allege that "(1) they are directly injured as a result of the action they seek to challenge[,] (2) there is a causal relationship between the injury and the challenged conduct[,] and (3) the injury is likely to be redressed by a favorable decision." *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 1, 144 N.M. 471, 188 P.3d 1222. Whether a party has standing presents a question of law that we review de novo. *Id.* ¶ 6.

{14} Here NMMI alleged in its complaint that the Association acted as its agent, that "[a]lumni and others have made numerous and substantial monetary contributions to the Association on the condition, both express and implied, that those funds directly benefit NMMI," and that because the relationship between NMMI and the Association had been terminated, the Association should not be allowed to retain control over funds that were intended to benefit NMMI. These claims allege an injury to NMMI in the form of loss of access to and control over funds intended to support its students and programs.

{15} NMMI further alleged that it had demanded the return of the funds, but that the Association had not responded to the demand, and apparently could not or would not act on the demand because its board had split into two factions with contrary aims. These allegations were sufficient to allege a causal connection between NMMI's loss of access to and control over the funds and the Association's

unwillingness or inability to return the funds to NMMI, despite its obligation to do so as NMMI's agent. *See, e.g., Moser v. Bertram*, 1993-NMSC-040, ¶ 6, 115 N.M. 766, 858 P.2d 854 (stating that an "agent stands in a fiduciary relationship with his or her principal, a position of great trust and confidence commanding the utmost good faith"); Restatement (Third) of Agency § 8.01 (Am. Law Inst. 2006) ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."). Finally, a favorable decision would redress NMMI's alleged injury by giving it control over funds that the Association had raised on NMMI's behalf.

{16} The Association claims, however, that NMMI failed to prove that it suffered any injury because the district court rejected NMMI's claim that it violated the 2012 MOA. The Association acknowledges NMMI's argument that as its agent, "the Association must return property that it can no longer rightfully possess after the termination of the agency relationship[.]" but asserts that NMMI lacks standing because: (1) NMMI failed to prove that it suffered any injury; (2) NMMI failed to offer evidence "that would suggest that the Association was not the proper party to hold and administer the funds under its control"; (3) "no language in the MOA . . . suggest[s] that [NMMI] is the proper owner or trustee of the Association's funds"; and (4) "[t]here is also no law on point that holds that an agent must disgorge its own property to a principal absent any breach of fiduciary duty."

{17} These arguments lack merit. The premise of the Association's arguments is that NMMI needed to demonstrate that the Association committed some breach of duty, or caused some harm, to justify NMMI's decision to terminate the agency relationship. But as we will explain at further length in response to the Association's substantial evidence claim, NMMI was entitled to terminate the Association's status as its agent for any reason or no reason. The Association was therefore obligated to turn over to NMMI all donations that it had collected on NMMI's behalf, even if its conduct was faultless. Here, NMMI sufficiently demonstrated that it had standing by alleging and proving that the Association was its agent, that the agency relationship had been terminated, and that nevertheless the Association would not or could not turn over to NMMI the donations that it had collected on NMMI's

behalf. We therefore conclude that NMMI had standing to pursue its claims against the Association. *See Am. Fed'n of State, Cty. & Mun. Employees, Council 18 v. Bd. of Cty. Comm'rs*, 2016-NMSC-017, ¶ 32, 373 P.3d 989 (holding that injury-in-fact requirement to obtain standing is satisfied where the plaintiff "show[s] that [it] is imminently threatened with injury, or, put another way, that [it] is faced with a real risk of future injury, as a result of the challenged action or statute" (internal quotation marks and citation omitted)).

**B. The district court's determination that the Association was acting as NMMI's agent is supported by substantial evidence**

{18} The Association next claims that substantial evidence does not exist to support the district court's finding that the Association acted as NMMI's agent, because there was no evidence that NMMI exercised the degree of control over the Association required to support the existence of an agency relationship. We disagree.

{19} "On appeal, we will not disturb a finding of agency if [it is] supported by substantial evidence." *Gallegos v. Citizens Ins. Agency*, 1989-NMSC-055, ¶ 17, 108 N.M. 722, 779 P.2d 99. "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 12, 329 P.3d 658 (internal quotation marks and citation omitted). "[W]hen considering a claim of insufficiency of the evidence, the appellate court resolves all disputes of facts in favor of the successful party and indulges all reasonable inferences in support of the prevailing party." *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177.

{20} "An agent is one authorized by another to act on his behalf and under his control." *Hansler v. Bass*, 1987-NMCA-106, ¶ 28, 106 N.M. 382, 743 P.2d 1031. Whether an agency relationship exists is a question of fact to be determined "from all of the facts and circumstances of the case, together with the conduct and communications between the parties." *Brown v. Cooley*, 1952-NMSC-083, ¶ 8, 56 N.M. 630, 247 P.2d 868. The existence of an agency relationship does not depend on the name that the parties use to describe their relationship. *See Chevron Oil Co. v. Sutton*, 1973-NMSC-111, ¶ 4, 85 N.M. 679, 515 P.2d 1283 (stating that "the majority rule is that the manner in which the parties

designate a relationship is not controlling, and if an act done by one person on behalf of another is in its essential nature one of agency, the one is the agent of the other, notwithstanding he is not so called").

{21} Here, the Association does not dispute that it acted on NMMI's behalf, but claims that NMMI did not exercise sufficient control over the Association to render the Association its agent. In determining whether an agency relationship exists, the "principal consideration" is "the control, or right to control" the agent's conduct. *Shaver v. Bell*, 1964-NMSC-255, ¶ 16, 74 N.M. 700, 397 P.2d 723. The principal, however, need not control, or have a right to control, all aspects of the agent's activities. "Thus, a person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgement." Restatement (Third) of Agency § 1.01 cmt. c (Am. Law Inst. 2006).

{22} In New Mexico, our case law has not required a particularly invasive level of control to support a finding that a principal-agent relationship exists. For example, in *Shaver*, a plaintiff who was injured after slipping in a puddle of gasoline at a service station sued both the actual operators of the station (Bass and Hendrix) and the man who had leased the station and sold gasoline to them (Bell) for negligence. Bell argued that Bass and Hendrix were not his agents because he could not control their operation of the gas station, and he obtained summary judgment on that basis. *Shaver*, 1964-NMSC-255, ¶ 1. Our Supreme Court reversed, holding that a dispute of fact existed about whether Bass and Hendrix were Bell's agents, although Bell did not control their day-to-day activities, where: (1) Bell provided "certain specified equipment" to the station; (2) Bell provided advertising for the station and paid its utilities; (3) Hendrix and Bass agreed to purchase gasoline sold by Bell; (4) Bell employed a "[s]tation [s]upervisor" to check on the station every week or two; and (5) Bell "sometimes suggested the price at which the gasoline should be sold, as well as ways to increase the business of the station, [although] these were suggestions only." *Id.* ¶¶ 3, 25-26. Similarly, in *Chevron Oil*, our Supreme Court held that an issue of fact existed about whether Chevron, who had leased a gas station to a man named Sharp, but did not control his day-to-day operations, was in a principal-agent relationship where

Chevron required Sharp to promote Chevron's products, to remain open for certain hours, and to meet minimum standards of cleanliness and order, and where Chevron provided Sharp with gasoline, advertising, and uniforms, and allowed his customers to pay with Chevron credit cards. 1973-NMSC-111, ¶ 7. And in *Gallegos*, our Supreme Court held that an insurance agency was in a principal-agent relationship with an insurance salesman where the salesman had access to the insurance agency's office building and rate books, solicited business for the insurance agency, and received price information from the insurance agency to relay to his customers. 1989-NMSC-055, ¶ 18.

{23} We conclude that substantial evidence supported the district court's finding that NMMI exercised sufficient control over the Association to place them in a principal-agent relationship. First, there was abundant evidence to support the existence of a close relationship between NMMI and the Association, and that the donations it solicited were for the benefit of NMMI and its students. The district court found that "[t]he Association, as an affiliated entity, has provided support to NMMI by raising funds on behalf of NMMI that were intended to benefit NMMI and its cadets[.];" that "[t]he Association solicited donations on behalf of NMMI[.];" that "[o]n behalf of NMMI, the Association created and established endowments, including those for scholarships, intended to benefit [the Association]"; and that the Association "solicited and raised funds to promote and help fund NMMI's annual homecoming festivities," to "offset and support the costs of various NMMI programs and cadet activities[.]" and to "create and establish professorial endowments at NMMI." All three MOAs, the Association's by-laws, and the Association's articles of incorporation described the Association's purposes as promoting the interest and welfare of NMMI and collecting and administering trust funds and endowments for the use and benefit of NMMI. The 2001 and 2012 MOAs specified that the Association would serve as the primary repository of records relating to alumni for NMMI. The Association's scholarship funds were solicited on behalf of NMMI's students.

{24} There was also substantial evidence of NMMI's power to control the Association's fundraising activities. The district court found that as an "affiliated entity with NMMI, the Association has been permitted to use the name 'NMMI'

in its corporate title and allowed the use of NMMI's name and marks in its letterhead"; that "[u]ntil NMMI declared the [2012 MOA] to be terminated, the Association's office was located on the campus of NMMI"; up until the 2012 MOA, all previous MOAs stated that the Association was not an agent of NMMI; and that "[a]ll three MOAs required the Association to undertake several commitments[.]" including the maintenance of an adequate financial accounting system and submission to annual audits. Any changes to the Association's bylaws and its articles of incorporation required NMMI approval. The 2001 and 2012 MOAs also required the Association to do a number of things, "unless excused by [NMMI] in writing," including maintaining its existence as a tax-exempt organization, employing an executive secretary, organizing its staff and retaining advisory and other professionals services as it deemed necessary." These provisions indicate a level of control on the part of NMMI, as they outline the basic structure and organization that the Association was to have and make clear where the Association had authority to exercise its own professional discretion.

{25} The 2012 MOA also required the Association to provide NMMI publications to alumni, provide and maintain a database with continued updates of all alumni, and to receive and disburse scholarship funds in conformity with all conditions imposed by the donors and in accordance with NMMI rules governing financial aid to cadets. Students at NMMI had to apply for Association-administered scholarships through NMMI's financial aid office, and the Association provided the scholarship funds for students to NMMI.

{26} This evidence established that NMMI exercised at least as much, if not more, control over the Association as did the principals in *Shaver*, *Chevron Oil*, and *Gallegos*. To be sure, the Association pointed to contrary evidence, such as the testimony of its past president, John Phinizy, and its former executive secretary, David Romero, that NMMI did not control the Association's actions; NMMI's audited financial statements, which appeared to disclaim any ability to control the Association's daily operations; and statements in the 1993 and 2001 MOAs that explicitly disclaimed a principal-agent relationship between NMMI and the Association. But on substantial evidence review, "[t]he question is not whether substantial evidence exists to support the opposite

result, but rather whether such evidence supports the result reached." *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 41, 146 N.M. 853, 215 P.3d 791 (internal quotation marks and citation omitted). Having concluded that the evidence was sufficient to support the district court's finding that the Association acted as NMMI's agent, we affirm that finding.

**C. NMMI had the power to terminate its agency relationship with the Association, regardless of whether the 2012 MOA was terminable only for cause, and the district court's imposition of the constructive trust was proper**

{27} The Association vigorously argues that NMMI could only terminate the 2012 MOA for cause, and given that the district court found that the Association did not violate the 2012 MOA, NMMI suffered no injury that would entitle it to end the parties' relationship or justify the imposition of a constructive trust requiring that it transfer the scholarship funds in its possession to NMMI. The Association also argues that the district court's post-trial finding that the 2012 MOA was terminable at will cannot justify the order requiring it to turn over its scholarship funds to NMMI, and should be reversed, because NMMI did not raise the terminable-at-will theory until after trial concluded. Moreover, the Association argues that even if the district court's agency finding was supported by the evidence, that "would not justify the transfer of funds to [NMMI]." The Association therefore asks this Court to reverse the district court's judgment and "order the immediate return of the funds" to the Association. In response, NMMI argues that because the Association was its agent, it therefore could end its agency relationship regardless of whether the 2012 MOA was terminable only for cause, and even if the Association complied with all of its obligations to NMMI. Whether NMMI as principal could terminate its agency relationship with the Association without cause presents a question of law that we review de novo. *See Bank of N.Y. Mellon v. Lopes*, 2014-NMCA-097, ¶ 6, 336 P.3d 443 ("We review issues of law de novo.").

{28} Although the parties have not cited any New Mexico cases that have directly addressed the issue, the overwhelming, if not unanimous, weight of authority is that a principal has the power to terminate an agency relationship at any time and for any reason, even if the principal and agent

have signed a contract providing that their relationship is irrevocable or may be terminated only for cause. The Restatement (Second) of Agency § 118 (Am. Law Inst. 1958) states that “[a]uthority terminates if the principal or the agent manifests to the other dissent to its continuance[.]” and Comment b to this section explains that “[t]he principal has power to revoke and the agent has power to renounce, although doing so is in violation of a contract between the parties.” A principal or agent who terminates the relationship in violation of such a contract may still be subject to liability to the other party for breach of contract. Restatement (Second) of Agency § 118 cmts. b, c. There is an exception to this rule where the agent’s authority is a “power given as security[.]” Restatement (Second) of Agency § 138 (Am. Law Inst. 1958), but that does not apply here.

{29} The Restatement (Third) of Agency § 3.10 (Am. Law Inst. 2006) similarly states that “[n]otwithstanding any agreement between the principal and agent, an agent’s actual authority terminates . . . if the principal revokes the agent’s actual authority.” Comment b to this section also states that the principal’s power to revoke an agent’s authority “is not extinguished because an agreement between principal and agent states that the agent’s actual authority shall be irrevocable or shall not be revoked except under specified circumstances[.]” although exercising that power “may constitute a breach of contract.” Comment b further explains that “[t]he rationale for the power to revoke . . . is that agency is a consensual relationship.” The power to revoke is justified because an agent with authority “holds ongoing power to act with adverse consequences for the principal[.]” and thus a principal should not be compelled to accept the services of an agent that has lost the principal’s confidence. Restatement (Third) of Agency § 3.10 cmt. b. The principal may, however, still be liable for breach of contract if it has wrongfully terminated an agent’s authority (except that specific performance is not a remedy available to the agent). *Id.*

{30} Case law from other jurisdictions confirms application of these general principles, and the Association has not cited any authority to the contrary. *See, e.g., Gov’t Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 95 F.3d 291, 300 (3d Cir. 1996) (stating that agency relationship is ordinarily terminable even if the parties agreed the relationship could not be terminated); *Woolley v. Embassy*

*Suites, Inc.*, 278 Cal. Rptr. 719, 724 (Ct. App. 1991) (stating that “[i]t is a cardinal principle of agency law that a principal who employs an agent always retains the power to revoke the agency”); *Ireland v. Wynkoop*, 539 P.2d 1349, 1362 (Colo. App. Ct. 1975) (reversing portion of injunction that purported to prevent principal from terminating agent’s authority, noting that principal has the power to terminate an agency relationship at any time, even in breach of a contract).

{31} Because the district court found that the Association was NMMI’s agent (a finding that we have already held was supported by substantial evidence), it follows that NMMI could terminate the Association’s authority to act as its agent without cause, even if the 2012 MOA could only be terminated for cause, and despite the district court’s finding that the Association did not breach the 2012 MOA. While we are sympathetic with the Association’s protests that it did not breach any duty to NMMI, mismanage any of its funds, or give NMMI any cause to terminate their relationship, the law is clear that NMMI needed no cause to terminate the Association’s status as an agent. The Association further argues that allowing NMMI to terminate their relationship without cause violates New Mexico law requiring the enforcement of contracts, because the 2012 MOA only allows termination for cause. But as we have stated, the law allows a principal to terminate an agent’s authority to act regardless of any agreement to the contrary. If the Association believed that NMMI breached the 2012 MOA by terminating the relationship, the Association could have asserted a breach of contract counterclaim in the district court, but it did not do so.

{32} Because NMMI had the power to terminate its agency relationship with the Association, it follows that the district court properly imposed a constructive trust requiring the Association to turn over funds it solicited on NMMI’s behalf while acting as NMMI’s agent. “The imposition of a constructive trust is an equitable remedy . . . within the broad discretion of the district court.” *In re Estate of Duran*, 2003-NMSC-008, ¶ 35, 133 N.M. 553, 66 P.3d 326. “A constructive trust will be imposed to prevent unjust enrichment that would result if the person having the property were permitted to retain it.” *Id.* ¶ 34 (internal quotation marks and citation omitted).

{33} As an agent, the Association owed fiduciary duties to its principal, NMMI. *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 40, 143 N.M. 142, 173 P.3d 749 (stating that “agency is a *fiduciary* relationship, whereby the agent is required to act only in the interest of the principal”). As part of its fiduciary duty, the Association was required to respect NMMI’s interest in the donations that it solicited on NMMI’s behalf. *See* Restatement (Third) of Agency § 8.12 (Am. Law Inst. 2006) (stating that an agent has a duty “not to deal with the principal’s property so that it appears to be the agent’s property” and “to keep and render accounts to the principal of money or other property received or paid out on the principal’s account”). Once NMMI terminated the Association’s status as an agent, it was required to turn over those funds to NMMI. *See* Restatement (Third) of Agency § 8.05 cmt. b (Am. Law Inst. 2006) (“A former agent who continues to possess property of a principal has a duty to return it and to comply with . . . management and record-keeping rules[.]”). It would therefore have been unjust for the district court to allow the Association to retain those funds in the face of NMMI’s demand for their return. The district court therefore acted within its discretion by imposing the constructive trust.

**D. The Association’s claim that the district court’s imposition of a constructive trust violated the donors’ intent and New Mexico testamentary law lacks merit**

{34} The Association’s final claim is that the district court’s constructive trust violated the intent of donors who made testamentary gifts to the Association to be administered by the Association. We hold that this claim is meritless.

{35} As discussed above, the district court’s imposition of the constructive trust was based on its finding that the Association was NMMI’s agent, and on its conclusion that NMMI, as principal, was entitled to terminate the agency relationship and require the Association, as its agent, to turn over all funds that it received while acting as NMMI’s agent. The Association claims that it is nevertheless entitled to keep the funds that it received and solicited on NMMI’s behalf because the donors intended that the Association should be in charge of administering and distributing those funds. In support of this claim, the Association cites *In re Cable Family Trust*, 2010-NMSC-017, 148 N.M. 127, 231 P.3d 108 and *In re Estate*

of *Seymour*, 1979-NMSC-069, 93 N.M. 328, 600 P.2d 274 for the legal principle that a donor “may do as he or she wishes with his or her money” and that courts should therefore strive to give effect to a donor’s intent. The Association, relying on *Schwarzkopf v. American Heart Association*, 541 So. 2d 1348 (Fla. Dist. Ct. App. 1989) and *National City Bank of Michigan/Illinois v. Northern Illinois University*, 818 N.E.2d 453 (Ill. App. Ct. 2004), also argues that a court “has no authority to alter the terms of a decedent’s will, even if there is evidence that there is a more cost effective and efficient means of operation.”

{36} The Association’s arguments, however, do not grapple with the district court’s actual ruling or demonstrate that it was wrong. We have no quarrel with the principle that courts should attempt to give effect to the intent of donors or testators with

respect to the disposition of their assets, or with the Association’s reliance on *Cable* and *Seymour* for that general proposition. But the district court found that the funds at issue here were donated to the Association in its capacity as an agent for NMMI, and that NMMI was therefore entitled to demand that they be turned over to it. The Association has cited no authority for the proposition that where an agent receives or solicits funds on behalf of its principal, it is entitled to keep those funds, even in the face of a demand from its principal for their return, merely because the donor intended that the agent be the one to administer the funds. Accordingly, the Association has failed to demonstrate that the district court erred. See *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (“We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was

unable to find any supporting authority.”). {37} Similarly, we also have no reason to dispute the principle that a court may not modify a will or gift merely because there’s a more efficient way of distributing the funds. But the district court’s decision was not based on efficiency concerns, and the Association’s argument and authority on this point are therefore irrelevant. Accordingly, we reject the Association’s challenge to the district court’s order directing it to turn over funds that it received while acting as NMMI’s agent.

#### CONCLUSION

{38} We affirm the district court’s judgment.

{39} **IT IS SO ORDERED.**

**EMIL J. KIEHNE, Judge**

#### WE CONCUR:

**J. MILES HANISEE, Judge**

**JULIE J. VARGAS, Judge**

From the New Mexico Court of Appeals

**Opinion Number: 2019-NMCA-009**

No. A-1-CA-35424 (filed October 22, 2018)

STATE OF NEW MEXICO,  
Plaintiff-Appellant,  
v.  
EMILY A. RUFFIN,  
Defendant-Appellee.

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

Jacqueline D. Flores, District Judge

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**Opinion**

**J. Miles Hanisee, Judge**

{1} The State appeals the district court's pretrial ruling prohibiting one of its witnesses from testifying as an expert. We affirm in part, reverse in part, and remand for further proceedings.

**I. BACKGROUND**

{2} At approximately 7:30 p.m. on October 18, 2013, Deputy Leonard Armijo responded to a report of a two-vehicle accident involving a Ford Bronco and Toyota 4Runner. Upon arriving at the scene, Deputy Armijo observed a Ford Bronco lying on its side with a deceased individual inside. Defendant Emily A. Ruffin was standing in front of the Ford Bronco and told Deputy Armijo she was the driver of the Toyota 4Runner. She was in a hurry to pick up a friend from the airport when her phone rang and fell to the floor. When she looked at the floor, the Ford Bronco "swerved and cut in front of her, which had caused the crash." Deputy Armijo detected an odor of alcohol while talking with Defendant, prompting him to call a DWI unit to his location. Deputy Johan Jareño responded and after investigating Defendant for DWI, placed her under arrest. Defendant was charged, *inter alia*, with homicide by vehicle and driving

while under the influence of intoxicating liquor or drugs.

{3} A week before trial was scheduled, the State, for the first time, notified the district court and defense counsel that it intended to qualify Deputy Armijo as an expert witness in, as the State later clarified, "crash investigations." The district court neither ruled on the admissibility of Deputy Armijo's proposed expert testimony, nor accepted Deputy Armijo as an expert witness under Rule 11702 NMRA (providing the requirements for a witness to be qualified and give an opinion as an expert).

{4} Four days before trial was scheduled, Defendant filed a motion in limine, seeking to prohibit Deputy Armijo from testifying as an expert witness on the issue of causation and in regard to accident reconstruction, and to limit his testimony to only his personal observations during his investigation of the accident scene. During the hearing on Defendant's motion, held the day before trial was scheduled, Defendant also argued that Deputy Armijo's proposed expert testimony should also be excluded under Rule 11-403 NMRA because it bore "a legitimate risk of misleading the jury."

{5} During the hearing, Deputy Armijo testified that for approximately eight years he had been assigned to the DWI Traffic Unit of the Bernalillo County Sheriff's De-

partment. In conjunction with his assignment, he attended a 240-hour, three-phase training course in crash investigations and reconstruction. As part of the first phase of training—"at-scene crash investigations"—Deputy Armijo learned how to respond to crash investigations, assist at and protect the scene, and observe points of impact, "skid marks," "yaw marks," "other debris deposited on the asphalt," and vehicles at their "final rest." During the second phase of training—"advanced at-scene crash"—he learned "airborne equations, what vehicles would become airborne[,] . . . speed analysis, crash analysis, [and] what causes vehicles to change directions." Deputy Armijo testified that to conduct a speed analysis, "[y]ou have to ascertain what's called the coefficient of friction or what is commonly referred to as the drag factor of the roadway[.]" which is determined by using a mathematical equation. During the third and final phase of training—"crash reconstruction"—Deputy Armijo learned how to reconstruct a crash, which involves observing the scene, looking at the crash damage, looking at the position of the vehicles, and looking for "any road evidence to include skid marks, [and] vehicle debris[.]" He testified this "teaches you where to locate the area of impact, where the crash occurred, how it occurred, and how the vehicles sustained the damage that they've sustained."

{6} Deputy Armijo explained that while a sergeant can override his recommendation as to whether a full accident reconstruction should be conducted, he only conducts such a reconstruction when there are no independent witnesses, he has no corroborating statements from the drivers, and/or the evidence does not match with what he observes at the scene of the accident. Deputy Armijo testified that, without conducting a full reconstruction of a given accident, he is only able to form an opinion regarding:

[H]ow the vehicles came together. What contacted. What is on each of the vehicles. There's specific damage to each of the vehicles that the vehicles will sustain during the contact of the vehicles. It's basically like a jigsaw puzzle. You can put those two vehicles together. As long as the damage matches up to what the evidence shows, reconstruction wouldn't be necessary.

Deputy Armijo testified that he had investigated over five thousand crashes—three hundred eighty-seven of which involved

great bodily injury or fatality—and performed full accident reconstructions in only eleven cases. During ensuing court proceedings, he had been qualified as an expert in “crash investigations” on four prior occasions, and in “crash reconstruction” on six occasions.

{7} In this case, Deputy Armijo decided not to conduct a full accident reconstruction “because what I was looking at, it was quite obvious, it was quite a simple crash.” Deputy Armijo observed “specific damage” to the Ford Bronco’s red tail light lens, as well as to the clear head light lens of Defendant’s vehicle. He then “walked” the scene of the accident and located pieces of the vehicles’ red and clear lenses deposited on the road approximately seven or eight hundred feet from the vehicles’ resting points, which helped him locate the apparent point of impact. Although he did not see any “braking marks on either vehicle[.]” Deputy Armijo observed yaw marks, which he stated are consistent with a vehicle sliding sideways, and gouge marks, which he explained indicate a vehicle’s roof and/or metal making contact with the road.

{8} While discussing the Ford Bronco, Deputy Armijo stated it was “fairly obvious” that it had rolled over. When asked what starts a rollover, Deputy Armijo stated:

The stability of that vehicle has been compromised by another vehicle coming into contact with it. Once that vehicle has gone into the yaw marks sliding sideways, it’s inevitable that vehicle is going to roll over due to the fact that the make and model of that vehicle, the speeds, and once the rims come in contact with the pavement[.] . . . [i]t’s going to roll.

In addition to not undertaking a full accident reconstruction, Deputy Armijo did not use any mathematical formulae in conjunction with his observations and determinations regarding the accident scene, including those that would be necessary to ascertain vehicle speed.

{9} On cross examination, defense counsel asked Deputy Armijo about Defendant’s Exhibit A, Deputy Armijo’s handwritten field notes concerning the accident. Deputy Armijo admitted that he did not write speed calculations, rollover sequence calculations, or any other type of calculations in his field notes. He also admitted that he “did not perform a timeline analysis of what occurred at various points in the

crash,” take crash measurements, analyze scratch patterns on the Ford Bronco to determine how many times it rolled, measure the “distance in the roll sequence,” nor return to the scene of the accident during “daylight hours[.]” Deputy Armijo conceded he did not analyze data from the crash data recorder, and did not collect or take any daytime photographs of the “roadway fragments.” Finally, defense counsel presented Deputy Armijo with Exhibit B, the diagram of the accident created by another officer on the scene, Deputy Phil Gonzales. Deputy Armijo was unable to say whether Deputy Gonzales documented the “beginning and end of the roll sequence” or the location of the yaw marks.

{10} Following testimony, the State explained it planned to present Deputy Armijo’s expert opinion as to the cause of the crash and that, based on the yaw and gouge marks on the road and damage to the Ford Bronco, the Ford Bronco had rolled over. The district court first expressed its general skepticism with qualifying investigatory law enforcement officers as expert witnesses because they “sort of have a stake in the outcome.” It then expressed its more specific concern that Deputy Armijo was unable to articulate a methodology “to render an opinion that would be reliable to the jury[.]” and that his opinion would therefore be “more confusing to the jury than helpful.” Although the State argued that Deputy Armijo’s testimony would not be based on scientific evidence, but rather his training, skill, and knowledge, the district court ruled that Deputy Armijo would not be qualified as an expert witness under Rule 11-702. While the district court recognized that Deputy Armijo “had extra training” and that the issue of causation was “key in this case,” it nonetheless ruled that it was prohibiting Deputy Armijo from testifying as to “any conclusions” he reached regarding the cause of the accident. The district court ruled that Deputy Armijo could only testify about his personal observations.

{11} The State appealed the district court’s ruling to this Court under NMSA 1978, Section 39-3-3(B)(2) (1972), before a jury was impaneled, certifying “that this appeal is not taken for the purpose of delay, and the evidence is a substantial proof of a fact material to the proceeding.” On appeal, the State elaborates that, if qualified as an expert, Deputy Armijo would have testified based on his training and experience, opined “that Defendant’s rear-ending [of]

the vehicle traveling in front of her caused the collision[.]” educated the jury about yaw and gouge marks, and testified that he could “match the damage up” from the two vehicles based on the specific damage sustained by both vehicles. Furthermore, Deputy Armijo would testify that, in rear-ending the Ford Bronco, Defendant’s vehicle “caus[ed] it to swerve sideways, then roll an unknown number of times, a theory buttressed by the physical damage to the [Ford] Bronco’s roof support pillars and roof.”

## II. DISCUSSION

{12} Appealing the district court’s ruling, the State argues that (1) its appeal is permitted under Section 39-3-3(B)(2); (2) the district court erred in prohibiting Deputy Armijo from testifying as to any of the conclusions he reached as a result of his investigation, including those that could be deemed “lay opinions”; (3) the district court erred in prohibiting Deputy Armijo from testifying as an expert under Rule 11-702; and (4) the district court erred in excluding Deputy Armijo’s expert testimony under Rule 11-403. We address each argument in turn.

### A. The State’s Appeal Under Section 39-3-3(B)(2) Is Proper

{13} Before considering the merits of the State’s appeal, we must first resolve whether the State had a right, prior to trial, to appeal the district court’s ruling precluding Deputy Armijo from testifying as an expert witness under Rules 11-702 and 11-403. Under Section 39-3-3(B)(2), the state may appeal a district court’s order excluding evidence if it “certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.” Defendant does not challenge the State’s appeal on the basis of timeliness, *see State v. Mendez*, 2009-NMCA-060, ¶ 11, 146 N.M. 409, 211 P.3d 206 (concluding that an appeal under Section 39-3-3(B)(2) is timely when initiated before the jury is sworn), *rev’d on other grounds by* 2010-NMSC-044, 148 N.M. 761, 242 P.3d 328; rather, Defendant argues that the State’s appeal is not proper because the district court’s “ruling did not make it impossible for the State to prove an element of its case” under Section 39-3-3(B)(2).

{14} Substantively, the State’s appeal must concern a court’s suppression or exclusion of evidence that “could constitute substantial proof of a material fact[.]” *Mendez*, 2010-NMSC-044, ¶ 14. Defendant relies on this Court’s holding in *State v. Romero*,



2000-NMCA-029, 128 N.M. 806, 999 P.2d 1038, which held that the State's appeal was proper under Section 39-3-3(B)(2) because the district court's ruling "controlled the course of the presentation of material evidence in the case, given the [s]tate's theory." *Romero*, 2000-NMCA-029, ¶ 8. We explained that "[t]he excluded evidence went to the very heart of the proof required to establish an essential element of the [s]tate's case . . . [and t]he court's ruling made it impossible for the [s]tate to prove an element of its case." *Id.* ¶ 9. However, we later clarified the substantive standard: "[W]e do not read *Romero* as allowing the state to appeal only when the district court's ruling makes it impossible for the state to prove its case. Rather, we interpret *Romero* as requiring that the excluded evidence be *important or significant*, as opposed to evidence of minor consequence." *Mendez*, 2009-NMCA-060, ¶ 12 (emphasis added). We discuss whether the State's appeal is proper under the substantive standard as clarified by this Court in *Mendez*.

{15} When causation is contested in a vehicular homicide case, the state must prove beyond a reasonable doubt that the defendant's unlawful actions caused the death "in a natural and continuous chain of events[.]" *State v. Simpson*, 1993-NMSC-073, ¶ 13, 116 N.M. 768, 867 P.2d 1150 (internal quotation marks and citation omitted); see UJI 14-251 NMRA (explaining that when causation is in issue, the state must prove beyond a reasonable doubt that the defendant's act, "in a natural and continuous chain of events, uninterrupted by an outside event, resulted in the death and without which the death would not have occurred"). To prove causation, the State may, but is not required to, call an expert witness. See *State v. Platero*, 2017-NMCA-083, ¶ 18, 406 P.3d 557 (concluding that an expert was not required to prove cause of death in a vehicular homicide case); cf. *State v. Jimenez*, 2017-NMCA-039, ¶ 79, 392 P.3d 668 (noting that the state's decision "to call or not call a witness is a matter of trial tactics and strategy within the control of counsel" (internal quotation marks and citation omitted)). Defendant directly contests the State's theory that she caused the accident because she was intoxicated, asserting instead that the accident resulted from her momentary inattention when the Ford Bronco moved into her lane. Although Deputy Armijo could offer no opinion regarding whether or not Defendant was intoxicated, the State nonetheless sought to qualify him as an expert

who would testify as to the cause of the accident from the standpoint of the sequence of events in which it occurred—a point of apparent dispute which bears upon the element of causation, which the district court identified as "key in this case." Even Defendant acknowledges that the district court's ruling prohibited Deputy Armijo from testifying that Defendant caused the accident itself. Under these circumstances, and without the benefit of a developed record regarding the precise nature of the dispute regarding the collision and its aftermath, we have no basis to conclude that the circumstances of an accident are not "important or significant" to a jury's determination regarding the element of causation. See *Mendez*, 2009-NMCA-060, ¶ 12. As such, the district court's ruling adversely impacted the State's capacity to present evidence that went to the "heart of the proof required to establish the element" of causation. *Id.* (internal quotation marks and citation omitted); cf. *State v. Gonzales*, 2012-NMCA-034, ¶ 5, 274 P.3d 151 (noting that an expert opinion is evidence). We conclude in this circumstance that, under Section 39-3-3(B)(2), the State may, pretrial, appeal from the deprivation of its capacity to prove the element of causation by means of an expert witness. We therefore proceed to the merits of the State's appeal.

#### **B. Deputy Armijo's "Lay Conclusions"**

{16} The State first argues that by prohibiting Deputy Armijo from testifying as to "any conclusions" he reached regarding the circumstances of the accident, the district court impermissibly prohibited him from offering certain conclusions that even a layperson would be permitted to offer at trial. As an example, the State cites *State v. Wildgrube*, 2003-NMCA-108, 134 N.M. 262, 75 P.3d 862, where this Court held that a law enforcement officer who had observed the scene of the accident was permitted to testify as a lay witness under Rule 11-701 NMRA about the location of the debris and to offer an opinion about the point of impact through a diagram. *Wildgrube*, 2003-NMCA-108, ¶ 15. *Wildgrube* involved the officer inputting measurements he had taken at the scene of the accident into a computer program which then produced a diagram of the scene. *Id.* ¶ 12. The officer then testified, without objection, as to the evidence he collected, the methods he used to gather the evidence, the methods he used to measure the location of debris found at the scene, the methods he used to create

the computer-generated diagram, and his opinions about the diagram's accuracy and "the meaning of the debris path." *Id.* ¶¶ 12-13.

{17} In this case, however, the State planned to offer Deputy Armijo's testimony to not only his personal observations, but also to explain his conclusions regarding what those observations mean and opine as to the cause of the accident in light of his specialized training and experience. And, unlike in *Wildgrube*, Defendant objected to the proposed testimony. The State argued to the district court that Deputy Armijo's opinion in this case and general understanding of traffic investigations, yaw marks, speed calculations, and crash data analysis were a product of his specialized training and experience not possessed by a regular police officer. Despite its similarity to the accident scene evaluation undertaken in *Wildgrube*, we conclude that the testimony excluded by the district court was, in this circumstance, expert testimony. See *State v. Winters*, 2015-NMCA-050, ¶ 11, 349 P.3d 524 (noting that "opinion testimony of lay witnesses is generally confined to matters which are within the common knowledge and experience of an average person" (internal quotation marks and citation omitted)); cf. *State v. Vargas*, 2016-NMCA-038, ¶¶ 22-23, 368 P.3d 1232 (concluding that an officer's testimony about the technical properties of stun guns and identifying stun gun injuries was based on his law enforcement training and experience, and was therefore expert testimony). We accordingly hold that the delineation of lay versus expert testimony in this instance is not controlled by *Wildgrube* and we have no basis on the limited record before us to reverse the district court's conclusion that Deputy Armijo's proposed testimony was not lay opinion testimony.

#### **C. Deputy Armijo's Expert Testimony**

{18} Having concluded that the district court excluded conclusions reached by Deputy Armijo that constitute expert testimony, we next address whether it erred in doing so. Our analysis begins with Rule 11-702, which provides that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." A witness may be admitted as an expert under Rule 11-702 upon

the satisfaction of three requirements: (1) “that the expert be qualified”; (2) that the testimony “will assist the trier of fact”; and (3) that the expert’s testimony concern “scientific, technical or other specialized knowledge.” *State v. Alberico*, 1993-NMSC-047, ¶¶ 43-45, 116 N.M. 156, 861 P.2d 192 (internal quotation marks omitted). “[T]he admission of expert testimony . . . is peculiarly within the sound discretion of the [district] court and will not be reversed absent a showing of abuse of that discretion.” *Id.* ¶ 58. Although Defendant argues that the district court’s exclusion of Deputy Armijo’s expert testimony was proper because Deputy Armijo was not sufficiently qualified, the district court did not exclude his expert testimony on that ground. Rather, the district court ruled that the proposed expert testimony lacked a reliable methodology, a ruling that implicates the scientific knowledge element of the third requirement for the admission of expert testimony. See *Andrews v. U.S. Steel Corp.*, 2011-NMCA-032, ¶¶ 12-13, 149 N.M. 461, 250 P.3d 887 (holding that, under *Alberico*, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), “the proponent of [scientific expert] testimony must establish the reliability of the science and methodology on which it is based” to satisfy the third requirement for expert testimony). We therefore limit our discussion of the district court’s ruling to its stated basis for exclusion under Rule 11-702. See Rule 12-321(A) NMRA (“To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked.”).

{19} “Where expert testimony concerns scientific knowledge, the proponent of the testimony must establish the reliability of the science and methodology on which it is based.” *Andrews*, 2011-NMCA-032, ¶ 13. When determining the admissibility of expert testimony involving scientific knowledge, the district court should, pursuant to *Alberico* and *Daubert*, consider whether the testimony is “grounded in valid, objective science and [is] reliable enough to prove what it purports to prove” by testing the expert’s methodology. *State v. Torres*, 2009-NMSC-029, ¶ 21, 146 N.M. 331, 210 P.3d 228 (internal quotation marks and citation omitted). The *Alberico-Daubert* standard applies only to scientific expert testimony. See *State v. Torres*, 1999-NMSC-010, ¶ 43, 127 N.M. 20, 976 P.2d 20 (concluding that “the *Alberico-Daubert* standard applies only to expert testimony that relies on scientific knowledge,” rather

than all forms of expert testimony); see also *Quintana v. Acosta*, 2014-NMCA-015, ¶ 14, 316 P.3d 912 (noting that the *Alberico-Daubert* standard applies “only when the district court is evaluating the admissibility of scientific testimony”). “[T]he initial determination of whether to apply the *Alberico-Daubert* standard entails a conclusion of law that is subject to de novo review.” *Torres*, 1999-NMSC-010, ¶ 28.

{20} Thus, we first answer whether Deputy Armijo’s expert testimony was based on “scientific” knowledge, thereby requiring application of the heightened *Alberico-Daubert* standard. “Evidence is based on scientific knowledge if it is not self-explanatory, or if it is based on a scientific or medical principle.” *State v. Aleman*, 2008-NMCA-137, ¶ 6, 145 N.M. 79, 194 P.3d 110 (internal quotation marks and citation omitted); see *State v. Bregar*, 2017-NMCA-028, ¶¶ 32-33, 390 P.3d 212 (noting that expert testimony involving the use of physics equations is based on scientific knowledge); cf. *State v. Brown*, 687 P.2d 751, 754 (Or. 1984) (en banc) (“The term ‘scientific’ . . . refers to evidence that draws its convincing force from some principle of science, mathematics and the like.”). We understand Deputy Armijo’s proposed expert testimony to fall within two distinct categories: non-scientific and scientific expert testimony.

#### 1. Deputy Armijo’s Non-Scientific Expert Testimony

{21} To better frame the narrow scope of Deputy Armijo’s scientific expert testimony, we begin by identifying Deputy Armijo’s non-scientific expert testimony. As Deputy Armijo testified at the *Alberico* hearing, he was able to match “specific damage” to the Ford Bronco’s red tail light lens and the Toyota 4Runner’s clear front lens, which led him to conclude that the front of the Toyota 4Runner made contact with the rear of the Ford Bronco. He also located the Ford Bronco’s red lens and the Toyota 4Runner’s clear lens approximately seven or eight hundred feet from the vehicles, allowing him to conclude that the Toyota 4Runner and the Ford Bronco collided where the lenses were discovered. He planned to inform the jury about the yaw and gouge marks he observed and the phenomena those marks generally indicate. Finally, based on the yaw and gouge marks found on the road and the physical damage to the Ford Bronco, Deputy Armijo concluded and the State proposed that he testify that the Ford Bronco rolled

over. Deputy Armijo’s non-scientific expert testimony is based on his personal observations of physical evidence found at the scene, is straightforward, and appears to fit directly within the scope of his specialized training. Moreover, none of these points of testimony arose from application of scientific principles or mathematic computations. We therefore conclude that this testimony was not based on “scientific knowledge” and the district court erred in applying the *Alberico-Daubert* standard to this testimony.

{22} Having concluded that the district court applied the wrong legal standard, we also analyze whether the district court abused its discretion in denying the admission of Deputy Armijo’s non-scientific expert testimony. A district court “abuses its discretion when it exercises its discretion based on a misunderstanding of the law.” *State v. Lente*, 2005-NMCA-111, ¶ 3, 138 N.M. 312, 119 P.3d 737. Given the district court’s application of the wrong legal standard to Deputy Armijo’s non-scientific expert testimony, we conclude it abused its discretion in this respect.

{23} Our holding in this regard should not, however, be construed to command that the district court determine Deputy Armijo’s non-scientific expert testimony to be either reliable or unreliable. See *Torrez*, 2009-NMSC-029, ¶ 21 (holding that “even with non-scientific expert testimony, the [district] court must exercise its gate-keeping function and ensure that the expert’s testimony is reliable”). When ruling on the admissibility of non-scientific expert testimony, the district court “must evaluate a non-scientific expert’s personal knowledge and experience to determine whether the expert’s conclusions on a given subject may be trusted.” *Id.* The district court tests “whether an expert’s skills, experience, training, or education qualify him or her in the relevant subject . . . [and] uses these same factors . . . to test the validity of the expert’s conclusions . . . [and determine whether they] prove what they purport to prove.” *Id.* ¶ 22. Whereas the district court misapplied the *Alberico-Daubert* standard to test the reliability of Deputy Armijo’s methodology in the first instance, on remand it should instead test the validity of Deputy Armijo’s non-scientific expert testimony by evaluating whether his conclusions are consistent with his specialized training and experience. If answered affirmatively, Deputy Armijo’s non-scientific testimony would be admissible under Rule 11-702.

## 2. Deputy Armijo's Scientific Expert Testimony

{24} We next discuss what we conclude to be Deputy Armijo's scientific expert testimony regarding the cause of the apparent rollover. As this Court noted in *Bregar*, expert testimony is scientific when it applies physics principles. 2017-NMCA-028, ¶¶ 32-33. Defendant contends that Deputy Armijo planned to "testif[y] to scientific matters involving math and physics." We agree. Whereas his expert opinion that a rollover occurred is based on his non-scientific knowledge, his expert opinion regarding the *cause* of the apparent rollover—in other words, *why* it happened vis-à-vis the colliding of the two impacted vehicles—necessarily requires that he analyze the chain of events leading up to, and culminating in the Ford Bronco rolling over. But by Deputy Armijo's own admission, determining how a rollover starts requires analyzing, amongst other things, the vehicles' speeds. Deputy Armijo testified that analyzing speed requires the use of a mathematical equation to "ascertain what's called the coefficient of friction or what is commonly referred to as the drag factor of the roadway." Accordingly, pursuant to Deputy Armijo's own description of the methodology needed to identify the cause of a collision that results in a vehicle rollover, any expert testimony concerning the cause of this apparent rollover would require application of mathematical principles and would therefore be scientific expert testimony.

{25} The State, however, argues that no scientific expertise was required for this testimony. To support its argument, the State cites *Duran v. Lovato* in which this Court held that the district court did not abuse its discretion in admitting an officer's expert testimony about the "area of impact" in an accident involving a pedestrian and vehicle, and whether speed was a factor in the accident. 1982-NMCA-182, ¶¶ 18-19, 99 N.M. 242, 656 P.2d 905 (internal quotation marks omitted). However, *Duran* was decided prior to both *Daubert* and *Alberico* and provides no guidance to this Court about distinguishing between scientific and non-scientific expert testimony. Furthermore, to the extent that *Duran* remains good law after *Daubert* and *Alberico*, it is factually distinguishable from the present case. In *Duran*, the officer took measurements at the scene of the accident which he later used to create a diagram of the accident scene and relied partly on his diagram to render his expert

opinion. 1982-NMCA-182, ¶ 18. Deputy Armijo did no such thing. We therefore decline to extend *Duran*'s rationale to the present case.

{26} The State also argues that Deputy Armijo's testimony was not subject to the *Alberico-Daubert* standard because it was based on his specialized knowledge, citing *State v. Bullcoming*, 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1 (*Bullcoming II*), *rev'd on other grounds sub nom. by Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (*Bullcoming III*), and *State v. Bullcoming*, 2008-NMCA-097, 144 N.M. 546, 189 P.3d 679 (*Bullcoming I*). In *Bullcoming I*, this Court first held that an officer who made contact with a defendant after an accident could testify based on his specialized knowledge that the defendant caused an accident because he "was under the influence of some kind of intoxicating liquor." 2008-NMCA-097, ¶¶ 10-11 (internal quotation marks omitted); see *Bullcoming II*, 2010-NMSC-007, ¶ 27 (noting that the record indicated that the officer based his opinion on his contact with the defendant). Our Supreme Court later held that the district court did not abuse its discretion in permitting the officer's testimony because he was well-qualified and "[d]efense counsel did not conduct voir dire examination or otherwise challenge his qualifications." *Bullcoming II*, 2010-NMSC-007, ¶ 29. However, both cases are factually distinguishable from this case. In *Bullcoming II*, the officer reached his conclusion based on his observations that the defendant exhibited signs of intoxication and had an odor of alcohol. *Id.* ¶¶ 4, 27. Here, considered in sum, Deputy Armijo's testimony conceded that he needed to apply physics principles to discover the cause of rollovers.

{27} Lastly, the State argues that no mathematical modeling was required for Deputy Armijo's expert opinion regarding the cause of the apparent rollover, citing *Lopez-Juarez v. Kelly*, 348 S.W.3d 10 (Tex. Ct. App. 2011). In *Lopez-Juarez*, the Texas Court of Appeals held that, "[i]n simple accidents, the accident reconstruction can be conducted without mathematical modeling." *Id.* at 21. However, the court noted that it was presented with a multiple vehicle accident, differing witness accounts of the accident, and the need to use complex physics calculations to determine fault. *Id.* at 19 n.13. It therefore concluded that the accident was "complex" which required mathematical modeling. *Id.* at 22. Although the case before this Court lacked the multivehicle complexity identified by

*Lopez-Juarez* as a basis for requiring a scientific level of expertise, the collision lends itself to two differing interpretations: (1) Defendant's contention that the accident was caused by a combination of her inattention and the Ford Bronco traveling from its own lane into hers; and (2) Deputy Armijo's proposed conclusion that based on the tail and head light lenses deposited on the road, the yaw and gouge marks discovered on the road, and the damage to the Ford Bronco, Defendant rear-ended the Ford Bronco, causing the rollover and the driver's death. As stated above, the methodology described by Deputy Armijo indicated his need to apply physics principles and mathematical calculations to determine whether his suspected conclusion regarding the rollover was supported by scientific methodology. In other words, Deputy Armijo's specialized knowledge is no substitute for scientific methodology when expert testimony is of a scientific nature or depends upon the application of scientific principles. *Cf. Aleman*, 2008-NMCA-137, ¶ 6 (requiring application of the heightened *Alberico-Daubert* standard to evidence based on scientific knowledge, i.e., knowledge that is not self-explanatory or is based on scientific or medical principles).

{28} For the aforementioned reasons, we conclude that application of *Duran*, *Bullcoming*, and *Lopez-Juarez* is inapposite here, and that Deputy Armijo's expert testimony regarding the cause of the apparent rollover in this case is based on scientific knowledge and must be subjected to the heightened *Alberico-Daubert* standard. See *Daubert*, 509 U.S. at 590 (holding that "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method"). But here, Deputy Armijo elected not to conduct a full reconstruction, apply mathematical formulae, or engage in other procedures consistent with a final determination of what happened and why. Deputy Armijo neither testified to, nor documented, any discernible methodology from which the district court could test the reliability of his opinion. Reiterating that our Supreme Court has given the district court broad discretion in the exclusion of expert testimony, we conclude that the district court's exclusion of Deputy Armijo's proposed expert testimony regarding the cause of the rollover was not an abuse of its discretion in light of the facts of his investigation in this case. See *State v. Downey*, 2008-NMSC-061, ¶ 30, 145 N.M. 232, 195 P.3d 1244 (explaining that "for

scientific evidence to be admissible under Rule 11-702, the reasoning or methodology underlying the testimony must not only be scientifically valid, it also must be *properly applied to the facts in [the] issue*” (alteration, omission, internal quotation marks, and citation omitted); *Alberico*, 1993-NMSC-047, ¶ 58 (holding that the exclusion of expert testimony is within the sound discretion of the district court and will not be disturbed unless “manifestly erroneous” (internal quotation marks and citation omitted)).

#### D. Rule 11-403

{29} Having concluded that Deputy Armijo’s non-scientific expert testimony still has the potential on remand to pass muster under Rule 11-702, we also discuss the district court’s ruling that it was nonetheless excludable under Rule 11-403. Even if expert testimony is admissible under Rule 11-702, it must be relevant under Rule 11-401 NMRA and even if relevant, may be excluded under Rule 11-403. *Alberico*, 1993-NMSC-047, ¶ 55. Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and it is “of consequence in determining the action.” Rule 11-401. Relevant evidence, although admissible under Rule 11-401, may still be excluded “if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . [or] misleading the jury[.]” Rule 11-403. “Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence that tends to suggest decision on an improper basis.” *State v. Anderson*, 1994-NMSC-089, ¶ 63, 118 N.M. 284, 881 P.2d 29. The district court’s exclusion of evidence under Rule 11-403 is reviewed for an abuse of discretion. *State v. Chamberlain*, 1991-NMSC-094, ¶ 9, 112 N.M. 723, 819 P.2d 673.

{30} The probative value of Deputy Armijo’s testimony is high because it bears directly upon whether Defendant rear-ended the Ford Bronco and caused the accident, which is a key issue in this case. Although the district court did not explicitly cite Rule 11-403 in its ruling, Defendant argued that the expert testimony would impermissibly mislead the jury under Rule 11-403 and the district court considered whether the evidence was relevant and weighed its probative value against two concerns. We therefore review its exclusion of Deputy Armijo’s expert testimony under Rule 11-403. *See*

*Progressive Cas. Ins. Co. v. Vigil*, 2018-NMSC-014, ¶ 12, 413 P.3d 850 (concluding that an appellate court may review a district court’s exclusion of evidence under Rule 11-403 when the district court fails to cite the rule but the record reflects that the parties’ arguments and the district court’s ruling were guided by the rule’s principles). First, the district court noted its skepticism about permitting investigating officers to testify as experts in their own cases as they “have a stake in the outcome.” Second, the district court stated that it was concerned that Deputy Armijo’s testimony would be confusing to the jury because his opinion lacked a scientific basis that would render it reliable.

{31} As to the district court’s first concern, any extent to which Deputy Armijo’s involvement in this case had the potential to impact his testimony is a question of credibility for the jury. *See Alberico*, 1993-NMSC-047, ¶ 37 (explaining that it is “the most basic function of a jury to arbitrate the weight and credibility of evidence, even expert opinion testimony”); *Poore v. State*, 1980-NMSC-035, ¶ 5, 94 N.M. 172, 608 P.2d 148 (concluding that “the credibility of the witnesses was for the jury to determine”); *State v. Paiz*, 1999-NMCA-104, ¶ 30, 127 N.M. 776, 987 P.2d 1163 (noting that “the jury acts as the sole fact[-]finder based upon its weighing of the evidence and credibility of the witnesses” (emphasis added)). Defendant, however, argues that several issues arise when the State calls an investigating officer to testify as an expert witness. *See United States v. Dukagjini*, 326 F.3d 45, 51 (2d Cir. 2003). The court in *Dukagjini* noted that when a case agent testifies as an expert, “the government confers upon him the aura of special reliability and trustworthiness surrounding expert testimony.” *Id.* at 53 (internal quotation marks and citation omitted). Our Supreme Court has explicitly rejected this proposition. *See Alberico*, 1993-NMSC-047, ¶ 36 (concluding that the “premise that juries are awed by the aura of the infallibility of expert opinion testimony and thus defer to it is flawed speculation” (internal quotation marks omitted)).

{32} The court in *Dukagjini* also noted that “there is an increased danger that the expert testimony will stray from applying reliable methodology and convey to the jury the witness’s sweeping conclusions about [the defendants’] activities[.]” *Dukagjini*, 326 F.3d at 54 (internal quotation marks and citation omitted). However, the *Dukagjini* court explained, and we agree,

that it is the responsibility of the district court to remain vigilant and ensure that the expert not stray from the scope of his/her expertise. *See id.* at 54-56 (noting that it is the role of district courts to remain “vigilant gatekeepers” to ensure that the expert witness not deviate “from the strictures of Rule[ 11-]403 and [Rule 11]702”); *see also Vargas*, 2016-NMCA-038, ¶¶ 13, 17 (noting that a witness may provide both lay and expert testimony in a single case, but “[w]hen the line between lay and expert opinion is blurred during the course of a single witness’s testimony, it is the proper function of the district court, as gatekeeper, to correct the error when raised”). Here, there was no indication that Deputy Armijo was going to stray from any strictures set forth by the district court.

{33} For these reasons, the danger of unfair prejudice or misleading the jury stemming from Deputy Armijo’s involvement in this case is speculative and minimal, at best, particularly given the availability of limiting jury instructions. *See State v. King*, 2012-NMCA-119, ¶ 5, 291 P.3d 160 (explaining that “[a] district court abuses its discretion if its decision is obviously erroneous, arbitrary, or unwarranted, or clearly against the logic and effect of the facts and circumstances of the case” (internal quotation marks and citation omitted)); *see also UJI 14-118 NMRA* (“You should consider each expert opinion and the reasons stated for the opinion, giving them such weight as you think they deserve. You may reject an opinion entirely if you conclude that it is unsound.”).

{34} As to the district court’s second concern, as we have concluded above, Deputy Armijo’s non-scientific expert testimony did not require the district court to probe whether he used a reliable methodology. The district court did not consider this distinction. Rather, it found that the lack of a reliable methodology—the standard applied to expert testimony based on *scientific* knowledge—would confuse the jury. Having considered the distinction between expert testimony based on scientific versus non-scientific knowledge, we conclude that the danger of unfair prejudice or misleading the jury is slight compared to the evidence’s probative value. A holding to the contrary would effectively permit the district court to circumvent our Supreme Court’s explicit restriction of the *Alberico-Daubert* standard to expert testimony based on *scientific* knowledge—a result we cannot permit. *See Torres*, 1999-NMSC-010, ¶ 43

(concluding that the *Alberico-Daubert* standard applies only to “expert testimony that relies on scientific knowledge,” rather than all forms of expert testimony); *see also Lente*, 2005-NMCA-111, ¶ 3 (noting that a district “court abuses its discretion when it exercises its discretion based on a misunderstanding of the law”). As there is no danger of unfair prejudice or misleading the jury that *substantially* outweighs the probative value of Deputy Armijo’s expert

testimony, we conclude that the district court abused its discretion in excluding this portion of Deputy Armijo’s expert testimony under Rule 11-403.

### III. CONCLUSION

{35} We conclude that the State properly appealed to this Court, the district court did not err in excluding Deputy Armijo’s scientific expert testimony, and the district court erred in excluding his non-scientific expert testimony. We therefore affirm

in part, reverse in part, and remand for further proceedings consistent with this opinion.

{36} **IT IS SO ORDERED.**  
**J. MILES HANISEE, Judge**

**WE CONCUR:**  
**JULIE J. VARGAS, Judge**  
**EMIL J. KIEHNE, Judge**

From the New Mexico Court of Appeals

**Opinion Number: 2019-NMCA-010**

No. A-1-CA-36336 (filed October 23, 2018)

STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
v.  
AUSTIN VERRET,  
Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

Fernando R. Macias, District Judge

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**Opinion**

**Daniel J. Gallegos, Judge**

{1} Defendant Austin Verret filed a motion in Doña Ana County Magistrate Court to exclude the arresting officer from testifying at his trial for aggravated driving while under the influence of intoxicating liquor or drugs (DWI), based on Defendant's inability to secure a pretrial witness interview with the officer. The magistrate court granted the motion and excluded the officer from testifying. In response, the State filed a nolle prosequi in magistrate court and refiled Defendant's case in district court pursuant to *State v. Heinsen*, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040. Defendant then requested that the district court conduct an independent review of his pretrial motion to exclude the arresting officer in accordance with *City of Farmington v. Piñon-Garcia*, 2013-NMSC-046, 311 P.3d 446. The district court, noting that *Piñon-Garcia* involved an appeal from an order of dismissal, concluded that the requirement for an independent review of the pretrial motion filed in the lower court does not apply to a case where the state refiles the charges in district court. Instead, the district court decided the motion anew based on the

facts as they existed in the district court. For the reasons that follow, we conclude that the district court erred in concluding that *Piñon-Garcia* does not apply to a *Heinsen* refiling. Consequently, we reverse and remand to the district court for an independent determination of the motion to exclude as filed in the magistrate court.

**BACKGROUND**

{2} Defendant was charged with one count of aggravated DWI in magistrate court. Prior to trial, Defendant repeatedly requested a witness interview with the arresting officer, Brad Lunsford, but to no avail. At one point, an interview with Officer Lunsford was scheduled, but the officer cancelled on the day of the interview.

{3} Based on the multiple failed attempts to interview Officer Lunsford, Defendant filed a motion to exclude the officer from testifying at trial. The magistrate court reserved its ruling on the motion until the day jury selection was set to occur. However, the magistrate court did enter an order requiring the State to provide the witness interview with Officer Lunsford by the day of jury selection. When that day came, Defendant still had not had the opportunity to interview Officer Lunsford. Defendant renewed his motion to exclude the officer from testifying, and the magistrate court granted it.

{4} Instead of proceeding to trial, the State filed a nolle prosequi in magistrate court and refiled Defendant's case in district court. The refiled complaint indicated that "[u]nder Rule 6-506(A) NMRA, and pursuant to . . . *Heinsen* . . . the State is exercising its discretion to have this matter heard in a court of record to remedy an order of suppression." In response, Defendant filed a motion in district court to dismiss. Then, after the district court denied the motion, Defendant filed a motion for reconsideration. In his motion for reconsideration, Defendant argued that the district court was required, pursuant to *Piñon-Garcia*, 2013-NMSC-046, to make a de novo determination of whether the magistrate court's exclusion order—entered as a discovery sanction—was correctly issued based on the merits of the motion as they existed at the time the magistrate court entered the order. *See id.* ¶ 1 (concluding that on appeal, "the district court must make an independent determination of the merits" of a pretrial motion filed in a court not of record). The district court concluded in its order denying Defendant's motion for reconsideration that "[b]ecause this case is not an appeal but is a refiling, the [d]istrict [c]ourt's role is not to pass upon the merits of the lower court's decision but to determine whether the motion, raised and filed in [d]istrict [c]ourt, is meritorious now." The district court then denied the motion because Defendant had evidently interviewed Officer Lunsford following the refiling in district court. Defendant subsequently entered a conditional plea agreement in which he pled no contest to a lesser DWI charge and reserved the right to appeal the district court's denial of his motion to reconsider.

**DISCUSSION**

{5} Defendant argues that the district court erred by failing to consider the events as they unfolded in magistrate court in making its decision on his motion for reconsideration, as required by *Piñon-Garcia*. *See id.* ¶ 21 (holding that "the district court should have made an independent determination regarding the validity of the [lower] court's order of dismissal based on the record on appeal and the arguments of counsel at the district court level"). For its part, the district court predicated its ruling on its conclusion that *Piñon-Garcia*, which involved an appeal from an order of dismissal, does not apply to a case where the state refiles the charges in district court. Defendant, however, points out that the State refiled the criminal complaint in

district court, pursuant to *Heinsen*, 2005-NMSC-035, in order to receive review of the magistrate court's exclusion ruling. *See id.* ¶ 1 (recognizing that “the [s]tate may obtain judicial review of . . . a suppression order by filing a nolle prosequi to dismiss some or all of the charges in a magistrate court after the suppression order is entered and refiled in the district court for a trial de novo”).<sup>1</sup> The question for this Court, then, is whether the *Piñon-Garcia* requirement for an independent determination of the merits of a pretrial motion filed in the lower court applies in the context of a district court refiled under *Heinsen*.

### I. Standard of Review

{6} “A court’s jurisdiction derives from a statute or constitutional provision.” *State v. Rudy B.*, 2010-NMSC-045, ¶ 14, 149 N.M. 22, 243 P.3d 726. Likewise, the right to appeal is a matter of substantive law created by constitution or statute. *State v. Armijo*, 2016-NMSC-021, ¶ 19, 375 P.3d 415. “We review issues of statutory and constitutional interpretation de novo.” *Id.* (internal quotation marks and citation omitted). We also review de novo the district court’s application of the law to the facts of the case. *State v. Foster*, 2003-NMCA-099, ¶ 6, 134 N.M. 224, 75 P.3d 824.

### II. District Court Review of a Potentially Dispositive Discovery Sanction Entered in Magistrate Court upon Refiling Pursuant to *Heinsen*

{7} Our New Mexico Constitution permits appeals from inferior courts to the district court. N.M. Const. art. VI, § 27. The relevant provision indicates that “[a]ppeals shall be allowed in all cases from the final judgments and decisions of the . . . inferior courts to the district courts, and in all such appeals, trial shall be had de novo unless otherwise provided by law.” *Id.*; *see* NMSA 1978, § 39-3-1 (1955) (“All appeals from inferior tribunals to the district courts shall be tried anew in said courts on their merits, as if no trial had been had below, except as otherwise provided by law.”); *Foster*, 2003-NMCA-099, ¶ 9 (stating that because magistrate courts are not courts of record, an appeal from a magistrate court is de novo).

{8} In light of the constitutional and statutory requirements for a trial de novo in district court following an appeal from

an inferior non-record court, our Supreme Court in *Piñon-Garcia*, 2013-NMSC-046, took on the question of how a district court must treat an appeal of a lower court’s order on a dispositive motion. *See id.* ¶ 17 (“The limited question we address in this case is the appropriate review in district court of a municipal court’s pretrial ruling.”). In *Piñon-Garcia*, the defendant was charged in municipal court with three traffic offenses, including DWI. *Id.* ¶¶ 4-5. On the day of the trial, the arresting officer did not appear, and the defendant moved to dismiss all charges, which the municipal court granted. *Id.* ¶ 5. The City of Farmington appealed the dismissal of the DWI charge to the district court. *Id.* The defendant then filed a motion in district court to dismiss the appeal, arguing that the municipal court’s dismissal should be reviewed on appeal for an abuse of discretion. *Id.* The district court determined that it was precluded from reviewing the municipal court’s order at all and instead held a trial de novo. *Id.* ¶¶ 5-6. The arresting officer appeared at the trial in the district court, and the defendant was convicted of DWI. *Id.* ¶ 6.

{9} Our Supreme Court concluded that the district court was correct in not reviewing the order of the municipal court for abuse of discretion. *See id.* ¶ 19 (“The district court does not consider whether the lower court abused its discretion[.]”). Our Supreme Court clarified, however, that the district court should have instead made an independent determination of the merits of the pretrial motion “based on the record on appeal and the arguments of counsel at the district court level.” *Id.* ¶ 21; *see id.* ¶ 19 (holding that the district court “must consider the merits of the motion without regard to what the municipal court decided”).

{10} Our Supreme Court reasoned that “[i]f district courts are not permitted to review a lower court’s grant or denial of potentially dispositive pretrial motions on appeal, the power of lower courts to grant relief when constitutional safeguards and procedural rules, such as speedy trial, double jeopardy, or discovery rules, are violated would be meaningless.” *Id.* ¶ 2. In other words, a party in an inferior court who is granted a dispositive order as a remedy for a constitutional or procedural vio-

lation “would effectively be deprived of the safeguards of the United States and New Mexico Constitutions and our procedural rules if a district court’s de novo review of the lower court’s ruling are bypassed in favor of a trial de novo on the underlying complaint.” *Id.* Our Supreme Court added that this would lead to inferior courts arbitrarily disregarding “enforcement of procedural rules and constitutional protections” because what the inferior courts did would not be reviewed. *Id.* ¶ 13. Ultimately, our Supreme Court remanded the case and instructed the district court to resolve whether to dismiss the case because the arresting officer failed to show up to the trial before the municipal court or whether it would consider alternatives to dismissal, “while balancing the need to vindicate the authority of the municipal court and protecting the parties’ rights under our rules and the United States and New Mexico Constitutions.” *Id.* ¶ 21.

{11} In the present case, Defendant requested—via his motion to reconsider—that the district court conduct an independent review of his motion to exclude Officer Lunsford, as filed in the magistrate court, citing the above-described requirement in *Piñon-Garcia*. The district court instead decided the motion for reconsideration anew, based upon the facts as they existed in the district court, essentially determining that *Piñon-Garcia* applies to direct appeals but not to the refiled charges.

{12} While the district court found this distinction—appeal versus refiled—to be pivotal, we can see no meaningful difference between either method of obtaining review of a dispositive motion by the district court. *See Heinsen*, 2005-NMSC-035, ¶ 1 (recognizing that “the [s]tate may obtain judicial review of . . . a suppression order by filing a nolle prosequi to dismiss some or all of the charges in a magistrate court after the suppression order is entered and refiled in the district court for a trial de novo”); *see also City of Santa Fe v. Marquez*, 2012-NMSC-031, ¶ 23, 285 P.3d 637 (recognizing a *Heinsen* refiled as “the specific procedure by which the state can appeal a suppression ruling in magistrate court in order to avoid a situation . . . in which the defendant would be acquitted as the result of the suppression

<sup>1</sup>Although *Heinsen* involved an order of suppression, both Defendant and the State treat a *Heinsen* refiled—a nolle prosequi filed in the magistrate court followed by a refiled of the charges in the district court—as the appropriate vehicle for the State to seek review of the magistrate court’s order excluding witness testimony as a discovery sanction for violation of Rule 6-504(D) NMRA. In the absence of briefing otherwise, we assume, but do not decide, that this is correct for purposes of resolving this appeal.

of evidence, thus barring the ability of the state to appeal”). With respect to our Supreme Court’s recognition that “[i]f district courts are not permitted to review a lower court’s grant or denial of potentially dispositive pretrial motions on appeal, the power of lower courts to grant relief when constitutional safeguards and procedural rules, such as speedy trial, double jeopardy, or discovery rules, are violated would be meaningless[.]” *Piñon-Garcia*, 2013-NMSC-046, ¶ 2, we can see no difference between an appeal from a ruling on a dispositive pretrial motion and a *Heinsen* refiling seeking the same type of review.

{13} The State does not argue that its refiling was anything other than an attempt under *Heinsen* to have the magistrate court’s exclusion ruling reviewed by the district court. In fact, the State has continuously asserted, both below and on appeal, that it refiled the charges in district court in order “to have this matter heard in a court of record to remedy an order of suppression.” Although not a traditional appeal, the refiling method utilized by the State is effectively the equivalent of an appeal. See *Marquez*, 2012-NMSC-031, ¶ 23 (“*Heinsen* . . . reflect[s] [our Supreme] Court’s evident concern that suppression orders generally should not be immune from appellate review.”).

{14} Because there is no meaningful distinction between an appeal and a *Heinsen* refiling when either method is utilized to obtain review of the inferior court’s ruling on a potentially dispositive pretrial motion, we conclude that the district court

should have conducted an independent review of the pretrial motion to exclude filed in magistrate court. From our review of the State’s argument on appeal, it does not appear that the State makes any contention to the contrary. Rather, the State argues that the district court did in fact conduct a de novo review of the motion. However, as noted earlier, the district court decided Defendant’s motion for reconsideration based upon the facts as they existed in the district court, not as they were before the magistrate court. This method of review is not in line with *Piñon-Garcia*. See 2013-NMSC-046, ¶ 21 (holding that “the district court should have made an independent determination regarding the validity of the [lower] court’s order of dismissal based on the record on appeal and the arguments of counsel at the district court level”); *Foster*, 2003-NMCA-099, ¶ 19 (stating that a district court does not “accord deference to the magistrate court’s ruling; instead, the district court makes an independent judgment based on the record before it” as to whether the magistrate court properly granted the motion); cf. *Piñon-Garcia*, 2013-NMSC-046, ¶ 12 (“Simply because municipal courts are not courts of record does not mean that the entire history of a case in municipal court is disregarded”). In fact, we recently held in *State v. Vanderdussen*, 2018-NMCA-041, 420 P.3d 609—albeit with little analysis on this point—that *Piñon-Garcia* applies when the State refiles charges following a mistrial in magistrate court, and we explained that that the district court “was bound by

events that transpired in magistrate court and therefore was required to base its independent judgment on the limited record brought before it and the arguments made by counsel in district court.” *Vanderdussen*, 2018-NMCA-041, ¶ 2. We conclude that the district court in this case should have reviewed the magistrate court’s exclusion ruling in the same manner.

{15} Last, we note that both parties have made extensive arguments on appeal as to the correctness of the magistrate court’s exclusion order. Given our conclusion that the district court erred in its review of Defendant’s motion to exclude, we need not reach those arguments. Instead, we reverse the ruling of the district court and remand with an instruction that the district court determine if it would have excluded Officer Lunsford based on the events in the magistrate court or if it would consider alternatives to exclusion. As in *Piñon-Garcia*, the district court should balance the need to vindicate the authority of the magistrate court and the protection of the parties’ rights under our rules and the United States and New Mexico Constitutions. See 2013-NMSC-046, ¶ 21.

#### CONCLUSION

{16} For these reasons, we reverse and remand to the district court for proceedings consistent with this opinion.

{17} **IT IS SO ORDERED.**

**DANIEL J. GALLEGOS, Judge**

#### WE CONCUR:

**J. MILES HANISEE, Judge**  
**EMIL J. KIEHNE, Judge**



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to our friend, colleague and distinguished member of our firm for 21 years, ***Lisa Chavez Ortega***, on her appointment as a District Court Judge in the Second Judicial District for the State of New Mexico.



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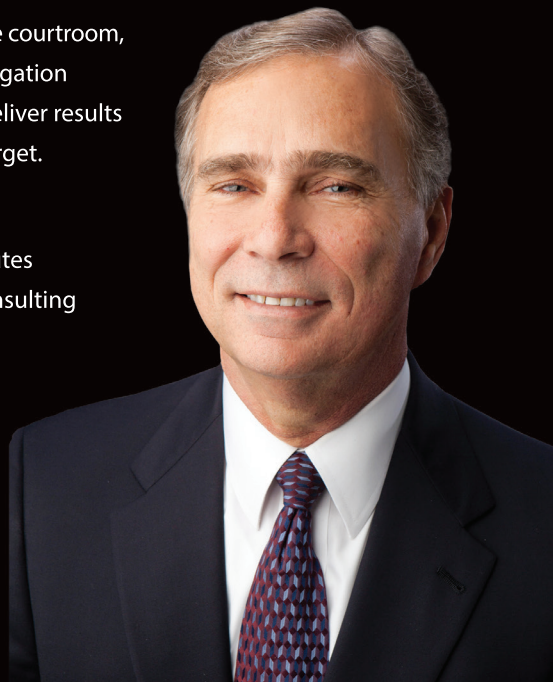
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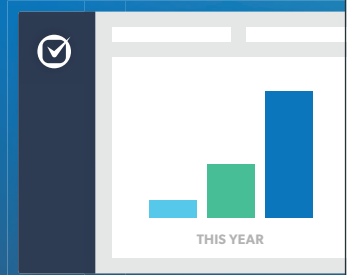
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## Miscellaneous

### Want To Purchase

Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201

### Searching for a Will

Searching for a will for Adeline Garcia Minchow. If found, please contact Michael Hughes at Silva & Hughes, PC 505-246-8300 or [mhughes@silvalaw-firm.com](mailto:mhughes@silvalaw-firm.com).

### Searching for Last Will and Testament

Searching for Last Will and Testament of Rosario Castro Gingras. Anyone with knowledge of such an instrument, please contact Mary Ann Green, Attorney at Law, at 505-254-0600.

### Search for Will

Seeking information as to Last Will of Thomas Joseph Blaszczyk of Placitas, New Mexico, who died on September 20, 2019. Formerly of Oak Lawn, Illinois. Please contact David Grammer III, tel (505) 266-8787. Email: [david@grammerlawoffices.com](mailto:david@grammerlawoffices.com)

Official Publication of the State Bar of New Mexico

# BAR BULLETIN

## 2019 ADVERTISING SUBMISSION DEADLINES

**Starting in January, the *Bar Bulletin* will publish every other week on Wednesdays.**

Submission deadlines are also on Wednesdays, two weeks prior to publishing by 4 p.m. Advertising will be accepted for publication in the Bar Bulletin in accordance with standards and ad rates set by publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. Cancellations must be received by 10 a.m. on Thursday, 13 days prior to publication.

**For more advertising information, contact: Marcia C. Ulibarri at 505-797-6058 or email [mulibarri@nmbar.org](mailto:mulibarri@nmbar.org)**

The 2019 publication schedule can be found at [www.nmbar.org/BarBulletin](http://www.nmbar.org/BarBulletin).



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