

BAR BULLETIN

December 8, 2021 • Volume 60, No. 23



Snowy Bluff, by Carla Forrest (see page 5)

carlaforrest.com

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SPECIAL INSERT

Pro Bono Spotlight 2021



**Volunteer
Attorney Program**
A Program of New Mexico Legal Aid



New Mexico State Bar Foundation
Center for Legal Education

CLE PROGRAMMING

from the Center for Legal Education



DECEMBER 14

In-Person and Webcast:

Gain the Edge! Negotiation Strategies for Lawyers (with Marty Latz)

5.0 G, 1.0 EP
9 a.m.–4:30 p.m.
\$282 Standard Fee

DECEMBER 15

Webinar:

Legal Malpractice Insurance & Claims Avoidance 101

1.0 EP
11 a.m.–Noon
\$89 Standard Fee

DECEMBER 16

Webinar:

2021 Trial Law Institute

6.0 G, 1.0 EP
8:30 a.m.–5 p.m.
\$301 Standard Fee

DECEMBER 17

In-Person and Webcast:

2021 NREEL Institute: Climate Change, Drought, and Associated Impacts in New Mexico

5.0 G, 1.0 EP
9 a.m.–4:30 p.m.
\$282 Standard Fee

Teleseminar:

Trust & Estate Planning for Client Privacy in a Public World

1.0 G
11 a.m.–Noon
\$79 Standard Fee

Webinar:

Flashes of Brilliance: Putting the Power Back in PowerPoint

1.0 G
11 a.m.–Noon
\$89 Standard Fee

Teleseminar:

Ethics and Conflicts with Clients, Part 1

1.0 EP
11 a.m.–Noon
\$79 Standard Fee

DECEMBER 21

Teleseminar:

Ethics and Conflicts with Clients, Part 2

1.0 EP
11 a.m.–Noon
\$79 Standard Fee

Webinar:

Spinning Plates – Task Management for Lawyers

1.0 EP
11 a.m.–Noon
\$89 Standard Fee

DECEMBER 22

Teleseminar:

Talking About Wealth Transfer Plans: Practical Strategies to Avoid Disputes Among Beneficiaries

1.0 G
11 a.m.–Noon
\$79 Standard Fee

DECEMBER 27

Webinar:

Replay: Minimizing “Cultural Errors” in Professional Practice (2020)

1.5EP
Noon–1:30 p.m.
\$74 Standard Fee

DECEMBER 28

Webinar:

Ethics Lessons from a Jersey Guy (with Stuart Teicher)

0.5 G, 2.5 EP
8:30–11:45 a.m.
\$147 Standard Fee

2021 Ethics Update, Part 1

1.0 EP
11 a.m.–Noon
\$79 Standard Fee

Webinar:

Ethical Issues Representing a Band – Using the Beatles

1.0 EP
11 a.m.–Noon
\$89 Standard Fee

Webinar:

An Afternoon of Legal Writing with Stuart Teicher

3.0 G
1–4:55 p.m.
\$147 Standard Fee

DECEMBER 29

Teleseminar:

2021 Ethics Update, Part 2

1.0 EP
11 a.m.–Noon
\$79 Standard Fee

Webinar:

Marketing Ethics 101

1.0 EP
11 a.m.–Noon
\$89 Standard Fee

DECEMBER 30

Teleseminar:

2021 Ethics in Civil Litigation Update, Part 1

1.0 EP
11 a.m.–Noon
\$79 Standard Fee

DECEMBER 31

Teleseminar:

2021 Ethics in Civil Litigation Update, Part 2

1.0 EP
11 a.m.–Noon
\$79 Standard Fee

*In-person programs subject to current public health guidelines. Should changing guidance make meeting in-person not possible, registrants will be transferred to virtual format or given a refund. All visitors to the State Bar Center are encouraged to read the latest COVID information at the CDC website and take any actions to keep themselves and others comfortable and healthy as we continue to transition out of the pandemic. NOTE: Face masks must be worn at all times in the public areas of the building, regardless of vaccination status.

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

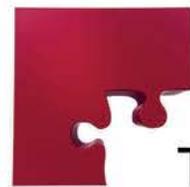
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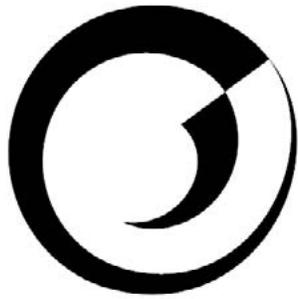
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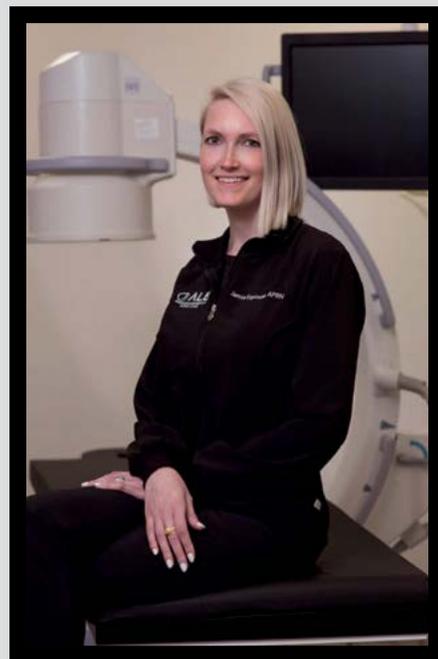
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Albuquerque, NM 87109**

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info@albpainclinic.com**



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Board Certified in Pain Medicine & Neurology



Jamie Espinosa, APRN



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Meetings

December

8
Children's Law Section
noon, teleconference

8
Tax Section
9 a.m., teleconference

9
Business Law Section
4 p.m., teleconference

10
Cannabis Law Section
9 a.m., teleconference

10
Prosecutors Section
noon, teleconference

10
**Committee on Diversity in the
Legal Profession**
noon, teleconference

14
Appellate Practice Section
noon, teleconference

Workshops and Legal Clinics

December

1
Divorce Options Workshop
6 p.m., virtual

8
Consumer Debt/Bankruptcy Workshop
6 p.m., virtual

2022

Coming soon!

About Cover Image and Artist: New Mexico artist Carla Forrest provides an exciting vision of the Southwest through her spectral luminescent works, inspired by direct observation of nature and life. Forrest's pieces have tiles of color and incised lines one might expect from a palette knife painting, but reveal an even more complex painting process. Forrest, who attributes her love of palette knife painting to her study of sculpture, is inspired by the Pointillists' method of placing two colors side by side to let the eye blend them into another color. Honored as a Local Treasure by the Albuquerque Arts Business Association, Forrest's personal artistic mission integrates awareness of environmental conservation, community connectivity, and creativity. Forrest obtained her bachelors in studio art from State University of New York, Master of Science in Teaching Visual Arts from Rochester Institute of Technology, and Doctor of Philosophy in Organization, Information, and Learning Sciences from University of New Mexico. Visit carlaforrest.com for more information.

Notices

COURT NEWS

New Mexico Supreme Court Rule-Making Activity

To view recent Supreme Court rule-making activity, visit the Court's website at <https://supremecourt.nmcourts.gov/>. To view all New Mexico Rules Annotated, visit New Mexico OneSource at <https://nmonesource.com/nmos/en/nav.do>.

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building hours: Monday-Friday 8 a.m.-5 p.m. Library Hours: Monday-Friday 8 a.m.-noon and 1 p.m.-5 p.m. For more information call: 505-827-4850, email: libref@nmcourts.gov or visit <https://lawlibrary.nmcourts.gov>.

Third Judicial District Court Mass Reassignment of Cases

On Aug. 25, Gov. Michelle Lujan-Grisham appointed Casey Fitch in Division V of the Third Judicial District Court. Effective Dec. 1, a mass reassignment of all pending cases previously assigned to the Honorable Lisa C. Schultz, District Judge, Division V, shall be reassigned to Honorable Casey Fitch. Pursuant to Supreme Court Rule 1.088, parties who have not yet exercised a peremptory excusal will have 10 days from Dec. 1 to excuse Judge Fitch.

STATE BAR NEWS

License Renewal and MCLE Compliance—Due Feb. 1, 2022

State Bar of New Mexico licensing certifications and fees and Minimum Continuing Legal Education requirements are due Feb. 1, 2022. The Supreme Court of New Mexico recently revised the rules relating to attorney licensing and MCLE (see NMSC Order NO. 21-8300-030). For more information, visit www.sbnm.org/compliance

To complete your licensing certifications and fees and verify your MCLE compliance, visit www.sbnm.org and click "My Dashboard" in the top right corner. If you have not logged into our website recently, you will need to choose "Forgot Password." For questions about licensing and MCLE compliance, email mcle@sbnm.org or call

Professionalism Tip

With respect to my clients:

I will advise my client against pursuing matters that have no merit.

505-797-6054. For technical assistance accessing your account, email techsupport@sbnm.org or call 505-797-6018.

New Mexico Judges and Lawyers Assistance Program Defenders in Recovery

Defenders in Recovery meets every Wednesday night at 5:30 p.m. The first Wednesday of the month is an AA meeting and discussion. The second is a NA meeting and discussion. The third is a book study, including the AA Big Book, additional AA and NA literature including the Blue Book, Living Clean, 12x12 and more. The fourth Wednesday features a recovery speaker and monthly birthday celebration. These meetings are open to all who seek recovery. We are a group of defenders supporting each other, sharing in each other's recovery. We are an anonymous group and not affiliated with any agency or business. Anonymity is the foundation of all of our traditions. Who we see in this meeting, what we say in this meeting, stays in this meeting. For the meeting link, send an email to defendersinrecovery@gmail.com or call Jen at 575-288-7958.

Employee Assistance Program

NMJLAP contracts with The Solutions Group, The State Bar's EAP service, to bring you the following: FOUR FREE counseling sessions per issue, per year. This EAP service is designed to support you and your direct family members by offering free, confidential counseling services. Check out the MyStress Tools which is an online suite of stress management and resilience-building resources. Visit www.sbnm.org/EAP or call 866-254-3555. All resources are available to members, their families, and their staff. Every call is completely confidential and free.

Monday Night Attorney Support Group

The Monday Night Attorney Support Group meets at 5:30 p.m. on Mondays by Zoom. This group will be meeting every Monday night via Zoom. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a

way to connect with colleagues, to know you are not in this alone and feel a sense of belonging. We laugh, we cry, we BE together. Email Pam Moore at pmoore@sbnm.org or Briggs Cheney at BCheney@DSCLAW.com for the Zoom link.

NMJLAP Committee Meetings

The NMJLAP Committee will meet at 10 a.m. on Jan. 8, April 2, and July 9, 2022. The NMJLAP Committee was originally developed to assist lawyers who experienced addiction and substance abuse problems that interfered with their personal lives or their ability to serve professionally in the legal field. Over the years the NMJLAP Committee has expanded their scope to include issues of depression, anxiety and other mental and emotional disorders for members of the legal community. This committee continues to be of service to the New Mexico Judges and Lawyers Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

N.M. Well-Being Committee Well-Being Survey

The N.M. Well-Being Committee invites members to complete its 2021 well-being survey. The survey is anonymous and the Committee will only gather generalized information to assist in pursuing initiatives for the improvement of the well-being of the legal community and its members. The survey will be open until Nov. 30. Visit <https://survey.sbnm.org/r/0LYaDI> to take the survey.

UNM SCHOOL OF LAW Law Library Hours

Due to COVID-19, UNM School of Law is currently closed to the general public. The building remains open to students, faculty and staff, and limited in-person classes are in session. All other classes are being taught remotely. The law library is functioning under limited operations, and the facility is closed to the general public until further notice. Reference services are available remotely Monday through Friday, from 9 a.m.-6 p.m. via email at UNMLawLibref@gmail.com or voice-

mail at 505-277-0935. The Law Library's document delivery policy requires specific citation or document titles. Please visit our Library Guide outlining our Limited Operation Policies at: <https://libguides.law.unm.edu/limitedops>.

Women's Law Caucus Nominations For The Annual Justice Mary Walters Award

The Women's Law Caucus organizes and hosts the annual Justice Mary Walters Award and Dinner. This award honors the pioneering spirit and legacy of Justice Mary Walters, the first female Justice of the New Mexico Supreme Court, by recognizing two women who represent Justice Walter's constant courage, strong ethics, leadership, and mentorship in the legal field. The Women's Law Caucus invites nominations. Submit the name of the nominee, a small blurb about why they should win the award, and a suggestion for who would introduce them if they win. Send nominations to johnstone@law.unm.edu by Feb. 28, 2022. The Justice Mary Walters Dinner and Award will be held on the evening of April 22, 2022."

OTHER NEWS Gene Franchini N.M. High School Mock Trial Competition

Judge Registration is Open

Mock trial is an innovative, hands-on experience in the law for high school students of all ages and abilities. Every year, hundreds of New Mexico teenagers and their teacher advisors and attorney coaches spend the better part of the school year researching, studying, and preparing a hypothetical courtroom trial involving issues that are important and interesting to young people. To register to judge, visit <https://registration.civicvalues.org/mock-trial/registration/judge-volunteer-registration>. The competition is scheduled to be in person, but will be online if necessary. The qualifier tournament will be Feb. 18–19, 2022, in Albuquerque and Las Cruces and the state final competition will be March 11–12, 2022. For more information, contact Kristen at the Center for Civic Values at 505-764-9417 or Kristen@civicvalues.org.

— *Featured* —

Member Benefit



Clio's groundbreaking suite combines legal practice management software (Clio Manage) with client intake and legal CRM software (Clio Grow) to help legal professionals run their practices more successfully. Use Clio for client intake, case management, document management, time tracking, invoicing and online payments and a whole lot more.

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Learn more at landing.clio.com/nmbar.

“ So What Have You Done for Me Lately? ”

The New Mexico Well-Being Committee, 2021 and Beyond

In 2020, the State Bar of New Mexico Board of Bar Commissioners established the New Mexico Well-Being Committee. The name says it all! Unsurprisingly the New Mexico Well-Being Committee, which consists of key stakeholders from the legal community, is focused on well-being in the legal community. This includes mental, emotional, physical, and spiritual health, and struggles. In 2021, the Committee worked on several important initiatives including: (1) the launch of the Committee’s “What a Healthy Lawyer Looks Like” campaign, a monthly series of articles and podcasts devoted to well-being topics; (2) a virtual 5K in partnership with the State Bar of New Mexico Young Lawyers Division; (3) a CLE Well Talks event featuring national speakers elaborating on different aspects of well-being in New Mexico and in the Nation; (4) the addition of important online resources for those members of the legal community seeking more well-being information or support; (5) supported the presentation by Cory Muscara, a featured speaker at the 2021 State Bar Annual Meeting and Member Appreciation Day, on meditation, working with discomfort, and demystifying intuition; (6) the creation and distribution of a well-being survey for members of the legal community; and (7) launched the first Judicial Wellness Program that focuses on the health and well-being of all of New Mexico’s judges.

In this last year, through the Committee’s work and the generous contributions of many volunteers from the legal community¹, we learned about the benefits and challenges of practicing law using virtual platforms, the physical, emotional, and mental toll of incivility and unprofessionalism, and how lawyers and judges are at risk of something known as “compassion fatigue” or “secondary trauma” resulting from working in a profession where they are called upon to witness and address others’ traumatic life events. We also learned about the benefits of sleep, exercise, connection, and hobbies. We talked about the importance of self-care, setting boundaries, and committing to taking time for ourselves away from work and technology to refresh and recharge. We explored how fear plays a role in our decisions and received tips on how to manage that fear. We explored the importance of seeking help, the stigma that often prevents us from doing so, and ways to overcome that stigma. And we heard and read about the illusive concept of happiness, including what it means to be happy, or at least “sort of happy” in law school. If you missed any of the podcasts over this past year, you can find them at <https://www.sbnm.org/Leadership/Committees/NM-Well-Being-Committee/Legal-Well-Being-In-Action-Podcast/Episode-Library>. You can find the related articles at <https://www.sbnm.org/Leadership/Committees/NM-Well-Being-Committee/What-a-Healthy-Lawyer-Looks-Like>. The Committee encourages you to listen to/read any or all.



The NM Judicial Wellness Program was born out of a judicial subcommittee made up of representatives from the following organizations: judges at different levels of the judiciary, the Judicial Education Center, Administrative Office of the Courts, the New Mexico Judges and Lawyers Assistance Program, and the Judicial Standards Committee. The goal is focusing on creating and/or increasing the level of well-being awareness, education, resources and services for NM judges. A three phased plan was put in place that identified the following areas to create or expand: (1) monthly JWell Now e-blasts; (2) Judicial Roundtables; (3) mental health first aid training; (4) mentoring; (5) coaching; (6) a confidential resource for struggling judges; and (7) a concierge counseling service. A full time employee has recently been hired to lead these state efforts and connect with the national judicial well-being movement. Judges can look forward to much more well-being education, services and resources in the year 2022 and beyond.

As you can see, the past year has focused on well-being at the individual lawyer or individual judge level. But as the Committee has maintained from its inception, it's time for a culture change in the entire legal community, and there is still much work to be done to accomplish that goal. So, for 2022, the Committee will launch its "What a Healthy Legal Community Looks Like" campaign. Look for podcasts and related articles on what law firms, state agencies, small and solo practitioners, and the Law School are or can be doing to create an atmosphere of well-being. Expect robust continuing education centered on well-being in the legal community. And, of course, the Committee will follow-up on what it learns from the well-being survey sent out in early November, 2021 and implement education and programs to address identified needs.

Protecting the integrity of the legal community; eliminating harm to clients brought on by their lawyer; being courteous, professional and respectful to colleagues and staff; and striving to put forward the best version of ourselves as a legal representative and human being is our duty and responsibility. Well-being education and efforts only succeed if the intended audience is open to the information, becomes curious about how they can do and be better, and makes a conscious effort toward changing maladaptive behaviors. We invite and challenge each legal professional to be the change you want to see in the world. Or, to put it another way, remember the golden rule – Treat yourself and others as you would want somebody to treat

“ ... it's time for a culture change in the entire legal community, and there is still much work to be done to accomplish that goal. ”

your most cherished loved one.

If you want more information, please visit <https://www.sbnm.org/>

[Leadership/Committees/](#)

[NM-Well-Being-Committee/What-a-Healthy-Lawyer-Looks-Like](#). If you want to get involved or have questions, email us at well@sbnm.org. Regardless, we hope that each of you will join us in a commitment to well-being individually and as a community.

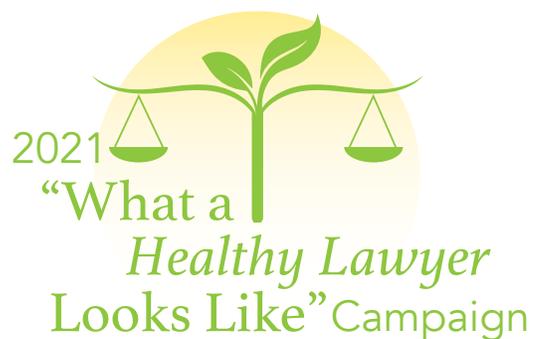
Endnotes

¹ In no particular order, the NM Well-Being Committee would especially like to thank the following persons for their time, insight and willingness to write articles and/or participate in Committee podcasts, and for their assistance in spreading the word about the importance of well-being: Annie Swift; Dr. Katie Young, PhD, J.D.; Denise Torres; Caitlin Dillon; William Slease; Sarah Armstrong; Rebecca Kitson; Pamela Moore; Briggs Cheney; Dr. Rex Swanda; Dr. Evelyn Sandeen; Richard Cravens; Sean Fitzpatrick; Justice Edward L. Chavez (ret); Justice Barbara Vigil (ret); Judge Josh Allison, Judge Henry Alaniz, Judge Sandra Engel; Judge Abigail Aragon; Norm Gagne; Beth Gillia; Scott Patterson; Lynette Paulman-Rodriguez; Laura Bassein; and Judi Olean.

Authors:

WILLIAM D. SLEASE is the Professional Development Program Director for the State Bar of New Mexico. In addition to his duties at the State Bar, he serves as an adjunct professor at the University of New Mexico School of Law where he teaches Ethics, 1L Lab, and serves as a practice skills evaluator for the evidence-trial practice skills course. He formerly served as the Chief Disciplinary Counsel for the New Mexico Supreme Court Disciplinary Board.

PAMELA MOORE, MA, LPCC, is the Director of the State Bar of New Mexico's Judges and Lawyers Assistance Program (NMJLAP), and a member of the NM Well-Being Committee.





New Rules Regarding Attorney Licensing and MCLE Compliance



Changes have been made to rules regarding attorney licensing and MCLE compliance. These changes streamline the deadline and fee structure. The changes are outlined in NMSC Order No. 21-8300-30. Learn more at www.sbnm.org/compliance

Benefits of the new rules

- ✓ Unifies both licensing renewal and MCLE compliance into a single set of deadlines and fees
- ✓ Members now have 30 extra days to complete MCLE compliance
- ✓ The maximum late penalty is now \$275
- ✓ Members may now roll over up to 4 hours of self-study into the next compliance period

All aspects of your License Renewal must be complete by Feb. 1, 2022, to avoid late penalties:

- ✓ Licensing forms and certifications
- ✓ Licensing fees
- ✓ Minimum Continuing Legal Education requirements

TIMELINE

✓ Feb. 1, 2022

- 2021 MCLE credits must have been completed (members and course providers have 30 days to check their transcripts for errors and file credits)
- 2022 license renewal must have been completed

✓ Feb. 2, 2022

- Any aspect of non-compliance will incur a \$275 late penalty
- Members and course providers have 30 days to file credits for courses taken at the end of the compliance period.
- After paying the \$275 late penalty, members will have an additional 90 days to complete compliance

✓ March 1, 2022

- Members and course providers must have filed any outstanding credits for the 2021 compliance period
- Members must have reported any errors in their transcripts to the State Bar
- It is the member's responsibility to check his/her transcript to ensure accuracy. Rule 18-301(B) NMRA

✓ May 1, 2022

- Any uncompleted aspect of compliance will cause the member to be reported to the Supreme Court for non-compliance and possible suspension of the member's license

To complete license renewal and MCLE compliance, visit www.sbnm.org/mydashboard.

For questions about licensing and MCLE compliance, email mcle@sbnm.org or call 505-797-6054. For technical assistance accessing your account, email techsupport@sbnm.org or call 505-797-6018.



License Renewal and MCLE Compliance



State Bar of New Mexico licensing certifications and fees and Minimum Continuing Legal Education requirements are due Feb. 1, 2022*

- ✓ 2022 Licensing certifications and fees
- ✓ 2021 MCLE requirements

*The Supreme Court of New Mexico recently revised the rules relating to attorney licensing and MCLE rules (see NMSC Order No. 21-8300-030).

To complete annual licensing and MCLE requirements, visit www.sbnm.org and click **My Dashboard** in the top right corner.
For questions, email mcle@sbnm.org.

Feeling overwhelmed about the coronavirus? We can help!
FREE SERVICE FOR MEMBERS!

Employee Assistance Program

Get help and support for yourself, your family and your employees.

FREE service offered by NMJLAP.



State Bar of New Mexico
Judges and Lawyers
Assistance Program



The
Solutions
Group

Services include up to four **FREE** counseling sessions/issue/year for ANY mental health, addiction, relationship conflict, anxiety and/or depression issue. Counseling sessions are with a professionally licensed therapist. Other **FREE** services include management consultation, stress management education, critical incident stress debriefing, video counseling, and 24X7 call center. Providers are located throughout the state.

To access this service call 855-231-7737 and identify with NMJLAP. All calls are **CONFIDENTIAL**.
Brought to you by the New Mexico Judges and Lawyers Assistance Program
www.sbnm.org

Legal Education

December

- | | | |
|---|---|--|
| <p>8 Ethics of Social Media Research
1.5 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>10 REPLAY: NM Paid Sick Leave and Workplace Privacy Issues (2021)
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>18 2021 Elder Law Institute
5.5 G, 1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> |
| <p>9 Drafting Property Management Agreements
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>13 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>20 Ethics and Conflicts with Clients, Part 1
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org</p> |
| <p>9 OneDrive: How Do I Use It
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>14 Gain the Edge! Negotiation Strategies for Lawyers
5.0 G, 1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>21 Ethics and Conflicts with Clients, Part 2
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org</p> |
| <p>9 2nd Annual Women in Law Conference
3.0 G, 1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>15 Legal Malpractice Insurance and Claims Avoidance 101
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>21 Spinning Plates: Task Management for Lawyers
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
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| <p>10 Ethics & Artificial Intelligence: What Lawyers Should Know
1.0 EP
Teleseminar
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1.0 G
Teleseminar
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www.sbnm.org</p> | <p>22 Talking About Wealth Transfer Plans: Practical Strategies to Avoid Disputes Among Beneficiaries
1.0 G
Live Webinar
Center for Legal Education of NMSBF
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| <p>10 REPLAY: Medical Aid in Dying: The Elizabeth Whitefield End-of-Life Options Act (2021)
1.5 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>17 Trust & Estate Planning for Client Privacy in a Public World
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>27 REPLAY: Minimizing Cultural Errors in Professional Practice (2020)
1.5 EP
Live Replay Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> |
| <p>10 REPLAY: Helping Business Owners and Employers Navigate COVID-19 Restrictions (2021)
1.0 G
Live Webinar
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www.sbnm.org</p> | <p>17 Flashes of Brilliance: Putting the Power Back in PowerPoint
1.0 G
Live Webinar
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www.sbnm.org</p> | <p>27 REPLAY: Minimizing Cultural Errors in Professional Practice (2020)
1.5 EP
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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@sbnm.org. Include course title, credits, location/course type, course provider and registration instructions.

December

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|---|--|--|
| <p>28 Ethics Lessons from a Jersey Guy with Stuart Teicher
0.5 G, 2.5 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>28 An Afternoon of Legal Writing with Stuart Teicher
3.0 G
In Person and Live Webinar
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2.0 EP
Live Replay Webinar
Center for Legal Education of NMSBF
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| <p>28 Ethical Issues Representing a Band: Using the Beatles
1.0 EP
Live Webinar
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1.0 EP
Live Webinar
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1.0 EP
Live Webinar
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| <p>28 An Afternoon of Legal Writing with Stuart Teicher
3.0 G
Live Webinar
Center for Legal Education of NMSBF
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1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>31 2021 Ethics in Civil Litigation Update, Part 2
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
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| <p>28 Ethics Lessons from a Jersey Guy
0.5 G, 2.5 EP
In Person and Live Webinar
Center for Legal Education of NMSBF
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1.0 EP
Live Webinar
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January 2022

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|---|---|--|
| <p>13 Deal or No Deal: Ethics on Trial
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>19 Using Free Public Records and Publicly Available Information for Investigative Research
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.sbnm.org</p> | <p>21 Digital Signatures
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
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| <p>14 Practical and Budget-Friendly Cybersecurity for Lawyers
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
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Ethics Advisory Opinion

From the State Bar of New Mexico's Ethics Advisory Committee

FORMAL OPINION: 2021- 001

TOPIC: Fee Splitting when one lawyer provides no services

RULES IMPLICATED: Rules 16-100, 16-101, 16-103, 16-104, 16-105 and 16-702 NMRA (2021).

DATE ISSUED: November 15, 2021

DISCLAIMER FOR FORMAL OPINIONS: The Ethics Advisory Committee of the State Bar of New Mexico ("Committee") is constituted for the purpose of advising lawyers on the application of the New Mexico Rules of Professional Conduct in effect at the time the opinion is issued ("Rules"). One way in which the Committee attempts to advise lawyers is through "formal opinions," which are published. In issuing formal opinions, the conclusions are based upon any facts that are referenced in the opinion. Lawyers are cautioned that should the Rules subsequently be revised, or different facts be presented, a different conclusion may be appropriate. The Committee does not opine on matters of substantive law although concerns regarding substantive law are sometimes raised in the opinions. The Committee's opinions are advisory only, and are not binding on the inquiring lawyer, the disciplinary board, or any tribunal. The statements expressed in this opinion are the consensus of the Committee members who considered the question presented, based upon the Rules in effect on the date issued.

QUESTIONS PRESENTED:

1. May a lawyer split a fee with counsel who, other than signing up the client, does no work in and assumes no responsibility for the matter?
2. Under what circumstances may lawyers who are not in the same firm split a fee?

SUMMARY ANSWERS:

1. No.
2. A fee may only be split between lawyers not in the same firm if each of the conditions of Rule 16-105(F) are met.

ANALYSIS:

Referral Fees Generally Prohibited.

In New Mexico, the Rules generally prohibit a lawyer from making the payment of a fee or "anything of value" to a person who has recommended the lawyer's services. Rule 16-702(B) NMRA (2021). There are only four enumerated and specific exceptions to this prohibition:

- (1) A lawyer may pay the reasonable costs of advertisements or communications through written, recorded or electronic communication, including public media;
- (2) A lawyer may pay the usual charges of a legal service plan¹ or not-for profit or qualified lawyer referral service²;
- (3) A lawyer may purchase a law practice in accordance with Rule 16-117 NMRA (2021); and
- (4) A lawyer may refer clients to another lawyer or non-lawyer

professional pursuant to a reciprocal referral agreement so long as the agreement is not exclusive and the client is informed of the nature and existence of the agreement.

Id. Any payment for referral (i.e., referral fee) that does not squarely fall within one of these exceptions is an impermissible referral fee prohibited by the Rules. For purposes of this opinion, the Committee assumes that the lawyer who signed up the client does not fall within any of the four exceptions, and therefore no referral fee or payment for referral is permissible.

Fee Splitting Permitted Under Certain Conditions.

The Rules do allow fee splitting, or a division of a fee, between lawyers who do not practice in the same firm but only under certain circumstances. The primary Rule applicable to this issue is Rule 16-105(F), which provides:

- (F) Fee Splitting. A division of a fee between lawyers who are not in the same firm may be made *only* if:
- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
 - (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
 - (3) the total fee is reasonable.

(Emphasis added).

The [Code of Professional Conduct] Committee Commentary ("Commentary") to this Rule recognizes that "A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well." Rule 16-105 NMRA (2021), cmt. [8]. In this Committee's view, such an arrangement could be appropriate based upon combined ability to timely and competently represent the client.

A. Proportion of Services or Joint Responsibility.

The first prong of Rule 16-105(F), i.e., a division of fees may be permitted "in proportion to the services performed by each lawyer" or "each lawyer assumes joint responsibility for the representation." A division "in proportion to the services performed" is not further explained in the rule or the commentary. In the Committee's view, such a division might be based upon the respective time spent on the matter by each attorney, or the application of both time and value provided by each lawyer. By example, if one lawyer is providing very generalized legal service while another is providing very specialized legal service, a reasonable adjustment by which the lawyer providing very specialized legal service is compensated more than the lawyer providing more generalized service is likely not prohibited by the Rule.

Lawyers may also split a fee, not based upon the proportion of services provided, so long as each lawyer assumes joint responsibility for representation. While the Rules do not define "joint

Ethics Advisory Opinion

responsibility,” the Commentary advises that “joint responsibility ... entails financial and ethical responsibility for the representation *as if the lawyers were associated in a partnership.*” (Emphasis added). Rule 16-106 NMRA (2021), cmt. [8]. Existing New Mexico case law does not expound on the meaning of the term as used in this Commentary. However, New Mexico partnership statutes provide: “Except as otherwise provided in Subsections (b) and (c) of this section, all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.” §54-1A-306 NMSA 1978. Some other ethics committees have opined that “joint responsibility” under similarly worded rules would include joint responsibility for legal malpractice. *See, e.g., New York State Bar Ass’n Ethics Op. 1201* (2020). The Committee does not opine on substantive law issues. However, lawyers utilizing the “joint responsibility” option would be wise to consider the substantive law issues surrounding such a relationship, including partnership law and resulting liabilities. Certainly, at a minimum, a lawyer contemplating a relationship that would be allowed under Rule 16-105(F) should consider the competency of the other lawyer in regard to the representation at hand. *See, Rule 16-101 NMRA* (2021).

Regardless of whether a matter involves proportionate splitting of a fee or a split based on joint responsibility, in any joint representation matter, it is important for all lawyers involved to recognize that the duties to a client as set forth generally in the Rules, as well as in substantive law, apply to each lawyer. By example, responsibilities related to competence, allocation of authority between lawyer and client, diligence, communication, fees, confidentiality, etc., apply to each lawyer engaged in a joint representation. *See, e.g., Rules 16-101 through 16-106.* This includes certain specific obligations, such as the disclosure of professional liability insurance requirement of Rule 16-104(C), which applies to each lawyer, and each lawyer must make the disclosure and obtain an acknowledgement from the client if the requisite level of professional liability insurance coverage is not held by the lawyer.

B. Client Agreement.

Any fee splitting arrangement requires that the “client agrees to the arrangement, including the share each lawyer will receive.” Rule 16-105(F)(2) NMRA (2021). The client’s agreement must be confirmed in writing. Lawyers are obligated to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Rule 16-104(B) NMRA (2021). Either or both lawyers involved should encourage the client to ask any and all questions the client may have regarding the arrangement and then provide the client with candid responses. In the Committee’s view, this requires the arrangement to be set forth in writing for the client’s review and, at the very least, the writing must confirm the client’s agreement.

C. Fee Must be Reasonable.

Lastly, the final requirement of Rule 16-105(F) is the total fee charged to the client be reasonable. This triggers consideration

of Rule 16-105(A) which prohibits a lawyer from “mak[ing] an arrangement for, charg[ing] or collect[ing] an unreasonable fee or an unreasonable amount for expenses.” The Commentary states that the fees must be “reasonable under the circumstances.” Cmt. [1]. A non-exclusive list of considerations is provided in Rule 16-105(A):

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

These factors “are not exclusive ... nor will each factor be relevant in each instance.” Cmt. [1]. Thus, the reasonableness of a fee in cases involving fee splitting will be based upon the facts and circumstances of the specific representation, as is true for all cases.

CONCLUSION:

Fee splitting where one of the lawyers brings the client to the matter but neither provides any service to the client nor assumes joint responsibility for the representation is prohibited under New Mexico’s Rules. Such an arrangement would amount to an impermissible referral fee.

Any matter in which a fee is split between lawyers not in the same firm must satisfy three requirements:

1. Either:
 - a. The division is in proportion to the services performed by each lawyer; or
 - b. Each lawyer assumes joint responsibility (ethical and financial) for the representation as if the lawyers were in a partnership regarding the matter;
2. The client must agree to the arrangement, including the share each lawyer will receive, with the client’s agreement confirmed in writing; and
3. The total fee must be reasonable.

Endnotes

¹A “legal service plan” is a “prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation.” Rule 16-702 NMRA (2021), cmt. [6].

²A “qualified lawyer referral service” is defined as a lawyer referral service that has been approved by an appropriate regulatory authority. Rule 16-702(B)(2).

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Advance Opinions

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From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-043

No. A-1-CA-37467 (filed May 18, 2020)

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

SANTIAGO MARTINEZ,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY

Jennifer L. Attrep, District Judge

Certiorari Denied, June 23, 2020, No. S-1-SC-38355.

Released for Publication October 6, 2020.

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Opinion

Linda M. Vanzi, Judge.

{1} Defendant Santiago Martinez appeals his convictions for (1) homicide by vehicle (driving while under the influence of drugs), contrary to NMSA 1978, Sections 66-8-101(A), -102(B) (2016); (2) great bodily harm by vehicle (driving while under the influence of drugs), contrary to Sections 66-8-101(B), -102(B); (3) possession of drug paraphernalia, contrary to NMSA 1978, Section 30-31-25.1(A) (2001, amended 2019); and (4) possession of marijuana, contrary to NMSA 1978, Section 30-31-23(A) (2011, amended 2019). Defendant raises three issues: (1) the admissibility of expert testimony concerning Defendant's alleged impairment; (2) the admissibility of Defendant's blood test results in evidence; and (3) the sufficiency of the evidence to sustain Defendant's convictions. We affirm.

BACKGROUND

{2} Defendant's convictions arise from a tragic motor vehicle collision on Highway 64, near Dulce, New Mexico, on June 16, 2014. On February 15, 2015, Defendant was indicted by grand jury on charges of homicide by vehicle (driving while under the influence of drugs), great bodily

harm by vehicle, possession of drug paraphernalia, and possession of a controlled substance (marijuana). Defendant's trial commenced on June 20, 2017, and concluded on June 22, 2017. We summarize the evidence presented at trial regarding the collision and investigation, and the opinion of the State's expert as to whether Defendant was impaired and therefore unable to drive safely at the time of the collision.

The Accident

{3} It was a sunny, clear afternoon, around 4:00 p.m., and Defendant and his girlfriend, Lindsay Hinds, were headed southeast on Highway 64 in Ms. Hinds' white Mercedes sedan. Defendant was driving, and Ms. Hinds was in the passenger seat. Headed northwest (in the opposite lane of travel) was Lylon Vigil, who was driving a GMC pickup truck. Ms. Vigil was driving slightly under the speed limit, and behind her were a dark SUV, followed by another pickup truck towing an RV. Emergency room physician Paul Mikkelson, M.D., was driving the pickup truck, and his partner, Sarah Yurkovich, a registered nurse, was in the passenger seat. Dr. Mikkelson, Ms. Yurkovich, and Ms. Vigil testified at trial regarding the collision.

{4} According to Dr. Mikkelson, the line of vehicles had just come over a rise when

the collision occurred. The dark SUV had pulled out as if to pass Ms. Vigil's pickup truck, but then moved back into the line of cars, and tapped its brakes. At this point, Dr. Mikkelson "backed off" to give the SUV and the truck some additional space. Then, Dr. Mikkelson saw a white sedan in the oncoming southeast-bound lane turn suddenly into the northwest-bound lane, colliding head-on with Ms. Vigil's pickup truck. Dr. Mikkelson testified that the dark SUV immediately in front of him swerved to the right, onto the shoulder, and Dr. Mikkelson swerved to the left.

{5} Ms. Yurkovich testified that she had a clear view down the road after traveling over the rise. Before the collision, Ms. Yurkovich observed the white sedan weaving onto the shoulder, then over the center line, and then back into its lane. She commented about this to Dr. Mikkelson, because the movements of the approaching white sedan "alarmed" her. The white sedan then veered head-on into the pickup truck ahead of them. When asked about whether she saw the SUV pulling out to pass at some point prior to the collision, Ms. Yurkovich stated that she had no specific recollection of it, and that her attention was focused on the white sedan.

{6} Ms. Vigil also testified that the collision occurred just after cresting a small hill. Ms. Vigil had no recollection of any vehicle pulling out to pass. According to Ms. Vigil, the white sedan suddenly appeared on Ms. Vigil's side of the road as Ms. Vigil descended from the hill, and there was no way to avoid a head-on collision. Both Ms. Vigil and Ms. Yurkovich testified that the roadway was clear of obstructions prior to the collision and that there was no other traffic on the road.

{7} After the collision, Dr. Mikkelson pulled over, and he and Ms. Yurkovich checked on the occupants of the two vehicles. A number of passing motorists stopped to assist and call for help, but there was poor cellular reception in the area, and emergency services did not arrive on the scene for twenty to thirty minutes. Dr. Mikkelson and Ms. Yurkovich first checked the white sedan, and saw that Ms. Hinds was not wearing a seat belt and was slumped in her seat, unresponsive, and struggling to breathe. Dr. Mikkelson and Ms. Yurkovich opened Ms. Hinds' airway, and (with the assistance of a few others) carefully removed Ms. Hinds from the vehicle, but Ms. Hinds succumbed to her injuries—blunt trauma to the head and chest—within minutes. The autopsy revealed that Ms. Hinds had 2 nanograms

per milliliter of THC¹ in her blood. Defendant, who was wearing his seatbelt, was slumped over, apparently unconscious and motionless, initially. Soon, however, he regained consciousness and began moaning, expressing confusion, and complaining of pain in his abdomen. Other motorists assisted in lifting Defendant out of the vehicle. Ms. Yurkovich then checked on Defendant, and stayed with him for ten to fifteen minutes, during which time Defendant was holding his belly and continuing to complain of pain, but was stable and responsive, as far as Ms. Yurkovich could discern.

{8} Ms. Vigil was conscious after the impact of the collision, but was in great pain and had difficulty breathing or moving. With Dr. Mikkelson's assistance and direction, other motorists helped remove Ms. Vigil from the GMC truck, via the passenger-side door. Dr. Mikkelson testified that Ms. Vigil appeared to be stable, though she complained of chest and belly pain.

{9} When asked if, while he was at the scene, Dr. Mikkelson or others had gone through or moved the items in the white sedan, Dr. Mikkelson stated that he and Ms. Yurkovich looked through a small wallet that they found near Ms. Hinds, to see if they could identify her, but otherwise didn't touch anything. Dr. Mikkelson also testified that he didn't see bystanders move or remove anything. Ms. Yurkovich testified that she noticed two small syringes containing a brown residue in the white sedan, which had various items scattered around the interior. She did not move anything and did not see anyone else move anything in the vehicle.

{10} The first police officers arrived at the scene five or ten minutes after EMS. New Mexico State Police, the Rio Arriba Sheriff's Office, and the Jicarilla Apache Police Department all dispatched officers, but the Rio Arriba Sheriff's Office led the investigation. Sergeant Gilbert Atencio of the Rio Arriba Sheriff's Office conducted the scene investigation, and testified that there were no skid marks, brake marks, or other evidence indicating that the white sedan had swerved or attempted to avoid either an obstruction or the collision with the GMC truck. Sergeant Atencio further testified that an accident reconstruction was not necessary because the "cause" of the collision was "obvious": the white sedan crossed over the center line and collided with the GMC pickup truck.

{11} Major Matthew Vigil, also of the Rio Arriba Sheriff's Office, investigated whether there was any evidence that either driver was impaired by a substance at the time of the collision. Major Vigil made

contact with Lylon Vigil, who had not yet departed with EMS, and observed nothing suspicious for substance abuse. Defendant had already departed with EMS, so Major Vigil began photographing the white sedan, when he noticed a "heavy odor of raw marijuana" emanating from the vehicle. He saw two electronic cigarettes (e-cigarettes): one in the driver's side door, and one on the driver's side floorboard. He also observed marijuana wax, a substance commonly smoked in e-cigarettes, in the vehicle. Sergeant Atencio also visually inspected the white sedan, and saw two syringes in the passenger seat, both of which contained a brownish-orange substance. Sergeant Atencio suspected that the substance was heroin, and determined that he should seek a search warrant for the vehicle; accordingly, he sealed the vehicle off with evidence tape. He also recalled a "very faint" odor of marijuana, but testified that he was focused on the syringes. Sergeant Atencio requested that the State Police intercept Defendant at the hospital to see if he displayed signs of impairment and to obtain a blood sample.

{12} Following the issuance of a search warrant, Sergeant Atencio and Major Vigil searched the white sedan and recovered (1) a glass smoking pipe with THC residue, found in the trunk; (2) nine syringes containing THC, and two jars containing a liquid tar substance, found in the trunk; (3) a green leafy substance containing THC, found in the trunk; (4) two small syringes with an orange-brown substance, containing THC, and a little vial, all found on the passenger seat; (5) a purple pill container containing nine tablets of alprazolam, otherwise known as Xanax, a benzodiazepine; (6) a black digital scale in the center console of the sedan; (7) a silver grinder found in the driver's side door compartment; (8) a package of a green leafy substance containing THC found in the driver's side door compartment; (9) an e-cigarette found in the driver's side door compartment; (10) a mouth piece and cylinder from an e-cigarette found in the driver's side door compartment; and (11) an e-cigarette found on the driver's side floor board. Sergeant Atencio testified that he learned the vehicle was registered to Ms. Hinds and he returned to her family the items not taken as evidence.

The Blood Test

{13} Both Ms. Vigil and Defendant were taken by helicopter to San Juan Regional Medical Center for treatment. Ms. Vigil testified that her right foot was crushed, and she suffered a concussion and six cracked ribs as a result of the collision. New Mexico State Police Officer Tayna Benally was waiting for Defendant upon

his arrival at the hospital to arrange for the blood draw requested by Sergeant Atencio. At approximately 7:00 p.m., after Defendant had been attended to by nurses for thirty minutes, Officer Benally was able to speak with Defendant and ask him what happened. Officer Benally testified that she was able to understand Defendant after some initial difficulty. Officer Benally testified that Defendant was evidently in pain, in a neck brace, and had blood on his face. Officer Benally asked Defendant if he was traveling alone, or if he had any passengers; he answered that he had a passenger, but did not give "a name." When asked if Defendant made any "admissions" as to "substance use," Officer Benally testified that Defendant told her that he "had one shot of 99 Bananas at the time." Defendant had bloodshot, watery eyes, and Officer Benally attempted to perform a horizontal gaze nystagmus (HGN) field sobriety test, but was unable to perform the test. Officer Benally then read Defendant the "New Mexico Implied Consent Advisory" and Defendant verbally agreed to a blood test. Officer Benally had to ask Defendant to open his eyes in order to sign the accompanying form.

{14} Officer Benally had brought with her a blood kit approved by the New Mexico Department of Health State Toxicology Bureau's Scientific Laboratory Division (SLD). Officer Benally testified that an SLD-approved blood draw kit includes two vials; a needle; forms listing the individual's name, date of birth, any witnesses, and a certification for the nurse; the Implied Consent form; tags to seal the vials; and bubble wrap in which to place the vials within the kit. The nurse was unable to get blood into the vial using the first kit, so Officer Benally had to "get another kit," which she described as "the same . . . box, with the same vials, and the needles and the forms and everything." The nurse drew Defendant's blood at about 8:00 p.m., which Officer Benally witnessed. On cross-examination, Officer Benally conceded that, in the certification accompanying the blood draw kit, the nurse had apparently crossed out the sentence that the blood had been drawn using the "entire contents of . . . [the] kit," but Officer Benally could not say why the nurse had done this. Officer Benally stated that she tagged and sealed the package after the nurse drew Defendant's blood, to ensure that the kit was not tampered with, and provided Defendant's blood sample to Officer Aaron Julian of the Rio Arriba Sheriff's Office.

{15} Because of Officer Benally's testimony, mid-trial, defense counsel filed a motion to exclude Defendant's blood test results from evidence, both because the test

¹THC, or Delta-9-Tetrahydrocannabinol, is the principal psychoactive constituent of marijuana.

Pro Bono Spotlight

Volunteer Attorney Program



The Volunteer Attorney Program (VAP) is a program of New Mexico Legal Aid, operated in partnership with the State Bar of New Mexico and the New Mexico Commission on Access to Justice. The Legal Services Corporation was established in 1974 by Congress to ensure the provision of legal services to low-income Americans. New Mexico Legal Aid is a grantee of the Legal Services Corporation. The Volunteer Attorney Program is an integral part of that grant.

The VAP seeks to increase access to justice for low-income New Mexicans by connecting pro se clients with members of the private bar. It achieves this goal in two ways: (1) direct case placement with pro bono attorneys through its direct representation track and (2) brief advice and counsel with pro bono attorneys through its legal clinic track.

The global pandemic brought in-person legal clinics to a halt in March 2020. But the important work of assisting pro se clients on family and civil law matters has continued in the form of legal teleclinics in 2021. The VAP collaborated with seven of New Mexico's thirteen judicial districts to implement one or more legal teleclinics in 2021. It also worked in conjunction with the State Bar of New Mexico and the Second Judicial District Pro Bono Committee to recruit private attorneys to provide pro bono direct representation to its clients.

In the midst of a pandemic, social unrest and increasing poverty across the state, the VAP wants to honor the good and important work that New Mexico's legal professionals are doing to make life better for those who cannot afford legal services. We are proud of all our volunteer attorneys who embraced the opportunity to assist pro se clients on family and civil law matters both telephonically and virtually. Their selfless contributions to increasing access to justice throughout the state deserves widespread recognition. They embody the heart of pro bono. This publication is dedicated to them.

VAP by the numbers in 2021

36 civil and family law teleclinics held throughout New Mexico

7 Judicial Districts hosted legal teleclinics throughout New Mexico

183 attorneys volunteered to advise pro se clients at civil and family law teleclinics

65 attorneys accepted one or more pro bono cases for direct representation

415+ pro se clients were served through civil and family law teleclinics (through Oct. 7, 2021)

81 pro se clients were served through our direct representation program

744 pro bono hours donated for direct representation

Volunteer Attorney Program

2021 Annual Awards Recipients

The Volunteer Attorney Program is pleased to announce its 2021 annual awards recipients. The following awards recognize outstanding commitment to pro bono service in what has certainly been a trying year.

Felipe Quintana Memorial Award of Excellence

In memory of Felipe Quintana, the VAP legal secretary for 26 years who was dedicated to the advocacy of helping low-income New Mexicans receive pro bono civil legal services. We are delighted to present this award to Pregonzer Baysinger Wideman & Sale, PC.



New Mexican families and small businesses in the midst of transition or crisis come to **PREGENZER, BAYSINGER, WIDEMAN & SALE, PC (PBWS Law)** for expert advice on matters related to estate planning, business planning, disability planning, guardianships, fiduciary litigation, and family law. Clients appreciate their multi-dimensional problem-solving skills delivered in an atmosphere of collaboration, clarity, and empathy. Their goal is to reduce the stress that accompanies life planning and life crises. They know that each client's situation is unique, and they tailor their approach to fit each client's specific needs. They also know that families are complicated, and that a dispute among family members can bring disastrous results for generations. Their clients are looking for the way forward, and they help them find it.

Pro Bono Attorneys of the Year

Kathryn E. Rubi: for her commitment to provide pro bono services in direct representation and civil legal teleclinics. Ms. Rubi has attended all of the VAP sponsored CLE's and has represented a VAP client in each practice area.



KATHRYN E. RUBI, ESQ. has been licensed to practice law for over 30 years. After graduating from the University of San Diego School of Law she joined the Public Defender's Office in New York where she worked until 1995. Attorney Rubi then practiced civil law with a litigation law firm in Charlotte, North Carolina. In 2006, she moved to New Mexico. Shortly after becoming licensed in New Mexico, Ms. Rubi experienced a life-threatening cardiac event. She thought it was an end to her legal career. However, she was fortunate to meet individuals like Professor Sandi Gilley and Dina Afek who introduced her to the Voluntary Attorney Program (VAP) and the staff that works at New Mexico Legal Aid. While Attorney Rubi's heart condition places physical limitations on her, it does not limit the number of people she reaches by telephone at legal clinics or in person or by taking occasional VAP cases.

Allan L. Wainwright: for his dedication to the 2nd Judicial Districts Pro Bono Committee work and his pro bono work in both direct representation and civil legal teleclinics.



ALLAN L. WAINWRIGHT, ESQ. is a native New Mexican with experience handling civil legal cases from coast to coast with offices in New Mexico and Colorado, where he is admitted to practice in both states. He attended the University of New Mexico Law School where he received his Juris Doctorate while on the Dean's List. He has a passion for helping people, especially those injured by the thoughtlessness or negligence of others. He has pursued his vision for helping others by volunteering in legal and other community activities. His passion to help others has served him well and brought him great success. He has achieved the highest rating in his legal profession (AV by Martindale Hubbell), and receives many referrals from other attorneys who know his reputation for excellence. Over the years, various Judges have also recognized his competence by appointing him Special Master, Mediator, and Guardian Ad Litem in numerous state and federal courts.

Pro Bono Appellate Attorney of the Year

Mark D. Standridge: for providing over fifty hours of pro bono representation to a VAP client in her appeal matter.



MARK D. STANDRIDGE grew up in Las Cruces, New Mexico. Mark is an Honors graduate of the University of Arizona, and graduated cum laude from the University of New Mexico School of Law. Mark's practice focuses on appellate, civil rights, and personal injury cases. Mark has briefed and argued several cases in both the state and federal appellate courts, including the United States Supreme Court and the New Mexico Supreme Court. Mark is a member of the Appellate Practice Section of the State Bar of New Mexico, and currently serves on the New Mexico Supreme Court's Appellate Rules Committee.

Direct Representation Shining Stars of the Year

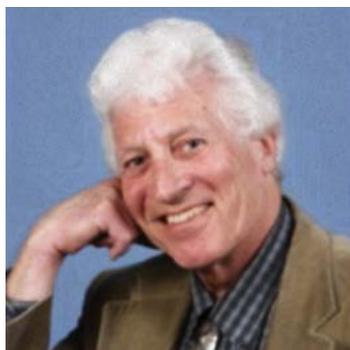
Brian Gaddy, Lucinda "Cindy" R. Silva, and Paul D. Mannick



BRIAN GADDY received his law degree from Texas Wesleyan School of Law in 1994. He is a member of the State Bars of Texas and New Mexico and is admitted to practice law in the United States District Court for the District of New Mexico and the United States District Courts for the Northern and Eastern Districts of Texas. Brian has extensive experience with personal injury litigation. With over 17 years of experience as a Claims Counsel with Professional Claims Managers and a Claims Attorney with the Texas Association of Counties Risk Management Pool, his focus was litigation and pre-suit claims involving municipal law enforcement and public officials' liability. Specifically, he dealt routinely with claims and litigation involving 42 U.S.C. Sections 1981, 1983, and 1985, Title VII, Americans with Disabilities Act, and Texas Whistleblowers Act. Brian has spoken at several conferences on topics involving civil rights, claims adjusting, and litigation management.



CINDY SILVA'S practice focuses on providing Guardian ad Litem services for minors and incapacitated adults in court-approved settlements, under the Structured Settlement Protection Act, in guardianship and conservatorship actions, and as a Rule 1-017(D) representative. She credits her 23 years of litigation experience and recent solo practice for her ability to serve as a volunteer attorney. Ms. Silva received her B.A. from the University of Southern California in 1993 and J.D. from the University of New Mexico School of Law in 1997. Ms. Silva is a member of the NM Board of Bar Examiners, chair-elect of the State Bar's Solo and Small Firm Section, and a member of the New Mexico Trial Lawyers Association.



PAUL D. MANNICK has practiced law in New Mexico since 1988 in a broad range of areas, often in medical malpractice litigation. Before going to UNM law school at 38, he had attained a Ph.D. in Greek Philosophy from the University of St. Andrews in Scotland and taught at St. John's College in a Great Books curriculum. Throughout his years of practice he has represented low-income clients pro bono and regularly participated in free law clinics.

Teleclinic Shining Stars of the Year

Stefanie Beninato, Sheryl L. Saavedra, and Krista L. Garcia



STEFANIE BENINATO is an attorney-mediator who believes in giving back to the community. Beninato has over 700 hours of training including divorce, workplace, Equal Employment Opportunity, victim-offender, probate, environmental and parent-teen training. She has mediated nearly 700 cases, both privately and through courts and public agencies. Stefanie has facilitated multiparty discussions/issues concerning health, education, work place, environmental, water, and land use. She has also arbitrated consumer cases for the Better Business Bureau. Stefanie has a Ph.D. in history which she feels gives her a perspective on why mediation is important. She has a law degree which reinforces her belief in the efficacy of mediation. Stefanie, a 46-year resident of New Mexico, currently resides in Santa Fe.



SHERYL L. SAAVEDRA is an attorney with Peak Legal Group, LLC focusing primarily on custody litigation, high asset divorces and Guardian ad Litem representation of minor children in custody and kinship guardianship cases. Originally from Roswell, NM, Sheryl has represented families and children for more than 27 years. Sheryl is currently the President-Elect of the UNM Law School's Alumni Association and participates in a variety of other organizations, including the State Bar Family Law Section, the NM Collaborative Practice Group, the H. Vearle Payne American Inn of Court, and the Commission on Women in the Legal Profession, among others. She actively volunteers her time to various pro bono legal services, including the Volunteer Attorney Program and Family Law Teleclinics for the 1st and 2nd Judicial Districts. She is a volunteer attorney for the New Mexico Immigrant Law Center and is a volunteer presenter for All Faiths Children's Advocacy Center.



KRISTA GARCIA is the founder and owner of Power Legal LLC. She represents clients in family law, criminal defense, and estate planning matters across the state of New Mexico. Krista is committed to giving back to our community and takes pride in giving her time and services to New Mexico Legal Aid. Krista stays active in the New Mexico legal community serving as a Director of the New Mexico Women's Bar Association, a Member of the Fit 2 Practice Committee of the Young Lawyers Division of the NM State Bar Association, and as a Director of the Law Alumni Association Recent Graduate Chapter.



Direct Representation Going the Distance

Susan M. Hapka and Martin K. Holland: Susan M. Hapka represented a VAP client whose case was filed in 2016 and concluded in 2021. Mr. Martin K. Holland represented a VAP client whose case was filed in 2015 and concluded in 2021. Upon closing of this case, Mr. Holland immediately accepted a new VAP client pro bono.



SUSAN M. HAPKA graduated from the University of Wisconsin in 1981 and completed her Juris Doctorate through University of New Mexico Law School in 1995. Susan was admitted in 1996 to the U.S. District Court, Court of New Mexico and the U.S. Court of Appeals, Tenth Circuit in 2000. Susan was a Partner at Sutin, Thayer & Browne until she retired in August of 2021. Susan achieved the highest rating in her legal profession (AV by Martindale Hubbell).



MARTIN K. HOLLAND, ESQ. is an AV rated attorney from Martindale-Hubbell and the President of Holland Law P.C. Holland was born in Wisner, Nebraska and graduated from the United States Air Force Academy in 1976. He has a Masters Degree in Business Administration from Golden Gate University and graduated from UNM Law School in 1986. Holland was an attorney in the Moses Law Firm from 1986 until 2004. He served on active duty in the Air Force and the New Mexico National Guard and retired as a Brigadier General in 2008. Holland has three combat tours in Iraq and Bosnia and over 5,000 hours of flying time in the A-7 and F-16. He also was a pilot for Delta Airlines. Holland was a past director of Law Access New Mexico and is currently a Board Member of Alvarado Realty. He is a member and the past Finance chair at Asbury United Methodist Church.

Pro Bono Committee Award

Eighth Judicial District Pro Bono Committee

The Pro Bono Committee, chaired by District Court Judge Jeffrey Shannon in the Eighth Judicial District Court, is designed to assist and provide a range of services to low income and pro se litigants. It has expanded the hours of service to staff the Help Desk in Taos with a paralegal during all business days. The Committee adapted to COVID-19 challenges and the barriers of a remote and rural area by offering telephonic and virtual Legal Fairs, Family Law Clinics and Pro Bono Consultations. Its Judges are highly committed to providing genuine assistance to our neighbors. Accordingly, they have set the goals and range of action for its Committee to pursue innovative ways to facilitate access to justice.



Back: Chief Judge Emilio Chavez. From left to right: CEO Karl Brooks, paralegal (Help Desk) Dolores Romo, paralegal (Domestic Relations/Domestic Violence Division) Holly Healy, Court Manager III Lauren Felts-Salazar and Program Manager Gino Unzueta San Miguel. Not in the photo but part of our Committee: Domestic Relations Hearing Officer (Commissioner) Corrie Darr, District Court Judge Jeffrey Shannon, Program Specialist Anita Manning, and Statewide Pro Bono Coordinator Jaime Mayfield.

CLE Presenter of the Year

Nicholas H. Mattison: for presenting the VAP sponsored Defending Debt Collections CLE and numerous VAP consumer debt clients with vital advice and counsel following the CLE.



NICHOLAS H. MATTISON is a partner at Feferman, Warren & Mattison, a consumer protection law firm. His practice includes individual cases and class actions against fraudulent car dealers, predatory lenders, abusive debt collectors, and other businesses that rip off consumers. Mr. Mattison has always felt that one of the best parts of his job is working together with other attorneys, especially legal aid attorneys, who are dedicated to working for New Mexico's most voiceless and vulnerable people. Prior to joining his current firm, Mr. Mattison clerked for the Honorable Edward L. Chavez on the New Mexico Supreme Court, and worked for four years in the Window Rock office of DNA-People's Legal Services, where he fought for the rights of people living in poverty in the four corners region.

Special Recognition

Ronald T. Taylor



VAP would like to give special recognition to volunteer attorney **RONALD T. TAYLOR** for having the most pro bono cases accepted and for judgements exceeding \$100,000 for VAP clients.

With Much Gratitude

To all of our volunteers who provided brief advice and counsel, limited representation, and full representation to those who would otherwise go unrepresented, **THANK YOU!!!**

Adam D. Oakey
Adelaide G. Schwartz
Alexis Shannez Dudelczyk
Alicia Hohl
Allison P. Pieroni
Amanda Aragon
Amanda Navarro
Amber R. Macias-Mayo
Andrea D. Harris
Andrea L. Romero
Angela Gordon
Anna Baecker
Anthony Aguirre
Anthony Spratley
Antoinette M. Sedillo Lopez
Antonia Roybal-Mack
Barbara V. Johnson
Ben Davis
Betsy Salcedo
Bill Russell
Billy K Burgett
Bobbie Batley
Brett Phelps
Brian Harris
Brian James
Bridget J. Hazen
Bridget L. Mullins
Brooke Nowak-Neely
Calvin Hyer, Jr.
Calvin Lee
Carlos N. Martinez
Charles Archuleta
Charles Esty
Charles K. Purcell
Charlotte Itoh
Chester Miller III
Chris Pierce
Christopher P. Bauman
Christopher Pommier
Clifton L. Davidson
Corbin P. Hildebrandt
Cynthia D. Williams
Dale A. Johnson
Damon J. Hudson
Dana Grubestic
Darin K McDougall
Darren Cordova
Dathan L. Weems
David Proper
Debashree Nandy
Deian McBryde
Dennis M. Feld
Dennis W. Hill
Diwayne I. Gardner
Donna J. Lynch
Donna S. Trujillo Dodd
Dorene A. Kuffer
Dorie Biagianti Smith
Dorothy C. Sanchez
Dylan P. Lutey
Dynette C. Palomares
Edward W. Shepherd
Eileen R. Mandel
Elliot Barela
Emeterio L. Rudolfo
Emily Powers
Erika R. Pirotte
Erin M. Pitcher
Eucaris Tatiana Perez-Valero
Eugenio S. Mathis
Felix Briones Jr.
Floyd W. Lopez
Fred C. Martinez
Gabrielle Johnson
Gerald G. Dixon
Grace Allison
Gregory Gahan
Gretchen Elsner
Helene Dobbins
Herman Chico Gallegos
Hilary Noskin
Jackie L. Fortner
Jacob N. Sanchez
Jaime Mayfield
James A. Burroughs
James A. Montalbano
James P. Lyle
Jamie Dawson
Jamison R. Shekter
Jason M. Searle
Jay L. Faurot
Jeffrey D. Johnson
Jennifer Olson
Jenny Dumas
Jensen Wallace
Jessica M. Hess
Joel Cruz-Esparza
Jon Feder
Jonathan M. Peake
Julie Bishop
K. Stephen Royce
Kaela Holmen
Karen Summers
Karlos Ulibarri
Katherine M. Moss
Kathleen AuCoin
Kathryn M. Wissel
Kedar Bhasker
Keith Franchini
Kelan Emery
Lalita Devarakonda
Lance B. Wainwright
Lane Tita
Latisha K. Frederick
Laura Horton
Lauren E. Riley
Laurie McFarland
Lee Boothby
Leisa M. Richards
Lesley Gray
Linda K. Wilson
Lucy Sinkular
Malia Santilla
Marc A. Grano
Mari S. Kempton
Maria Montoya-Chavez
Mark A. Curnutt
Mark D. Freudenheim
Mark J. Klecan
Marlo Aragon
Marna N. Trammell
Mary Green
Marylou Poli
Matthew Gandert
Matthew Rowland
Matthew Tucker
Meredith M. Baker
Merrie L. Chappell
Michael Casey
Michael Flores
Michael J. Doyle
Michael J. Golden
Michael K. Daniels
Michael M. Rueckhaus
Michael S. Liebman
Michele Carey
Mingjie Hoemmen
Monica D. Baca
Morgan E. Honeycutt
Moses B. Winston
Nathaniel Gentry
Nicholas H. Mattison
Orlando Lucero
Paige Diem
Patricia L. Simpson
Patrick J. Hart
Patrick L. McDaniel
Paul A. Kastler
Paul Cash
Penelope Quintero
R. David Humphreys
Rachel Berenson
Raymundo Rojas
Rebecca Branch
Rebecca Mulcahy
Richard J. Moran
Rob Treinen
Robert F. Medina
Roger Moore
Roger V. Eaton
Rolando Morales
Ryan D. Baughman
Ryan Kluthe
Ryan Sanders
Samantha M. Adams
Sean P. McAfee
Sean S. Ramirez
Serena C. Valley
Shahnaz Stanley
Sherrie A. Sanchez
Sidney P. Childress
Sitora K. Wirfel
Stephen C. Long
Stephen P. Eaton
Susan Crawford
Susan E. Page
Susan M. Warren
Susanne Holloway
Suzanne Gaulin
Tamara Couture
Tatiana D. Engelmann
Taylor E. Smith
Terrence R. Kamm
Terrill L. Muller
The Honorable Clay Campbell
The Honorable Jeff McElroy
The Honorable Louis P. McDonald
Thomas C. Montoya
Thomas L. Isaacson
Thomas W. Guerra
Timothy L. White
Tomas R. Benavidez
Troy D. Ward
Vanessa I. Peake
Victoria Lucero
Wendy Basgall
Wesley Enns
William A. Moore
William C. Birdsall
William J. Morgan

Meet the VAP Team

VAP DIRECTOR (To be determined)

The VAP Director oversees the entire program, including direct representation, legal teleclinics, CLE presentations, and volunteer recruitment and training. The VAP Director also works closely with State Bar leaders, Courts, the Access to Justice Commission, Pro Bono Committees, law school faculty and student groups, and private volunteer attorneys.



Meryl Sutton, VAP Paralegal

Meryl screens applicants for the direct representation program. Once eligibility is assessed, Meryl conducts legal research and collects discovery to create an attorney blast that facilitates placement with a private volunteer attorney. The volunteer attorney decides the scope of representation they would like to provide to the client.



Jaime Mayfield, Esq., Statewide Pro Bono Coordinator

Jaime works closely with the Judicial District Pro Bono Committees throughout the state to coordinate civil and family law teleclinics. She screens applicants for teleclinics, recruits and trains volunteer attorneys, and supports pro bono committees in their efforts to meet the needs of pro se clients in their respective judicial districts.



Marissa Gonzalez, VAP Legal Secretary

Marissa manages a high volume of telephone calls and emails from clients and community members statewide who inquire about legal teleclinics. She assists with client registration, file management, and teleclinic advertising. She also provides referrals to clients who do not meet VAP's eligibility guidelines. Given that she is bilingual, she is also able to assist our Spanish speaking clientele without language barriers.

Contact us

If you would like to volunteer with the Volunteer Attorney Program of New Mexico Legal Aid, we would love to connect you with our pro se clients!

To volunteer with one of our **teleclinics**, please contact Jaime Mayfield at jaimem@nmlegalaid.org.

To volunteer for **direct representation**, please contact Meryl Sutton at meryls@nmlegalaid.org.

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was not administered within three hours of driving (citing 7.33.2.15(A)(2) NMAC) and because the State failed to show that the test kit used was SLD-approved, as required by 7.33.2.15(A)(3) NMAC. The district court initially reserved ruling on the motion, noting that other witnesses on the State's witness list might be able to provide more information as to whether the kit used complied with SLD requirements. Subsequently, the State's toxicology expert, Protiti Sarker, staff manager and chemist at the SLD, testified that she had seen the nurse's certification in Defendant's blood kit, and the crossed-out language, but that the nurse had also added a note indicating that she used a smaller needle, a "butterfly 21 GA and vacuum meter" rather than the needle included in the kit. Ms. Sarker testified that sometimes nurses taking blood samples with an SLD kit use a different needle from the needle in the kit, as the needle in the kit may be too large. Ms. Sarker testified that there was no reason to believe that any other aspect of the kit had not been used, as it is standard procedure for the SLD analyst to note any irregularities, and there were none in this case. Ms. Sarker also testified that the SLD would not accept a blood test kit if there was "something wrong with the kit."

{16} Following Ms. Sarker's testimony on these issues, the district court denied Defendant's motion, concluding that there was no evidence that strict compliance regarding use of the needle in the SLD blood kit was required to ensure the accuracy of the sample, and cited Ms. Sarker's testimony that the SLD would not have accepted the blood sample had the kit failed to meet SLD requirements. The district court also held that the passage of more than three hours between the collision and the blood test was relevant as to the weight of the evidence, but did not render the blood test results inadmissible, citing NMSA 1978, Section 66-8-110(E) (2007), and *State v. Bowden*, 2010-NMCA-070, ¶ 1, 148 N.M. 850, 242 P.3d 417.

Expert Opinion Testimony of Ms. Sarker

{17} The State also offered Ms. Sarker as an expert qualified to testify regarding Defendant's blood toxicology results, and as to whether Defendant was impaired by drugs at the time of the collision, such that he was unable to safely operate a vehicle. Defense counsel objected to Ms. Sarker's expertise to offer testimony concerning the effects of drugs on human behavior and, specifically, the ability to operate a vehicle. Following voir dire, and direct questioning by the district court, the court found that Ms. Sarker was so qualified, citing, among other things, Ms. Sarker's bachelor's and master's degrees in pharmacy; her work at the SLD for eleven years as an advanced chemist and staff manager; her profes-

sional coursework on the effects of drugs on human performance and driving behavior, including a forty-hour course that she completed twice (in 2007 and 2016); her reliance upon the same studies relied upon by other experts in the field; and her previous qualification, on over thirty occasions, as an expert in the same area. The district court also generally found that Ms. Sarker's testimony would be of assistance to the jury, and that it had a reliable basis, citing Rule 11-702 NMRA, and *State v. Downey*, 2008-NMSC-061, ¶ 25, 145 N.M. 232, 195 P.3d 1244.

{18} Ms. Sarker testified regarding the process of testing blood samples for drug and alcohol content, and her review of the data produced by the chemical analysis of Defendant's blood. Defendant's blood test revealed the presence of 0.04 milligrams per liter of alprazolam; 0.05 milligrams per liter of oxycodone, and 3 nanograms per milliliter of THC. The levels of oxycodone and alprazolam in Defendant's blood were within the relevant therapeutic ranges. Ms. Sarker testified that, although alprazolam is a central nervous system depressant drug, prescribed for anxiety, and oxycodone is an analgesic pain medication, both have central nervous system depressant effects. She explained that these effects include drowsiness or sleepiness and slower reaction time and reflexes. Ms. Sarker also noted that, while THC is a psychoactive drug not categorized as either a depressant or stimulant, it can have both depressant and stimulant effects on the central nervous system. Moreover, oxycodone, alprazolam, and THC ingested in combination produce an additive effect.

{19} When asked about the effects of these drugs on a person's driving ability, Ms. Sarker stated that blood levels alone are not adequately informative because the strength of the effect of any drug depends upon individualized factors, such as a person's metabolism, how long a person has used the drug, a person's sensitivity to particular effects of a given drug, and so forth. Ms. Sarker explained that, in order to determine whether a person was experiencing certain effect(s) of a drug or drugs at the relevant time, she considers other factors from the police reports, such as driving behavior, and the results and observations from field sobriety tests. On direct examination, Ms. Sarker discussed Defendant's behavior at the hospital following the accident, as described in the police report. Specifically, she testified that, during the attempted field sobriety test, Defendant was unable to keep his eyes open to take the test, consistent with the depressant effects of the drugs that were found in Defendant's blood. Ms. Sarker was then asked whether, based on the "additive effect" of the drugs in issue,

and her analysis of the "raw data," it was her opinion that Defendant was "impaired to the extent that he was not able to drive safely" at the time of the accident, to which Ms. Sarker answered "yes."

{20} On cross-examination, Ms. Sarker confirmed that she could not form an opinion about impairment based on the concentration of a drug in the individual's blood, alone, without more information. Ms. Sarker acknowledged that, here, she did not have any information outside of the police reports. She had no information about Defendant's metabolism, tolerance, or history of drug use, nor did she have any information from his medical records, either prior to the accident, or relating to the accident. Ms. Sarker acknowledged that she did not know what if any drugs were administered by emergency medical personnel in the hours between the collision and the blood test. Ms. Sarker reiterated that she found significant Defendant's reported inability to open his eyes, such that Officer Benally was unable to perform the field sobriety "eye tests." When asked what if any injuries Defendant was suffering from at the time of the attempted "eye tests," Ms. Sarker acknowledged that she did not know. Ms. Sarker agreed that, if Defendant suffered a head injury, that would probably explain his inability to open his eyes in the emergency room, but added that she is not a physician, and that she could only say that his symptoms were consistent with the effects of central nervous system depressants.

{21} Ms. Sarker further testified on cross-examination that, even if the oxycodone was administered at the hospital, it was her opinion that Defendant was impaired by the additive effects of alprazolam and THC at the time of the accident, based on his driving behavior. She initially agreed that her opinion "really [came] down to" the "fact that there was an accident," but then qualified that statement, reiterating the significance of the totality of the circumstances, including Defendant's drowsiness at the hospital, the toxicology results, and Defendant's driving behavior. Ms. Sarker agreed that her "issue" with Defendant's driving at the time of the collision was his "reaction time," but she was not asked to explain the significance of the circumstances of the accident with respect to reaction time. As to the cause of the accident, Ms. Sarker testified that her understanding from the police reports was that Defendant had "merged into the lane and hit the vehicle in front of [him]."

{22} Following Ms. Sarker's testimony, defense counsel moved for a directed verdict, which the district court denied. Defendant put on no evidence. The jury convicted Defendant on all four counts: (1) homicide by vehicle (driving while

under the influence of drugs); (2) causing great bodily injury (driving while under the influence of drugs); (3) possession of drug paraphernalia; and (4) possession of marijuana. Defendant appeals.

DISCUSSION

{23} Defendant raises three issues on appeal. First, he argues that the district court abused its discretion in admitting the opinion of the State's toxicology expert, Ms. Sarker, whose opinion, he contends, was "unmoored from the facts of the case" and therefore unreliable and inadmissible. Second, he argues that the district court abused its discretion in admitting Defendant's blood test results, because the State failed to lay a proper foundation, both because the blood test kit was not shown to be "SLD-approved," and because the blood was collected approximately four hours after the accident. Finally, he argues that the State failed to present sufficient evidence to sustain the convictions.

{24} We first address Defendant's second argument, concerning the blood test results, given that Ms. Sarker's opinion relied, in part, upon those results. Next, we address the admissibility of Ms. Sarker's testimony. Last, we address Defendant's argument concerning the sufficiency of the evidence to sustain the convictions.

Blood Test Results

{25} We review alleged errors in the admission or exclusion of evidence under an abuse of discretion standard. *State v. Martinez*, 2007-NMSC-025, ¶ 7, 141 N.M. 713, 160 P.3d 894. This generally means that a district court's evidentiary ruling "will be disturbed on appeal only when the facts and circumstances of the case do not support its logic and effect." *Id.* (alteration, internal quotation marks, and citation omitted). However, where the district court admits evidence lacking a foundation, it abuses its discretion. *See State v. Gardner*, 1998-NMCA-160, ¶ 5, 126 N.M. 125, 967 P.2d 465. We review questions of law related to foundational requirements, and the district court's application of the law, *de novo*. *See Bowden*, 2010-NMCA-070, ¶ 9.

{26} Defendant argues that, because there was insufficient evidence that an SLD-approved kit was used to collect his blood, the State failed to lay the requisite foundation for admission of his blood test results. The State counters that there was evidence of the kit's conformance to SLD requirements in all respects, except that a "butterfly" needle was used, rather than the standard needle included in the kit. Moreover, according to the State, there was no evidence that a butterfly needle

compromises the accuracy of a blood sample, accuracy being the touchstone of admissibility. We agree with the State.

{27} The administration and use of chemical tests in cases involving charges of driving while intoxicated (DWI) are governed by criminal statutes, including New Mexico's Implied Consent Act (ICA), and regulations promulgated by the SLD. *See NMSA 1978, §§ 66-8-101 to -141* (1953, as amended through 2019); 7.33.2 NMAC. As discussed by our Supreme Court in *State v. Dedman*, these provisions require the state to show, for any chemical test result sought to be admitted in evidence, that the test complied with the accuracy-ensuring aspects of SLD regulations. *See* 2004-NMSC-037, ¶ 13, 136 N.M. 561, 102 P.3d 628, *overruled on other grounds by State v. Bullcoming*, 2010-NMSC-007, ¶ 16, 147 N.M. 487, 226 P.3d 1. The State does not, however, need to show compliance with regulations that are *not* accuracy-ensuring. *See Martinez*, 2007-NMSC-025, ¶ 11 (reiterating *Dedman's* holding that "to meet foundational requirements, the [s]tate does not need to show compliance with all regulations, but only with those that are 'accuracy-ensuring'").

{28} By way of illustration, in *Dedman*, our Supreme Court considered whether the defendant's blood test results lacked the proper foundation, where the state failed to prove that the defendant's blood-alcohol test had been administered via venipuncture, as required by 7.33.2.15(A)(1) NMAC. *See Dedman*, 2004-NMSC-037, ¶¶ 4-6.² Examining various methods for drawing blood (including venipuncture, arterial puncture, and skin puncture), our Supreme Court concluded that "the reason for collection through veni[]puncture is not a higher probability of accuracy. Instead, veni[]puncture is the preferred method for collecting blood alcohol samples from adults because extraction is easier, less hazardous, and less painful when conducted through the vein." *Dedman*, 2004-NMSC-037, ¶¶ 14-20. Accordingly, our Supreme Court held that "compliance with the 'collection by veni[]puncture' requirement is not a prerequisite to the admissibility of blood alcohol reports." *Id.* ¶ 21. By contrast, in *Martinez*, our Supreme Court held that the SLD requirement (in 7.33.2.11(A)-(B) NMAC) that "breath-alcohol testing equipment be certified by SLD for a period of up to one year" and related requirements, "clearly exist to ensure that the result of a test conducted on a breathalyzer is accurate." *Martinez*, 2007-NMSC-025, ¶¶ 11-12. Thus, before a breath alcohol test

card "is admitted into evidence, the [s]tate must make a threshold showing that the machine has been certified." *Id.* ¶ 12.

{29} SLD regulations with respect to blood sample collection for purposes of toxicology screening provide in part:

The samples shall be dispensed or collected using an SLD-approved blood collection kit. SLD-approved blood collection kit will contain two or more sterile tubes with sufficient sodium fluoride so that the final concentration shall contain not less than 1.0 percent sodium fluoride.

7.33.2.15(A)(3) NMAC. Defendant argues that this regulation requires the State to prove that the entire SLD-approved kit was used, as a predicate to admissibility, to ensure the accuracy of any blood sample, quoting our language from *State v. Garcia*, 2016-NMCA-044, ¶ 4, 370 P.3d 791, in which we described an SLD-approved blood draw kit as "includ[ing] everything that is needed for a blood draw to ensure continuity and standardization, and to avoid compromising the accuracy and integrity of blood samples. The kits contain instructions, paperwork, an iodine cleaning pad, a needle with attached tube, and two gray-topped, sterile vacuum tubes containing sodium fluoride—a white powder preservative." Here, Defendant contends, because Officer Benally "was unable to say" whether the kit used by the nurse was an SLD-approved kit, the State failed to lay the requisite foundation. We disagree with Defendant's characterization of the evidence, and his contention that, in effect, every piece of the SLD-approved kit must be utilized to ensure the accuracy, and therefore admissibility, of blood samples.

{30} First, Officer Benally testified that the blood collection kit used by the nurse was "the same" as the kit that Officer Benally had brought with her initially, and Officer Benally was able to describe the contents of the kits in detail. If the second kit was not an SLD-approved kit, it is also unclear why it included the standard tags and the SLD forms filled out by Officer Benally. Moreover, a note next to the nurse's certification (entered in evidence by defense counsel) explained the crossed-out language as to the "entire contents" of the (second) kit having been used: the nurse substituted a "butterfly" needle for the needle included in the kit. A butterfly needle, also known as a "winged set," is a venipuncture method recommended for small veins, the elderly, or children. *See, e.g., Geneva: World Health Organization,*

²The SLD regulations were amended in 2010; when *Dedman* was decided in 2004, the regulation regarding venipuncture, now located at 7.33.2.15(A)(1) NMAC, was located at 7.33.2.12(A)(1) NMAC (2001), which was repealed. *See Dedman*, 2004-NMSC-037, ¶ 4.

WHO Guidelines on Drawing Blood: Best Practices in Phlebotomy, Ch. 3.2, Table 3.1 (2010), <https://www.ncbi.nlm.nih.gov/books/NBK138650/>. According to Ms. Sarker, a staff manager familiar with the standards and procedures of the SLD, use of a “smaller” needle, rather than the needle included in the kit, is not uncommon. Thus, the district court’s finding that an SLD-approved kit was used, but for the substitution of the butterfly needle for the standard needle, was supported by the facts and circumstances of the case.

{31} Second, the quoted language from *Garcia*—that SLD kits contain everything necessary “to avoid compromising the accuracy and integrity of blood samples”—was our description of the testimony in that case; we expressly did *not* decide whether the blood test result should have been excluded because “the protocols and contents of the SLD blood draw kit were not followed and used” 2016-NMCA-044, ¶¶ 4, 24. Furthermore, even though the regulation states that blood samples “shall be collected” using an “SLD-approved blood collection kit,” such mandatory language was also used in the regulation at issue in *Dedman*. 7.33.2.15(A)(3) NMAC; see *Dedman*, 2004-NMSC-037, ¶¶ 4, 21 (noting that 7.33.2.12(A)(1) NMAC (2001) requires blood samples to be collected by venipuncture). The question is whether the mandate goes to accuracy, or to other factors, such as ease of administration or the safety and comfort of the subject of the blood draw.

{32} If *Dedman* held that proof of the use of venipuncture as the method of drawing a blood sample is not a prerequisite for admissibility, it would be contradictory for us to hold that a particular *method* of venipuncture—i.e., use of the needle included in the standard SLD-approved kit—is a prerequisite for admissibility, absent evidence that other methods are less reliable.³ Defendant did not make this showing, nor any argument to this effect. We further note that the regulation at issue states that SLD-approved kits “will contain two or more sterile tubes with sufficient sodium fluoride so that the final concentration shall contain not less than 1.0 percent sodium fluoride[,]” but does not specify which needle should be included in the kit. 7.33.2.15(A)(3) NMAC. Presumably, if a particular method or needle-type were critical to ensuring the accuracy of a blood sample, the regulation would list it explicitly, as it does by listing the required tubes and preservative concentration. In sum, in the absence of evidence or regulatory guidance to the effect that the needle included in SLD-approved blood

draw kits is accuracy-ensuring, rather than a common and convenient needle for venipuncture blood draws, the district court did not err in finding that the use of a butterfly needle was not a basis upon which to exclude Defendant’s blood test result from evidence.

{33} Defendant argues that the district court also erred in admitting his blood test results in evidence because his blood was collected approximately four hours after the collision, and SLD regulations provide that “[t]he initial blood samples should be collected within three hours of arrest.” 7.33.2.15(A)(2) NMAC. Defendant emphasizes that, based on our decision in *Bowden*, 2010-NMCA-070, ¶¶ 6-7, this regulation is “accuracy-ensuring,” and therefore the State must demonstrate compliance with the regulation as a precondition to admissibility of the blood test result. The State counters that the ICA supersedes this regulation, permitting admission in evidence of test results collected more than three hours after the arrest, with the “trier of fact” to “determine what weight to give the test result,” Section 66-8-110(E), also citing (as did the district court) our holding in *Bowden*, 2010-NMCA-070, ¶¶ 8-12. Defendant replies that the ICA provision explicitly applies to *blood-alcohol tests only*; therefore, the regulation governs. A closer examination of the relevant statutes and the SLD’s amended regulatory scheme convinces us that 7.33.2.15(A)(2) NMAC does not mandate per se exclusion of all chemical tests administered more than three hours after arrest. We explain.

{34} Our de novo interpretation of the DWI statute, the ICA, and SLD regulations is guided by longstanding principles, the most important of which is to give effect to the intent of the Legislature and/or promulgating agency. See *State v. Torres*, 2006-NMCA-106, ¶¶ 5, 8, 140 N.M. 230, 141 P.3d 1284; see also *State v. Willie*, 2009-NMSC-037, ¶ 9, 146 N.M. 481, 212 P.3d 369 (applying principles of statutory interpretation to SLD regulations under de novo standard of review). “[I]n determining intent we look to the language used and consider the statute’s history and background.” *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶ 13, 121 N.M. 764, 918 P.2d 350. When the words used are plain and unambiguous, we give a statute its literal reading, unless that reading would lead to an injustice, absurdity, or contradiction, in which case “we will construe the statute according to its obvious spirit or reason.” *Willie*, 2009-NMSC-037, ¶ 9 (internal quotation marks and citation omitted); see *Torres*, 2006-NMCA-106, ¶

8. Moreover, we consider the provision(s) at issue “in the context of the statute as a whole,” including its purposes and consequences. *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 15, 309 P.3d 1047.

{35} The ICA establishes a framework for chemical testing of persons suspected of DWI, such that “[a]ny person who operates a motor vehicle” in New Mexico is deemed to have consented “to chemical tests of his breath or blood,” with such testing processes to be approved by the SLD. Section 66-8-107(A). The SLD is separately authorized to “promulgate and approve satisfactory techniques or methods to test persons believed to be operating a motor vehicle . . . under the influence of drugs” and to “establish criteria and specifications for equipment, training, quality control, testing methodology, blood-breath relationships and the certification of operators, instructors and collectors of breath samples.” NMSA 1978, § 24-1-22(A), (B) (2003). The SLD promulgated these regulations in 7.33.2 NMAC. Under the ICA, “[t]he results of a test performed pursuant to the [ICA] may be introduced into evidence in any civil action or criminal action arising out of the acts alleged to have been committed by the person tested for driving a motor vehicle while under the influence of intoxicating liquor or drugs.” Section 66-8-110(A).

{36} Provisions governing chemical blood tests, and the timing of blood collections within New Mexico’s DWI statutes, the ICA, and SLD regulations have been amended in ways relevant to our interpretation of the specific provisions at issue here. From 1993-2003, New Mexico’s DWI provision read (in relevant part) as follows:

A. It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this state.
B. It is unlawful for any person who is under the influence of any drug to a degree that renders him incapable of safely driving a vehicle to drive any vehicle within this state.

C. It is unlawful for any person who has an alcohol concentration of eight one-hundredths or more in his blood or breath to drive any vehicle within this state.

NMSA 1978, § 66-8-102 (1993). Notably, although Subsection C established a presumptive level of impairment (blood alcohol concentration (BAC) of .08 or higher), the statute did not contain any provision governing the timing of blood alcohol tests. This Court recognized that “[t]iming is an essential element of the

³We note that, when *Dedman* was decided in 2004, the SLD regulations contained the same provision requiring use of an SLD-approved blood kit, then located at 7.33.2.12(A)(3) NMAC (2001).

crime” under any of these subsections, and that [S]ubsection C in particular required “[t]he State [to] prove a nexus between a BAC of 0.08 or more” at the time “defendant operated a motor vehicle” *State v. Baldwin*, 2001-NMCA-063, ¶ 8, 130 N.M. 705, 30 P.3d 394 (internal quotation marks and citation omitted). We also recognized both the inevitability of some delay in testing, and the difficulty of “[e]xtrapolating backward in time[.] . . . even for experts,” suggesting that our Legislature “could choose to create a statutory inference that a 0.08 BAC within a specified time, say two or three hours after driving, is prima facie evidence of a per se violation of Section 66-8-102(C), which a defendant could then try to rebut.” *Baldwin*, 2001-NMCA-063, ¶¶ 17, 19; see *State v. Christmas*, 2002-NMCA-020, ¶ 22, 131 N.M. 591, 40 P.3d 1035 (stating that “it would be preferable if the [L]egislature would prescribe a relation-back period by statute so that a jury could rely on a subsequent, timely BAC test result as a presumptive surrogate for what the BAC likely was at the time of driving”). At the time of these observations, the SLD regulations provided, with respect to the timing of blood tests, that “[t]he initial blood samples should be collected within two hours of arrest.” 7.33.2.12(A)(2) NMAC (2001).

{37} Then, in 2007, the Legislature amended the DWI statute as follows:

It is unlawful for . . . a person to drive a vehicle in this state if the person has an alcohol concentration of eight one hundredths or more in the person’s blood or breath *within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle*[.]

NMSA 1978, § 66-8-102(C)(1) (2007) (emphasis added). The Legislature also added the following provision to the ICA:

If the test performed pursuant to the [ICA] is administered more than three hours after the person was driving a vehicle, the test result may be introduced as evidence of the alcohol concentration in the person’s blood or breath at the time of the test and the trier of fact shall determine what weight to give the test result for the purpose of determining a violation of Section 66-8-102[.]

Section 66-8-110(E).

{38} The interaction between these amended statutory provisions and the SLD regulation was raised in *Bowden*, where a defendant appealed his conviction under Section 66-8-102(C)(1), arguing that the SLD regulation providing that blood samples “should be collected within two hours

of arrest” mandated exclusion of his blood-alcohol test result, the test having been conducted two hours and forty minutes after his arrest. *Bowden*, 2010-NMCA-070, ¶ 4 (internal quotation marks and citation omitted). We held that, while the regulation’s two-hour testing requirement was accuracy-ensuring, and therefore would be a foundational requirement for admission of blood-alcohol test results in evidence, the amendment to the ICA in Section 66-8-110(E) superseded the regulation by permitting the introduction of results of tests administered after three hours as “evidence of the alcohol concentration in the person’s blood or breath at the time of the test,” with “the trier of fact” to “determine what weight to give the test result.” *Bowden*, 2010-NMCA-070, ¶¶ 7-11 (internal quotation marks and citation omitted). We explained that a statute prevails over an inconsistent regulation. *Id.* ¶ 12 (citing, *inter alia*, *Jones v. Emp’t Servs. Div. of Human Servs. Dep’t*, 1980-NMSC-120, ¶ 3, 95 N.M. 97, 619 P.2d 542, holding that “[a]n agency by regulation cannot overrule a specific statute”).

{39} The State advocates that we extend *Bowden* to hold that Section 66-8-110(E) also supersedes the SLD regulation with respect to blood tests for drugs. The State argues that reading the statute literally would produce the absurd result of excluding drug test results, but admitting blood-alcohol results from blood tests administered more than three hours after driving. We could so hold, particularly given the stated intent of the Legislature to provide for the admissibility of “chemical tests,” presumably including drug tests, taken more than three hours after driving. S.B. 440, 48th Leg., Reg. Sess. (2007) (proposing the 2007 amendments to the ICA and DWI statutes, describing the amendments, in apparent reference to Section 66-8-110(E), as “providing for the admissibility of chemical tests taken more than three hours after driving”); see *Willie*, 2009-NMSC-037, ¶ 9 (holding that we do not read a statute literally where such a reading would lead to an injustice, absurdity, or contradiction; in such cases “we will construe the statute according to its obvious spirit or reason” (internal quotation marks and citation omitted)). However, we need not take this course, as we are no longer persuaded that the SLD intended its provision regarding the timing of chemical blood tests to be a “cutoff” after which a test lacks sufficient accuracy to be given evidentiary weight in any circumstance. We acknowledge and reiterate that, in general, the greater the delay in chemical testing, the less informative the test is likely to be as to a person’s condition at the time of driving. However, it does not necessarily follow that the SLD intended

to establish a window of time in which a driver suspected of DWI *must* be tested for the result to have probative value.

{40} Following our decision in *Bowden*, the SLD amended its regulations to provide that initial blood samples “should be collected within *three* hours of arrest.” 7.33.2.15(A)(2) NMAC (emphasis added). We conclude that the SLD intended in this subsection to establish a *preference*, not a mandate, for testing within a three-hour window, at least in part so that any BAC test result of 0.08 or higher would be probative under the statutory presumption set forth in Section 66-8-102(C) (1). Several factors favor this interpretation. First, the SLD apparently amended the provision in 2010 to align with the statutory presumption enacted in 2007, as described hereinabove. Second, if the intent of the SLD provision was always to bar, on accuracy grounds, the admissibility of tests administered after a certain length of time, surely the SLD would not have responded to the statutory amendments by expanding the timeframe for all chemical blood testing. Third, the SLD has continued to use the word “should” rather than “shall” or “must,” suggesting that the SLD does not view the provision as mandatory, but as preferred or recommended. See, e.g., Federal Plain Language Guidelines, 25 (March, 2011, rev. May, 2011), <https://www.plainlanguage.gov/media/FederalPLGuidelines.pdf> (guiding writers of regulations to use “should” for a recommendation). The SLD used the term “shall,” a term with mandatory connotations, in many other subsections of the SLD regulations, but not here. See, e.g., 7.33.2.15(A)(1) NMAC (providing that “[b]lood samples shall be collected in the presence of the arresting officer or other responsible person who can authenticate the samples”); see also *Redman v. Bd. of Regents of N.M. Sch. for Visually Handicapped*, 1984-NMCA-117, ¶ 17, 102 N.M. 234, 693 P.2d 1266 (“The use of the word ‘shall’ ordinarily imposes a mandatory requirement.”); see also *Anderson v. United Tel. Co. of Kan.*, 933 F.2d 1500, 1502 (10th Cir. 1991) (stating that “the legislature’s use of two different terms is presumed to be intentional”).

{41} Finally, and most critically, we can hardly imagine that the SLD amended its provisions knowing that alcohol tests administered after three hours would be admissible as evidence of blood alcohol levels at the time of testing, but intending that drug tests so administered would be inadmissible. Unlike alcohol, “drugs” as a category encompass everything from prescription medications to heroin—a wide variety of chemicals, processed by and stored in the body in myriad ways, and causing varying effects. The significance

of a drug test administered at any point in time after an arrest will have at least some variance according to substance. More critically, in New Mexico, there are no statutory presumptions with respect to drugs—the State must always establish that the presence of a drug in the defendant’s body at the time of testing is probative as to the defendant’s alleged impairment at the time of driving. See § 66-8-102(B) (providing that “[i]t is unlawful for a person who is under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle to drive a vehicle within this state”); *Baldwin*, 2001-NMCA-063, ¶ 8 (confirming that the state must prove an excessive BAC at the time of driving). This context reveals no reason that the SLD would select three hours as a mandatory cutoff for all drug test results.

{42} In sum, we conclude that the SLD’s amended regulation, 7.33.2.15(A)(2) NMAC, establishes a preference for blood tests to be administered within a time-frame that permits a statutory presumption of impairment if the BAC result is 0.08 or higher, while still allowing blood tests (for alcohol or drugs) to be administered outside of this time-frame and given appropriate weight under the factual circumstances of each case. Accordingly, we hold that Defendant’s blood test did not lack a foundation due to the test having been administered approximately four hours after the accident in this case.⁴

Admissibility of Expert Testimony

{43} Defendant also argues that the district court abused its discretion by admitting the testimony of the State’s toxicology expert, Ms. Sarker, because Ms. Sarker’s opinion was unreliable and inadmissible. Defendant failed to preserve this argument. A claimed error in admission of evidence is not preserved unless the party claiming the error timely objected and stated the specific basis. See Rule 11-103(A)(1) NMRA; Rule 12-321(A) NMRA; see also *State v. Walters*, 2007-NMSC-050, ¶ 18, 142 N.M. 644, 168 P.3d 1068 (“In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon.” (internal quotation marks and citation omitted)). Here, while Defendant contends that he preserved his argument through “multiple defense objections,” the portions of the record to which Defendant directs us are defense counsel’s objections

to Ms. Sarker’s qualifications to testify as to the effect of drugs on human behavior and driving ability. Ms. Sarker was questioned by counsel and the district court with respect to her qualifications to testify on this issue, but—once the court qualified Ms. Sarker as an expert—defense counsel made no objections as to the substance of Ms. Sarker’s opinions or the reliability of her methodology as applied in this case. Indeed, Defendant concedes that the district court advised counsel at the conclusion of trial that a *Daubert* motion and hearing would have been beneficial, noting that “qualifications versus reliability [of expert opinions] are different things.” We agree. See *United States v. Avitia-Guillen*, 680 F.3d 1253, 1257 (10th Cir. 2012) (holding that “[w]here a party objects only to an expert’s qualifications, he does not preserve an objection to the expert’s methodology”).

{44} Although Defendant raises no argument that admission of Ms. Sarker’s testimony constituted fundamental or plain error, we have the discretion to review the district court’s decision under these standards. See Rule 11-103(E) (“A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.”); Rule 12-321(B)(2)(b), (c) (permitting the appellate court in its discretion to review issues involving plain or fundamental error); *State v. Lucero*, 1993-NMSC-064, ¶ 12, 116 N.M. 450, 863 P.2d 1071 (citing *State v. Barraza*, 1990-NMCA-026, ¶ 17, 110 N.M. 45, 791 P.2d 799). “The rule of fundamental error applies only if there has been a miscarriage of justice, if the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or if substantial justice has not been done.” *State v. Orosco*, 1992-NMSC-006, ¶ 12, 113 N.M. 780, 833 P.2d 1146. Plain error, which applies only to evidentiary matters, is a less stringent standard than fundamental error, but the error must affect a substantial right of the defendant, such that we have “grave doubts concerning the validity of the verdict and the fairness of the trial.” *Lucero*, 1993-NMSC-064, ¶¶ 12, 22.

{45} Review for plain or fundamental error on unpreserved expert issues may prove, as it does here, an extremely difficult task. Our observations from *Barraza*, 1990-NMCA-026, ¶ 3, are fitting:

[T]his case does not present a suitable vehicle for us to accomplish more than providing a

few limited observations. Proper analysis of the subtleties arising in [this] testimony requires that the issue be focused in the trial court. When a specific objection is raised to such testimony, counsel for both parties can produce an appropriate record and the trial judge can exercise an informed discretion. We can then review whether that discretion was abused. In this case, however, the most troubling contentions raised in [the] defendant’s brief . . . were not preserved for appeal because they were not raised in the trial court. Therefore, we need not address them to dispose of this appeal. Nor do we think it wise to utter dicta on subtle evidentiary matters without a record that presents the issues with greater clarity than does the record here.

(Citations omitted.) Accordingly, we are able to conduct only a limited review of Defendant’s arguments.

{46} Defendant compares this case to *Downey*, 2008-NMSC-061, ¶¶ 28-34, in which our Supreme Court held that scientific expert testimony⁵ will only assist the trier of fact if the expert’s methodology “fits” the facts of the case. According to Defendant, Ms. Sarker’s opinion did not “fit” the facts of this case because her opinion was predicated on assumptions, which had no evidentiary foundation in the record. Defendant points to Ms. Sarker’s testimony that the effect of the drugs found in Defendant’s blood on a person’s ability to drive depends on a person’s metabolism, the length of time the person has used the drugs, and a person’s sensitivity to the effects of the drugs. Ms. Sarker conceded that she knew none of these things about Defendant, nor did she have information about his injuries or his medical treatment after the accident, which may have impacted both his drug test results and his behavior in the hospital. Accordingly, Defendant contends, Ms. Sarker’s opinion that Defendant was impaired at the time of driving was mere guesswork.

{47} Defendant is correct 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 issue.” *Downey*, 2008-NMSC-061, ¶ 30 (alteration, emphasis, and internal quotation marks omitted).

⁴We assume without deciding that “arrest” is used in 7.33.2.15(A)(2) NMAC is synonymous with “accident,” or “time of driving,” an argument advanced by Defendant and not contested by the State.

⁵There is no dispute that Ms. Sarker’s testimony is subject to the requirements for scientific expert testimony, as set forth in *State v. Torres*, 1999-NMSC-010, ¶¶ 25-26, 127 N.M. 20, 976 P.2d 20 (describing factors to guide the district court in analyzing the reliability of scientific knowledge and testimony).

In *Downey*, the expert purported to apply a retrograde extrapolation analysis of the defendant's BAC, but "did not have the facts necessary to plot [the d]efendant's placement on the BAC curve[.]" *Id.* ¶ 33. Here, however, Defendant does not identify the methodology he contends was misapplied by Ms. Sarker. Although Ms. Sarker testified that the effects of a drug or drugs on a person varies according to factors such as a person's metabolism and sensitivity, she never testified that her methodology requires direct knowledge of these variables. Rather, she testified that she based her opinion on Defendant's toxicology results, his driving behavior, and his interactions with Officer Benally at the hospital. Defendant never challenged (here or at trial) the soundness of this methodology as applied in this case. Such testing of Ms. Sarker's methodology could have included whether, for instance, Defendant's behavior at the hospital were attributable to his injuries and/or possible medication administration, Defendant's toxicology results and his driving behavior alone were capable of supporting Ms. Sarker's opinion. We cannot analyze these issues in a vacuum. The district court found that Ms. Sarker was qualified to offer an opinion on whether Defendant was impaired by drugs at the time of the collision, and Defendant does not challenge Ms. Sarker's qualifications on appeal. The district court's role is to ensure that "the scientific procedure which supports the testimony is . . . capable of supporting opinions based upon a reasonable probability rather than conjecture." *State v. Alberico*, 1993-NMSC-047, ¶ 98, 116 N.M. 156, 861 P.2d 192 (internal quotation marks and citation omitted). On this record, we cannot say that an alternative explanation for Defendant's behavior at the hospital rendered Ms. Sarker's methodological procedures incapable of supporting an opinion based on reasonable probability rather than conjecture. While Ms. Sarker's conclusions may be shaky, it was the jury's province to weigh them. See *Acosta v. Shell W. Expl. & Prod., Inc.*, 2016-NMSC-012, ¶ 41, 370 P.3d 761; see also *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). Moreover, "any doubt regarding the admissibility of [expert opinion] evidence should be resolved in favor of admission, rather than exclusion." *Lee v. Martinez*, 2004-NMSC-027, ¶ 16, 136 N.M. 166, 96 P.3d 291. For all these reasons, while we agree with the district court that a *Daubert* hearing would have been beneficial in this case, the admission of Ms. Sarker's testimony does not cause

us grave concern about the validity of the verdict or the fairness of Defendant's trial, and therefore such admission did not constitute plain or fundamental error.

Sufficiency of the Evidence

{48} Defendant's last argument is that the State failed to present sufficient evidence to sustain his convictions. Sufficient evidence means "substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314. In reviewing the evidence, we must view it "in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict." *Id.* We do not reweigh the evidence or substitute our judgment for that of the jury. See *id.* (explaining that "[a]n appellate court does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence").

{49} With respect to his convictions for homicide and great bodily harm by vehicle, Defendant first alleges that "the State has failed to prove" an essential element of both crimes: namely, that Defendant was under the influence of oxycodone, alprazolam and marijuana to the extent that he was incapable of safely driving a vehicle. See §§ 66-8-101(C), -102(B); UJI 14-240(B), (D) NMRA; UJI 14-245 NMRA. According to Defendant, even if Ms. Sarker's testimony was admissible as sufficiently reliable, her opinion that "the toxicology report was 'consistent' with the accident does not establish beyond a reasonable doubt that [Defendant] was impaired to the degree that he was incapable of safely driving." Defendant cites *State v. Consaul*, 2014-NMSC-030, ¶ 73, 332 P.3d 850, for the proposition that, where the State relies "solely" on expert opinion testimony to establish an element of a crime, the expert's opinion must go beyond a reasonable degree of probability for a jury to find the element established beyond a reasonable doubt.

{50} First, Defendant's reference to Ms. Sarker's testimony is incomplete. Ms. Sarker also testified that, in her opinion, based on the totality of the circumstances, Defendant was unable to drive safely at the time of the accident. She further testified that, even if Defendant was administered oxycodone after the accident, it was her opinion that the additive effects of alprazolam and THC had impaired Defendant's ability to drive safely. Second, our Supreme Court in *Consaul* contrasted the isolated medical expert testimony in that case with "most cases," in which "additional non-opinion evidence, such as forensic evidence, supplements an

expert's opinion," allowing the jury to "draw supporting inferences and reason from the totality of the evidence to find proof beyond a reasonable doubt." *Id.* ¶ 71. There was such additional evidence here. Ms. Yurkovich testified that the white sedan was weaving onto the shoulder and into the opposite lane of traffic even before the collision occurred. Sergeant Atencio testified that there was no evidence that Defendant either braked or swerved to avoid an obstacle in the road, consistent with the testimony of Ms. Yurkovich and Ms. Vigil that the road was clear just before the collision. According to Major Vigil, after the accident, the white sedan not only smelled strongly of marijuana, but e-cigarettes were found on the floorboard of the driver's side and in the driver's side door panel, along with marijuana in the driver's side door panel. At the hospital, Officer Benally observed that Defendant's eyes were red and glassy. Although we agree that emergency medical personnel may have administered a pain medication such as oxycodone to Defendant, no evidence suggested that Defendant may have been administered marijuana or alprazolam, an anti-anxiety medication, after the accident. The evidence also shows that Defendant was initially unconscious, then had to be removed from the vehicle and airlifted to a hospital, rendering it extremely unlikely that he used marijuana or alprazolam between the collision and the drug test. All of this supported Ms. Sarker's opinion, such that the jury could "reason from the totality of the circumstances to find proof beyond a reasonable doubt" that Defendant was under the influence of, at a minimum, alprazolam and marijuana, to the extent that he was incapable of safely driving a vehicle at the time of the collision.

{51} Defendant also contends that the State failed to prove that the accident was not the result of the black SUV attempting to pass Ms. Vigil. We interpret this argument as a limited challenge to the evidence in support of causation (that Defendant's driving while under the influence of drugs caused the death of Ms. Hinds and the injuries to Ms. Vigil). Defendant contends that "[t]he State's own evidence established that the negligence of the SUV driver was the only significant cause of the accident." We cannot agree with this characterization. The only evidence that the black SUV attempted a pass, prior to the collision, was Dr. Mikkelsen's testimony, which lends little if any support to Defendant's theory. Dr. Mikkelsen testified that the black SUV had returned to the northwest-bound lane, and that Dr. Mikkelsen had slowed down to allow more space between his vehicle and the black SUV before the collision occurred. And, as noted by Officer Atencio, there was no evidence that Defendant swerved aggressively or braked to avoid a collision. This evidence is inconsistent with a theory that Defendant

collided with Ms. Vigil in an attempt to avoid the black SUV. Furthermore, the State was not charged with eliminating every theory consistent with Defendant's innocence. The jury weighed the evidence and was free to reject Defendant's version of the facts. See *State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515. Our inquiry is not whether the jury could have reached a different conclusion, but whether there was substantial evidence for the conclusion the jury did reach. See *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318. Defendant does not engage that larger inquiry with respect to causation, so neither do we. See *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (holding that the appellate court does not review undeveloped arguments).

{52} Concerning Defendant's convictions for possession of marijuana and drug paraphernalia, Defendant argues that the State failed to prove constructive possession. Specifically, Defendant argues that the State proved only Defendant's proximity to the drugs and paraphernalia found in the white sedan, but "failed to prove that [Defendant] had knowledge [of,] or control over," those items. We are unpersuaded.

{53} UJI 14-130 NMRA defines possession as follows:

A person is in possession of (name of object) when, on the occasion in question, he knows what it is, he knows it is on his person or in his presence and he exercises control over it.

Even if the object is not in his physical presence, he is in possession if he knows what it is and where it is and he exercises control over it.

Two or more people can have possession of an object at the same time.

A person's presence in the vicinity of the object or his knowledge of the existence or the location of the object is not, by itself, possession.

{54} Thus, the possession element of an offense is satisfied where there are facts from which a jury could reasonably infer that the defendant "(1) knew of the presence of the [object at issue], and (2) exercised control over it." *State v. Maes*, 2007-NMCA-089, ¶ 13, 142 N.M. 276, 164 P.3d 975; see *State v. Brietag*, 1989-NMCA-019, ¶ 14, 108 N.M. 368, 772 P.2d 898 (holding that possession requires a "rational connection between the location of the [object] and [the] defendant's probable knowledge and control [over it]"); see also *State v. Barber*, 2004-NMSC-019, ¶ 28, 135 N.M. 621, 92 P.3d 633 (noting that "possession denotes facts pertaining to the relationship between a person and an item of property, as well as the consequences that at-

tach to those facts" (internal quotation marks and citation omitted)). A jury may infer knowledge and control from the defendant's actions, statements, or conduct, and from circumstantial evidence connecting the defendant to the object. *Barber*, 2004-NMSC-019, ¶ 27; *State v. Phillips*, 2000-NMCA-028, ¶ 8, 128 N.M. 777, 999 P.2d 421.

{55} Defendant contrasts this case with *State v. Garcia*, in which our Supreme Court held that sufficient evidence supported the defendant's conviction for felony possession of a firearm, where the gun was in a location equally accessible to passenger and driver, but the defendant (passenger) was sitting on a clip which fit the gun. 2005-NMSC-017, ¶¶ 21-24, 138 N.M. 1, 116 P.3d 72. Our Supreme Court acknowledged that other evidence (such as the driver not claiming the gun, and the defendant's beer bottle located next to the gun) supported a finding of possession, but held that it was insufficient to show the necessary control; the defendant sitting on a clip that fit the gun was evidence that "tip[ped] the balance in favor of the verdict." *Id.* ¶ 24. Here, Defendant contends, there is no such definitive evidence. He notes that the white sedan was registered to Ms. Hinds, who was also present in the vehicle; that many of the items recovered were in the trunk of the vehicle or scattered throughout the vehicle; and that many people had access to the vehicle after the accident, before the items were recovered by the police. Defendant thus implies that the evidence was equally consistent with Ms. Hinds possessing the items in issue, and/or with others having deposited the items in the vehicle.

{56} We disagree that the evidence presented by the State was merely suggestive of Defendant constructively possessing marijuana and paraphernalia, such that, as in *Garcia*, a further piece of definitive evidence was required. Two people can possess an object at the same time. UJI 14-130. This case is similar to *State v. Bauske*, 1974-NMCA-078, ¶¶ 5, 10, 24, 86 N.M. 484, 525 P.2d 411, where this Court affirmed the district court's conviction of the defendant (after a bench trial) for possession of heroin, finding that the defendant and his wife had jointly, constructively possessed the drug. A search of the vehicle had revealed heroin-related paraphernalia in the wife's purse, in the center console of the vehicle, and in the trunk. *Id.* ¶ 7. There was evidence that the wife had placed an eyeglass case containing heroin and a "fix kit" under the rear seat of the patrol car. *Id.* ¶¶ 8, 10. **The fix kit contained a syringe with the defendant's fingerprint on it, and a spoon, engraved with the name of the defendant's child, containing traces of heroin.** *Id.* ¶ 8. The defendant had red needle marks on his arm consistent with recent use of heroin. *Id.* ¶ 9. The foregoing constituted substantial evidence that the defendant had "constructively possessed the eyeglass case

containing the heroin prior to his wife placing the case under the back seat of the patrol car[.]" *Id.* ¶ 10.

{57} Similarly, here, there was evidence that the marijuana and paraphernalia were "in a location subject to the joint dominion and control" of Defendant and Ms. Hinds. See *id.* ¶ 5. **Ms. Hinds, who owned the vehicle**, was Defendant's girlfriend, and she apparently permitted him to operate the white sedan on the date of the accident. As described in detail hereinabove, following the accident, marijuana products and paraphernalia were found throughout the white sedan, including a digital scale in the center console; an e-cigarette, a package of marijuana leaves, and a grinder in the driver's side door compartment; another e-cigarette on the driver's side floor; and syringes containing marijuana wax underneath Ms. Hinds on the passenger seat. Although it is theoretically possible that someone tampered with these items or placed them in the sedan after the accident, and prior to the arrival of the police, there is substantial evidence they were in the sedan and under Defendant's and Ms. Hinds' joint control. Ms. Yurkovich observed the syringes in the passenger seat in the minutes immediately following the accident. The items recovered from the trunk (including nine syringes containing THC residue, a glass smoking pipe containing THC residue, and more marijuana leaves) were similar to the items recovered from the cabin, and there was no evidence that the trunk was opened at any time prior to the vehicle being impounded and searched by the police. The postmortem examination of Ms. Hinds revealed a positive toxicology result for THC, and there was evidence credited by the jury that Defendant was under the influence of drugs including THC at the time of the accident. Major Vigil testified that, when he arrived at the scene and approached the white sedan, there was a strong odor of marijuana. Moreover, Dr. Mikkelson and Ms. Yurkovich testified that they looked through a wallet in Ms. Hinds' seat, but moved no other objects, and saw no one else move anything in the vehicle before the police arrived.

{58} For all these reasons, we hold that, as in *Bauske*, there was substantial evidence, sufficient to sustain Defendant's convictions, that Defendant constructively possessed drug paraphernalia and marijuana.

CONCLUSION

{59} We affirm for the reasons set forth herein.

{60} **IT IS SO ORDERED.**
LINDA M. VANZL, Judge

WE CONCUR:
JACQUELINE R. MEDINA, Judge
BRIANA H. ZAMORA, Judge

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-044
No. A-1-CA-37477 (filed June 16, 2020)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
GREGORY MARVIN HOBBS,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
FREDDIE J. ROMERO, District Judge

Certiorari Granted, September 8, 2020, No. S-1-SC-38437;
Cross-Petition Granted, September 8, 2020, No. S-1-SC-38437.
Released for Publication October 6, 2020.

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Opinion

Kristina Bogardus, Judge.

{1} The State appeals the district court's order granting Defendant Gregory Martin Hobbs' motion for new trial pursuant to Subsection H of the Procedures for Post-Conviction Consideration of DNA Evidence statute, NMSA 1978, Section 31-1A-2 (2005, amended 2019). This appeal requires us to interpret, as a matter of first impression, the standard for granting relief under Section 31-1A-2(H).¹ We hold DNA evidence is "exculpatory" as used in Section 31-1A-2(H)—that is, it reasonably tends to negate the petitioner's guilt—when it (1) is material; (2) is not merely cumulative; (3) is not merely impeaching or contradictory; and (4) raises a reasonable probability that the petitioner would not have pled guilty or been found guilty had the DNA testing been performed prior to the conviction. We reverse the district

court's grant of a new trial and remand for further consideration in light of the standard we announce in this opinion.

BACKGROUND

I. Defendant's Trial and Direct Appeal
{2} During an altercation on June 15, 2012, Defendant shot and killed Ruben Archuleta, Jr. and Ruben Archuleta, Sr. Concluding that Defendant was legally justified in shooting Ruben Jr., the State did not prosecute Defendant for Ruben Jr.'s death. The State prosecuted Defendant for voluntary manslaughter, contrary to NMSA 1978, Section 30-2-3(A) (1994), in relation to Ruben Sr.'s death.

{3} At trial, Defendant argued that he shot Ruben Sr. in self-defense. Specifically, Defendant testified to the following: After he had shot Ruben Jr., Ruben Sr. grabbed either his hand or the gun. Defendant began backing up, attempting to get away, but Ruben Sr. grabbed him again. Defendant thought that Ruben Sr. was going to take the gun away from him and use it against

him. Defendant began to fire at Ruben Sr., and they were so close that Defendant felt Ruben Sr.'s blood fall onto his hands from having been shot. Defendant continued to fire until he was out of ammunition; Ruben Sr. continued to struggle with Defendant until the last shot. Defendant was afraid during the fight and believed that he was protecting his own life when he shot Ruben Sr.

{4} The jury also received the following evidence that could reasonably support his theory of self-defense: When interviewed on the night of the incident, Teresa Archuleta—Ruben Jr.'s wife—told police that Defendant and Ruben Sr. were wrestling before Ruben Sr. was shot. Teresa also testified that Defendant and Ruben Sr. were really close together before the shooting. Another witness testified that Defendant and Ruben Sr. were wrestling with each other and it appeared that Ruben Sr. was trying to get the gun from Defendant. Dr. Andrews, from the Office of the Medical Examiner, opined that the gunshot wound to the left side of Ruben Sr.'s chest was the result of a shot fired from six to eight inches away. Dr. Andrews further testified Ruben Sr.'s shirt had to have been pulled down to line up a gunshot defect on the shirt with the bullet wound to his left chest. {5} During closing argument, the State questioned Defendant's theory of self-defense by asking the jury to consider whether Defendant's actions were reasonable and whether there were facts that supported the immediate appearance of great bodily harm or death. Specifically, the State noted that Ruben Sr. was unarmed and argued that the condition of Defendant's t-shirt, which had been admitted into evidence, was inconsistent with Defendant's description of a struggle for life and death. Defendant requested, and the jury was instructed on, his theory of self-defense.

{6} The jury rejected Defendant's self-defense theory, found Defendant guilty of voluntary manslaughter, and also found that Defendant used a firearm in the commission of that crime, contrary to NMSA 1978, Section 31-18-16(A) (1993). Defendant was sentenced to a seven-year term of incarceration.

{7} Defendant appealed and advanced three arguments: (1) his "right to a public trial was violated," (2) he "received ineffective assistance of counsel," and (3) "the district court erred in denying [his] request for new trial." *State v. Hobbs*,

¹The district court's ruling and the parties' arguments are based on the 2005 amendment of Section 31-1A-2, which was in effect in 2015 when Defendant filed his petition for post-conviction DNA testing under that statute. Accordingly, this opinion also applies the 2005 amendment.

2016-NMCA-006, ¶ 1, 363 P.3d 1259, cert. denied, 2015-NMCERT-___ (No. S-1-SC-35584, Dec. 7, 2015). Defendant did not challenge whether sufficient evidence supported the jury's finding that he did not act in self-defense. Ultimately, this Court affirmed Defendant's conviction, *id.* ¶ 37, and our Supreme Court denied certiorari.

II. The Proceedings Pursuant to Section 31-1A-2

{8} In August 2015, while his appeal was pending, Defendant filed a petition for post-conviction DNA testing pursuant to Section 31-1A-2(A). Defendant sought (1) DNA testing on the handgun he used to shoot Ruben Sr. as well as the t-shirt Defendant was wearing on the night of the shooting; and (2) the release of Ruben Sr.'s FTA blood card for comparison purposes. As required by Section 31-1A-2(B), Defendant agreed to submit to DNA testing and authorized the district attorney's use of the DNA test results to investigate all aspects of the case.

{9} At a hearing on Defendant's petition, the State did not oppose the requested testing but did not concede that any result therefrom would entitle Defendant to a new trial or call into question the jury's verdict. Following the hearing, the district court granted Defendant's petition; ordered that all relevant evidence that could be subjected to DNA testing be secured and preserved, in accordance with Section 31-1A-2(F); and further ordered DNA testing of the handgun and Defendant's t-shirt, pursuant to Section 31-1A-2(G) (requiring that the district court "order DNA testing if the petitioner satisfies the requirements set forth in Subsections B and C" of the statute).

{10} After DNA testing was complete, Defendant moved to vacate his conviction or, in the alternative, for a new trial. Defendant argued that the DNA testing results were exculpatory and he was therefore entitled to relief under Section 31-1A-2(H), which provides that "[i]f the results of the DNA testing are exculpatory, the district court may set aside the petitioner's judgment and sentence, may dismiss the charges against the petitioner with prejudice, may grant the petitioner a new trial or may order other appropriate relief." Defendant acknowledged that our Legislature did not define "exculpatory" and argued for a plain language analysis. *See Buzbee v. Donnelly*, 1981-NMSC-097, ¶ 45, 96 N.M. 692, 634 P.2d 1244 ("Exculpatory evidence is evidence reasonably tending to negate guilt." (internal quotation marks and citation omitted)). Specifically, Defendant asserted that "[t]he DNA test results in this case are exculpatory because the test results are favorable to [him]" because "they corroborate his self-defense claim and counter the State's argument that

[Ruben Sr.'s] behavior did not present an appearance of death or great bodily harm to [Defendant]."

{11} In response to Defendant's motion, the State argued that the "DNA test results are not exculpatory and d[id] not create any factual dispute as to the evidence presented at trial." The State also argued that Defendant's "claim is best reviewed through a claim of ineffective assistance of counsel" because the handgun and t-shirt were available for forensic testing before trial. Furthermore, the State noted that Defendant had pointed to the lack of forensic testing on the t-shirt and handgun at trial as evidence that the Roswell Police Department did not adequately investigate whether Defendant acted in self-defense.

{12} Defendant replied that if the DNA testing evidence had been available at trial, there is a reasonable probability that the jury would have found that Defendant acted reasonably and in self-defense because it "supports the testimony of a struggle over the gun, that [Defendant] was subjectively reasonable in his perception of an immediate threat of death or great bodily harm, and that he had reason to be in fear for his life." Defendant also disputed that trial counsel's effectiveness was at issue in his request for relief.

{13} At the hearing on Defendant's motion, the district court received testimony from Eve Tokumaru, a forensic scientist with the New Mexico Department of Public Safety Forensic Laboratory who was qualified as an expert in DNA analysis. Ms. Tokumaru testified that she was able to compare DNA mixtures from both the ejection port of the handgun and the t-shirt to the known samples for Ruben Sr. and Defendant. Ms. Tokumaru believed that the DNA mixtures came from touch DNA, which she defined as DNA that was not left behind in a biological fluid like blood or saliva. Ms. Tokumaru acknowledged that touch DNA can be the result of a secondary transfer, wherein a person's DNA is deposited on an item by someone other than that person.

{14} Ms. Tokumaru testified that Ruben Sr. could not be eliminated as a possible contributor to either mixture. However, Ms. Tokumaru could not say that there was a greater than fifty-percent probability that Ruben Sr.'s DNA was on the ejection port or the t-shirt. Defendant was eliminated as a contributor to the DNA mixture found on the ejection port but was a major contributor to the DNA found on the t-shirt.

{15} After the evidence was presented at the hearing, the district court discussed its proposed analysis, which involved consideration of the following four questions: (1) whether the evidence is new; (2) whether the evidence is admissible; (3) whether the evidence is exculpatory; and (4) whether

there was a reasonable probability that the evidence, if presented at trial, would have resulted in Defendant not being found guilty. In response to the district court's proposed analysis, Defendant argued that Section 31-1A-2 did not require that the evidence be new in order to receive post-testing relief. Ultimately, the district court requested briefing from the parties on whether the DNA evidence testified to by Ms. Tokumaru would be admissible and whether the evidence was exculpatory.

{16} In its briefing, the State conceded that the evidence presented by Ms. Tokumaru would be admissible at trial but argued that the results of the DNA testing were not exculpatory. Specifically, the State argued that (1) the evidence was cumulative; (2) secondary transfer could explain why DNA consistent with Ruben Sr.'s was found on the handgun's ejection port; and (3) there were other explanations for why DNA consistent with Ruben Sr.'s was found on the handgun's ejection port—for example, Ruben Sr. could have touched the gun inadvertently or in an effort to push it away. Defendant argued that the results of the DNA testing were exculpatory. Defendant contended that, because the DNA evidence was physical evidence that could support an inference that Ruben Sr. grabbed the handgun, the State would not have been able to prove that Defendant did not act in self-defense. Defendant again argued that there is no language in Section 31-1A-2 that requires the evidence to be new or newly discovered.

{17} The district court entered findings of fact and conclusions of law, wherein it denied Defendant's motion to vacate his conviction or, in the alternative, for a new trial. The district court explained that it could not conclude that the evidence was exculpatory, noting that Ms. Tokumaru could not say that there was a greater than fifty-percent probability that Ruben Sr.'s DNA was present on the t-shirt or the handgun's ejection port. The district court further explained that, even if the evidence was exculpatory, it could not conclude that there was a reasonable probability that Defendant would not have been found guilty even if the DNA evidence was presented at trial because the evidence did not contradict the State's theory that Defendant did not suffer any physical injuries.

{18} Defendant then filed a motion to reconsider, requesting that the Court reopen the record "for submission of additional evidence addressing the interpretation of the complex DNA mixtures" found on the tested items. Defendant noted that the raw data from the DNA testing performed by Ms. Tokumaru had already been submitted for probabilistic genotyping, which is a statistical method that uses Markov Chain Monte Carlo (MCMC) methods to infer

genotypes that may have contributed to a DNA sample and then assigns a probability to the inferred genotypes. The State responded that Defendant's motion did not advance any new argument regarding the DNA results being exculpatory and therefore contended it should be denied.

{19} A hearing was held on Defendant's motion to reconsider. At the hearing, the district court received testimony from Ms. Tokumaru and Dr. Greg Hampikian, a professor of biology at Boise State University whose research included the development of new forensic technology and analysis of complex DNA mixtures. Both were admitted as experts. Ms. Tokumaru's testimony was consistent with her testimony at the first hearing. Ms. Tokumaru noted that although the Department of Public Safety Forensic Laboratory did not conduct probabilistic genotyping at the time, there were a number of other laboratories that have employed and validated that method. Dr. Hampikian testified that Cybergenetics used a software product called "True Allele" to subject the raw data that was produced by Ms. Tokumaru to probabilistic genotyping. Dr. Hampikian testified that the probabilistic genotyping process takes into account more of the data than the process employed by Ms. Tokumaru, including consideration of data that is below Ms. Tokumaru's laboratory's analytical threshold and consideration of the relative peak heights to a much greater degree. Regarding the DNA mixture found on the handgun's ejection port, Dr. Hampikian testified that although he could not say that Ruben Sr.'s DNA was present, he could say that based on the probabilistic genotyping in this case, assuming that the sample was a three-person mixture, the likelihood that a random person contributed to this three-person mixture as opposed to Ruben Sr. was 1 in 10,000,000.

{20} Following the hearing, the district court issued a written order granting Defendant's motion to reconsider. In its order, the district court noted that the evidence presented by Ms. Tokumaru would be admissible and that it was "highly likely" that the evidence presented by Dr. Hampikian would also be admissible with proper foundation and sponsoring witnesses. While the order also noted that it was a "close case" on whether Defendant met the standard for a new trial set forth in Section 31-1A-2(H), the district court ultimately granted the new trial after "conclud[ing] that the evidence is probative to Defendant's claim of self[-]defense and could be

exculpatory."² The State appealed.

DISCUSSION

{21} The State advances four arguments in this appeal: (1) the district court erred by failing to follow the procedures governing the consideration of post-conviction DNA testing as set forth in Section 31-1A-2; (2) the district court erred by granting Defendant a new trial without first finding that the DNA evidence was exculpatory; (3) the district court erred in concluding that the probabilistic genotype DNA evidence would be admissible; and (4) the district court abused its discretion in granting Defendant a new trial. We need only address the State's fourth argument because it is dispositive of this appeal.

I. We Reverse the District Court's Grant of a New Trial and Remand for Reconsideration in Light of the Standard We Announce in This Opinion

{22} This appeal presents the first opportunity for New Mexico's appellate courts to construe Section 31-1A-2, which governs the procedures for post-conviction consideration of DNA evidence. We are not tasked with examining the requirements for a petitioner to obtain testing, *see* Section 31-1A-2(G), because the State did not contest Defendant's testing request. Instead, our task in this case is to analyze Section 31-1A-2(H), which governs whether a petitioner is entitled to a remedy after post-conviction DNA testing has been completed.

{23} To determine whether Defendant is entitled to a remedy under Section 31-1A-2(H), the State urges us to adopt the six requirements on which courts rely when considering a motion for new trial on the grounds of newly discovered evidence. *See* Rule 5-614(C) NMRA (governing motions for new trial on the grounds of newly discovered evidence); *State v. Garcia*, 2005-NMSC-038, ¶ 8, 138 N.M. 659, 125 P.3d 638 (identifying the six requirements for the grant of a new trial on the grounds of newly discovered evidence). Applying those requirements to the facts of this case, the State argues that the district court abused its discretion in granting Defendant a new trial. Expressing no disagreement with the State that those six requirements are relevant in this context, Defendant likewise analyzes the district court's grant of his motion for new trial under that framework but argues that the district court did not abuse its discretion. Nevertheless, the parties' agreement on the analytical framework does not com-

pel us to adopt it. Therefore, we take this opportunity to independently analyze the meaning of "exculpatory" as used in Section 31-1A-2(H).

A. Standard of Review

{24} Typically, "we review the district court's grant of a new trial for clear and unmistakable abuse of discretion." *State v. Acosta*, 2016-NMCA-003, ¶ 15, 363 P.3d 1240 (internal quotation marks and citation omitted). However, this appeal requires us to interpret Section 31-1A-2, which "is a question that this Court reviews *de novo*." *State v. Martinez*, 2006-NMCA-068, ¶ 5, 139 N.M. 741, 137 P.3d 1195. "In interpreting a statute, our primary objective is to give effect to the Legislature's intent." *State v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125. "We do this by giving effect to the plain meaning of the words of [the] statute, unless this leads to an absurd or unreasonable result." *State v. Marshall*, 2004-NMCA-104, ¶ 7, 136 N.M. 240, 96 P.3d 801. "[I]n applying the plain meaning rule, this Court must exercise caution because its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate . . . differences of opinion concerning the statute's meaning." *Martinez*, 2006-NMCA-068, ¶ 5 (alteration, internal quotation marks, and citation omitted).

B. Review of Legislative Enactments Governing Post-Conviction DNA Testing in the United States Demonstrates That Section 31-1A-2 Is Unique

{25} New Mexico is not alone in allowing a convicted person access to evidence for post-conviction DNA testing. Indeed, all fifty states and the District of Columbia have adopted a statute or an act that allows for post-conviction DNA testing. *See* Innocence Project, *Access to Post-Conviction DNA Testing*, <https://www.innocenceproject.org/causes/access-post-conviction-dna-testing/> (last visited June 3, 2020) (stating that "all [fifty] states have post-conviction DNA testing access statutes"); D.C. Code Ann. §§ 22-4131 to -4135 (West 2002, as amended through 2013). Having reviewed each of these statutes or acts, we can say that none are identical to Section 31-1A-2.

{26} Some of the statutes and acts are distinguishable from our post-conviction DNA testing statute because they clearly and unmistakably require that DNA testing demonstrate a petitioner's factual in-

²As we previously mentioned, the district court entered findings of facts and conclusions of law when it initially denied Defendant's motion to vacate his conviction or, in the alternative, for a new trial. When the district court subsequently granted Defendant a new trial, it did not enter findings of fact and conclusions of law. Instead, it provided the explanation that we have summarized in this paragraph.

nocence before any post-testing remedy is granted. *See, e.g.*, Ala. Code § 15-18-200(h) (2) (2009) (“If the DNA testing conducted under this section produces conclusive evidence of the petitioner’s factual innocence of the offense convicted, the petitioner, during a 60-day period beginning on the date on which the petitioner is notified of the test results, may file a petition to the circuit court that ordered the testing for post-conviction relief pursuant to Rule 32.1 of the Alabama Rules of Criminal Procedure.”). Others are distinguishable because they require only that the DNA testing be favorable to a petitioner. *See, e.g.*, Ind. Code Ann. § 35-38-7-19 (West 2001) (“Notwithstanding any law that would bar a trial as untimely, if the results of post[-]conviction DNA testing and analysis are favorable to the person who was convicted of the offense, the court shall order any of the following: (1) Upon motion of the prosecuting attorney and good cause shown, order retesting of the identified biological material and stay the petitioner’s motion for a new trial pending the results of the DNA retesting[.]; (2) Upon joint petition of the prosecuting attorney and the petitioner, order the release of the person[.]; (3) Order a new trial or any other relief as may be appropriate under Indiana law or court rule.”).

{27} In our review, we were only able to identify six other states that use the word “exculpatory,” as does Section 31-1A-2(H), when evaluating whether to grant post-testing relief. *See State v. Gutierrez*, 278 P.3d 1276, 1280 (Ariz. 2012) (En Banc) (requiring Arizona’s district courts to order a hearing when the DNA results “completely and indisputably exonerate the defendant” as well as when the “results are favorable but not necessarily or completely exculpatory”); *People v. Starks*, 850 N.E.2d 206, 212 (Ill. App. Ct. 2006) (stating that “[i]f the results are neither truly exculpatory nor inculpatory, . . . this may provide a basis for a defendant to file a post[-]conviction petition asserting a claim of actual innocence based on newly discovered evidence[.]” and “[s]uch evidence of actual innocence has to be so conclusive that it would probably change the result on retrial” (internal quotation marks and citation omitted)); Neb. Rev. Stat. Ann. § 29-4119 (2001) (defining “exculpatory evidence” as used in its DNA Testing Act as “evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody”); Or. Rev. Stat. Ann. § 138.696(2) (West 2020) (stating that if the DNA testing “produces exculpatory evidence, the

person who requested the testing may file . . . a motion for a new trial based on newly discovered evidence”); 42 Pa. Cons. Stat. Ann. § 9543.1(f)(3) (West 2018) (providing that “the court shall determine whether the exculpatory evidence resulting from the DNA testing conducted under this section would have changed the outcome of the trial as required by section 9543(a) (2)(vi)”); S.C. Code Ann. § 17-28-100(B) (2009) (providing that “[i]f the results of the DNA test are exculpatory, the applicant may use the exculpatory results of the DNA test as grounds for filing a motion for new trial pursuant to the South Carolina Rules of Criminal Procedure”). However, of those six states, it appears that only the Oregon Court of Appeals has had the opportunity to construe “exculpatory” in the post-testing relief context, and it declined to do so when it concluded the defendant was not eligible for relief even under the definition the defendant proposed. *See State v. Nefstad*, 456 P.3d 294, 297 (Or. Ct. App. 2019).

{28} Because the statutes and acts from other states are either distinguishable from Section 31-1A-2 or have not been interpreted by those state’s respective appellate courts, they are unhelpful to our analysis.³ Against this background, we therefore proceed to analyze the words chosen by our Legislature in Section 31-1A-2 under our rules of statutory interpretation.

C. DNA Evidence Is Exculpatory When It Reasonably Tends to Negate the Petitioner’s Guilt

{29} As we previously mentioned, Section 31-1A-2(H) provides that “[i]f the results of the DNA testing are exculpatory, the district court may set aside the petitioner’s judgment and sentence, may dismiss the charges against the petitioner with prejudice, may grant the petitioner a new trial or may order other appropriate relief.” Notably, our Legislature did not define “exculpatory” as used in Section 31-1A-2(H).

{30} Our Supreme Court has recognized that “[e]xculpatory evidence is evidence reasonably tending to negate guilt.” *Buzbee*, 1981-NMSC-097, ¶ 45 (internal quotation marks and citation omitted). This definition is consistent with dictionary definitions of “exculpatory evidence.” *See Griego v. Oliver*, 2014-NMSC-003, ¶ 21, 316 P.3d 865 (“Under the rules of statutory construction, we first turn to the plain meaning of the words at issue, often using the dictionary for guidance.” (internal quotation marks and citation omitted)). For example, *Black’s Law Dictionary*

defines “exculpatory evidence” as “[e]vidence tending to establish a criminal defendant’s innocence.” *Evidence*, Black’s Law Dictionary (11 ed. 2019). Similarly, *Merriam-Webster* defines “exculpatory evidence” as “evidence that tends to clear a defendant from fault or guilt.” <https://www.merriam-webster.com/dictionary/evidence#legalDictionary> (last visited June 15, 2020).

{31} Importantly, all of the foregoing definitions, including the one recognized by our Supreme Court, use a variation of the verb phrase “tends to” when discussing the required effect of the DNA evidence on a defendant’s guilt. Nevertheless, the State relies on the language of Section 31-1A-2(A) to support its contention that Defendant had the burden to show that the DNA evidence will exculpate him or, in other words, prove his innocence. *See State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (stating that “a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter” (internal quotation marks and citation omitted)).

{32} In relevant part, Section 31-1A-2(A) provides that “[a] person convicted of a felony, who claims that DNA evidence will establish his innocence, may petition the district court of the judicial district in which he was convicted to order the disclosure, preservation, production and testing of evidence that can be subjected to DNA testing.” (Emphasis added.) This language cannot be interpreted, as the state suggests, to require the petitioner to establish that DNA evidence will prove him innocent. Instead, Section 31-1A-2(A) simply identifies the class of defendants who may petition the district court—those convicted of a felony and claiming that DNA evidence will establish their innocence. Accordingly, we decline the State’s invitation to adopt a definition that is inconsistent with the words chosen by our Legislature when identifying the petitioner’s burden.

{33} Instead, our determination in this case is guided by a plain language analysis of the statute’s actual wording as chosen by our Legislature and our case law interpreting the same term in other contexts. Based on those considerations, we determine that post-conviction DNA evidence is “exculpatory” under Section 31-1A-2(H) when it reasonably tends to negate the petitioner’s guilt.

D. The DNA Evidence Must Meet Four Requirements In Order to Be “Exculpatory”

³We also note that New Mexico’s previous statute governing post-conviction DNA testing, repealed with the enactment of Section 31-1A-2, focused on the requirements for post-conviction DNA testing without identifying the standard necessary to obtain post-testing relief. *See NMSA 1978*, § 31-1A-1 (2001, repealed 2003). Accordingly, it is also not helpful to our analysis.

{34} Having defined “exculpatory” under Section 31-1A-2(H), we believe it necessary to provide the district courts of New Mexico with guidance on how to apply that definition. It is here that we address the applicability of the analytical framework that the parties employed in this appeal—i.e., the standard for granting a motion for new trial on the grounds of newly discovered evidence. A motion for new trial on the grounds of newly-discovered evidence is only to be granted when the newly-discovered evidence meets six requirements:

- 1) it will probably change the result if a new trial is granted;
- 2) it must have been discovered since the trial;
- 3) it could not have been discovered before the trial by the exercise of due diligence;
- 4) it must be material;
- 5) it must not be merely cumulative; and
- 6) it must not be merely impeaching or contradictory.

Garcia, 2005-NMSC-038, ¶ 8 (internal quotation marks and citation omitted).

{35} As an initial matter, we note that Section 31-1A-2 contains no requirement that the evidence be newly discovered. In fact, the Legislature only required a defendant to prove that “the evidence to be subjected to DNA testing: (a) has not previously been subjected to DNA testing; (b) has not previously been subjected to the type of DNA testing that is now being requested; or (c) was previously subjected to DNA testing, but was tested incorrectly or interpreted incorrectly[.]” Section 31-1A-2(C)(3), choosing not to include a requirement that the evidence must have been discovered since the trial. See *State v. Greenwood*, 2012-NMCA-017, ¶ 38, 271 P.3d 753 (“The Legislature knows how to include language in a statute if it so desires.” (alteration, internal quotation marks, and citation omitted)). Further, the focus of Section 31-1A-2(H) is on whether the DNA evidence is exculpatory rather than on when the evidence could have been discovered. Cf. *Montoya v. Ulibarri*, 2007-NMSC-035, ¶ 32, 142 N.M. 89, 163 P.3d 476 (concluding that the requirements applicable to motions for a new trial on the grounds of newly-discovered evidence do not constrain examination of a freestanding claim of actual innocence because the focus “is on actual innocence rather than when the evidence could have been discovered or procedural error”). Accordingly, we are not persuaded that a conclusion that the DNA evidence is “exculpatory” under Section 31-1A-2(H) requires a showing that (1) the evidence

has been discovered since trial and (2) could not have been discovered before the trial with due diligence; thus we decline to include these requirements into the analytical framework that we adopt in this case.

{36} As for the other requirements, we believe they are relevant, with some modification, to whether evidence is “exculpatory” under Section 31-1A-2(H). Cf. *Montoya*, 2007-NMSC-035, ¶ 32 (concluding that, while the requirements for a new trial on the grounds of newly-discovered evidence did not confine the inquiry, those requirements were relevant when reviewing whether the evidence was reliable). We explain.

{37} The New Mexico judiciary has an “interest in ensuring accuracy in criminal convictions in order to maintain credibility[.]” *Id.* ¶ 21. It is unassailable that criminal defendants have a fundamental interest in not being wrongly convicted. To protect these interests, Section 31-1A-2(H) allows a district court to grant appropriate relief when presented with exculpatory DNA evidence. When evaluating whether to grant relief under Section 31-1A-2(H), New Mexico courts must balance the foregoing interests with “the public’s interest in the finality of a conviction obtained after a petitioner has been afforded all constitutional rights required by law[.]” *Montoya*, 2007-NMSC-035, ¶ 29, the victim’s interest in the closure that finality brings, and the fact that the petitioner often⁴ has previously challenged his conviction in a direct appeal. We believe that the adoption of the following four requirements strikes the necessary balance between these interests.

{38} First, the DNA evidence must be material to the petitioner’s innocence such that it raises a reasonable probability that the petitioner would not have pled guilty or been found guilty at trial. Cf. *State v. Fero*, 1988-NMSC-053, ¶¶ 10, 13, 107 N.M. 369, 758 P.2d 783 (concluding that evidence is material only “if there is a reasonable probability that . . . the result of the proceeding would have been different” and applying the definition of materiality found in *United States v. Bagley*, 473 U.S. 667, 682 (1985), when reviewing the denial of a motion for new trial on the grounds of newly discovered evidence (internal quotation marks omitted)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Fero*, 1988-NMSC-053, ¶ 10 (internal quotation marks and citation omitted).

{39} Second, the DNA evidence must not be merely cumulative. Our Supreme Court

has explained that the phrase “merely cumulative” contemplates “cumulative evidence the weight of which would probably be insufficient to turn the scales in [the] defendant’s favor.” *State v. Houston*, 1927-NMSC-024, ¶ 17, 33 N.M. 259, 263 P. 754 (internal quotation marks and citation omitted).

{40} Third, the DNA evidence must not be merely impeaching or contradictory. The DNA evidence, even if impeaching or contradictory, must corroborate a petitioner’s claims to satisfy this requirement. Cf. *Garcia*, 2005-NMSC-038, ¶¶ 15-16.

{41} Fourth, the DNA evidence must raise a reasonable probability that the petitioner would not have pled guilty or been found guilty had the DNA testing been performed prior to the conviction. We adopt this language from Section 31-1A-2(C)(5) because it indicates that our Legislature expected that any exculpatory DNA evidence would have had that effect on the original proceeding. This requirement is similar to, but distinguishable from, the first requirement for a new trial on the grounds of newly-discovered evidence—that the evidence will probably change the result if a new trial is granted. See *Garcia*, 2005-NMSC-038, ¶ 8. The two requirements are similar because both require the district court to weigh the probable effect of the evidence. However, they are distinguishable because under Section 31-1A-2(H), the district court is to determine the DNA evidence’s probable effect on the *original* proceeding whereas under a motion for new trial on the grounds of newly-discovered evidence, the district court is to determine the newly-discovered evidence’s probable effect on a *new* trial. Importantly, the district court is in the best position to determine, in its discretion, whether the exculpatory DNA would have changed the result of the original proceeding. Cf. *State v. Shirley*, 1985-NMCA-120, ¶ 15, 103 N.M. 731, 713 P.2d 1 (“The question of whether the evidence produced in support of the motion [for a new trial on the grounds of newly discovered evidence] will probably change the result is one peculiarly addressed to the discretion of the [district] court.”).

{42} In summary, we hold that DNA evidence is exculpatory under Section 31-1A-2(H)—that is, it reasonably tends to negate the petitioner’s guilt—when it (1) is material; (2) is not merely cumulative; (3) is not merely impeaching or contradictory; and (4) raises a reasonable probability that the petitioner would not have pled guilty or been found guilty had the DNA testing

⁴We recognize that Section 31-1A-2 allows those who have pled guilty to petition for post-conviction DNA testing and to seek post-testing relief. Accordingly, we are mindful that those who have pled guilty may have waived their right to appeal as a condition of their plea.

been performed prior to the conviction. We believe that these requirements take into consideration the competing interests identified above and provide a uniform framework for district courts to employ when making such a determination.

{43} When granting or denying relief under Section 31-1A-2(H), the district court shall enter findings of fact and conclusions of law addressing each of the four requirements. This will provide clarity in the decision for the parties and assist in appellate review. When a district court concludes that any of the requirements are not met, it is proper for the court to deny relief under Section 31-1A-2(H). See *Hill v. Burnworth*, 1973-NMCA-135, ¶ 8, 85 N.M. 615, 514 P.2d 1312 (stating

that if the party moving for a new trial on the grounds of newly discovered evidence “fails to establish any of the six grounds, the motion is properly denied”).

{44} While the district court entered written orders explaining its initial denial and subsequent grant of Defendant’s motion for new trial, we cannot say that the foregoing requirements were fully considered such that we could evaluate the propriety of the district court’s grant of the new trial in this appeal. Accordingly, we will not speculate on the conclusion the district court may have reached on each of these requirements. Instead, we remand to the district court for further consideration. On remand, the district court shall enter specific findings of fact and conclusions

of law as to each requirement and thereby reach a conclusion as to whether relief is warranted under Section 31-1A-2(H).

CONCLUSION

{45} We reverse the district court’s grant of a new trial and remand for further consideration in light of the standard announced in this opinion.

**{46} IT IS SO ORDERED.
KRISTINA BOGARDUS, Judge**

**WE CONCUR:
J. MILES HANISEE, Chief Judge
JULIE J. VARGAS, Judge**

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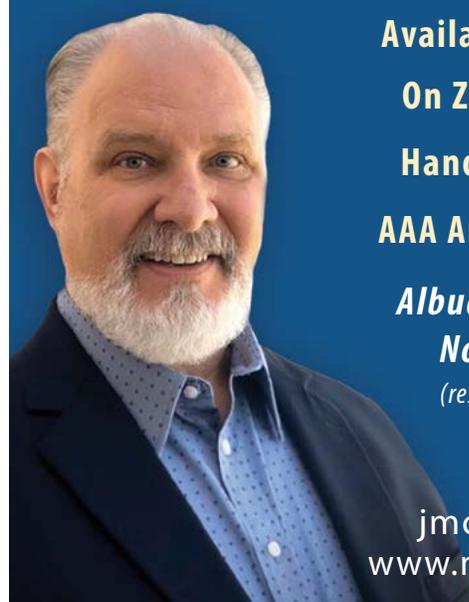


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Positions

Assistant District Attorney

The Fifth Judicial District Attorney's office has immediate positions open for new or experienced attorneys, in our Carlsbad and Hobbs offices. Salary will be based upon the New Mexico District Attorney's Salary Schedule with starting salary range of an Assistant Trial Attorney to a Senior Trial Attorney (\$58,000 to \$79,679). There is also an opening for a prosecutor with at least 2 years of Trial Experience for a HIDTA Attorney position in the Roswell office, with starting salary of (\$ 70,000.00) Please send resume to Dianna Luce, District Attorney, 301 N. Dalmont Street, Hobbs, NM 88240-8335 or e-mail to 5thDA@da.state.nm.us.

Chief Deputy District Attorney

The Third Judicial District Attorney's Office in Las Cruces is seeking a Chief Deputy District Attorney, Deputy District Attorneys, Senior Trial Attorneys, Trial Attorneys, and Assistant Trial Attorneys. You will enjoy the convenience of working in a metropolitan area while gaining valuable trial experience along side experienced Attorney's. Please see the full position descriptions on our website <http://donaanacountyda.com/SubmitCoverLetter>, Resume, and references to Whitney Safranek, Human Resources Administrator at wsafranek@da.state.nm.us.

Assistant General Attorney Positions

The City of Albuquerque Legal Department is hiring for various Assistant City Attorney positions. The Legal Department's team of attorneys provides a broad range of legal services to the City, as well as represent the City in legal proceedings before state, federal and administrative bodies. The legal services provided may include, but will not be limited to, legal research, drafting legal opinions, reviewing and drafting policies, ordinances, and executive/administrative instructions, reviewing and negotiating contracts, litigating matters, and providing general advice and counsel on day-to-day operations. Attention to detail and strong writing and interpersonal skills are essential. Preferences include: Five (5)+ years' experience as licensed attorney; experience with government agencies, government compliance, real estate, contracts, and policy writing. Candidates must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Current open positions include: Assistant City Attorney - APD Compliance; Assistant City Attorney - Employment/Labor. For more information or to apply please go to www.cabq.gov/jobs. Please include a resume and writing sample with your application.

Full-time and Part-time Attorney

Jay Goodman and Associates Law Firm, PC is seeking one full-time and one part-time attorney, licensed/good standing in NM with at least 3 years of experience in Family Law, Probate, Real Estate and Civil Litigation. If you are looking for meaningful professional opportunities that provide a healthy balance between your personal and work life, JGA is a great choice. If you are seeking an attorney position at a firm that is committed to your standard of living, and professional development, JGA can provide excellent upward mobile opportunities commensurate with your hopes and ideals. As we are committed to your health, safety, and security during the current health crisis, our offices are fully integrated with cloud based resources and remote access is available during the current Corona Virus Pandemic. Office space and conference facilities are also available at our Albuquerque and Santa Fe Offices. Our ideal candidate must be able to thrive in dynamic team based environment, be highly organized/reliable, possess good judgement/people/communication skills, and have consistent time management abilities. Compensation DOE. We are an equal opportunity employer and do not tolerate discrimination against anyone. All replies will be maintained as confidential. Please send cover letter, resume, and a references to: jay@jaygoodman.com. All replies will be kept confidential.

Associate Attorneys

Mynatt Martínez Springer P.C., an AV-rated law firm in Las Cruces, New Mexico is seeking two associate attorneys to join our team. The firm's practice areas include insurance defense, civil rights defense, commercial litigation, and government representation. Applicants with 0-5 years of experience will be considered for full-time employment. If it is the right fit, the firm will also consider applications for part-time employment from attorneys with more than 5 years of experience. Associates are a critical component of the firm's practice and are required to conduct legal research; provide legal analysis; advise clients; draft legal reviews, pleadings, and motions; propound and review pretrial discovery; and prepare for, attend, and participate in client meetings, depositions, administrative and judicial hearings, civil jury trials, and appeals. Successful candidates must have strong organizational and writing skills, exceptional communication skills, and the ability to interact and develop collaborative relationships. The firm will consider applicants who desire to work remotely. Offers of employment will include salary commensurate with experience and a generous benefits package. Please send your cover letter, resume, law school transcript, writing sample, and references to rd@mmslawpc.com.

Litigation Attorney

Cordell & Cordell, P.C., a domestic litigation firm with over 100 offices across 37 states, is currently seeking an experienced litigation attorney for an immediate opening in its offices in Albuquerque and Santa Fe, NM. The candidate must be licensed to practice law in the state of New Mexico, have minimum of 3 years of litigation experience with 1st chair family law preferred. The position offers a significant signing bonus, 100% employer paid premiums including medical, dental, short-term disability, long-term disability, and life insurance, as well as 401K and wellness plan. This is a wonderful opportunity to be part of a growing firm with offices throughout the United States. To be considered for this opportunity please email your resume with cover letter indicating which office(s) you are interested in to Hamilton Hinton at hhinton@cordelllaw.com

Associate Attorney

Atkinson, Baker & Rodriguez, P.C. is an aggressive, successful Albuquerque-based complex civil commercial and tort litigation firm seeking an extremely hardworking and diligent associate attorney with great academic credentials. This is a terrific opportunity for the right lawyer, if you are interested in a long term future with this firm. Up to 3-5 years of experience is preferred. Send resumes, references, writing samples, and law school transcripts to Atkinson, Baker & Rodriguez, P.C., 201 Third Street NW, Suite 1850, Albuquerque, NM 87102 or e_info@abrfirm.com. Please reference Attorney Recruiting.

Associate Attorney and Legal Assistant

Gluth Law, LLC, an estate planning and probate firm in Las Cruces, New Mexico and El Paso, Texas, has immediate full-time openings for an associate attorney and legal assistant. Duties would primarily include preparation of estate planning and probate documentation as well as handling all aspects of estate and trust administration. Prior experience in these practice areas is preferred, but not required. Successful applicants will have strong organizational, writing, and time-management skills. Salary is commensurate with experience. Please send resume and references to alan@gluthlaw.com.

Associate Attorney

Dixon Scholl Carrillo PA is seeking an associate attorney with 3 or more years of experience to join them in their thriving litigation practice. We seek a candidate with excellent writing and oral advocacy skills and a strong academic background who is ready to be part of a hard-working team in a fun and friendly office. For consideration, please submit your resume to lcarrillo@dsc-law.com.

City of Albuquerque – Contract Attorney

The City of Albuquerque, through the Albuquerque-Bernalillo County Air Quality Control Board (“Air Board”), is seeking a qualified attorney to contract with to provide legal representation and general legal services to the Air Board. This position is an independent contractor, and is not an employee of the City of Albuquerque. Applicant must be admitted to the practice of law by the New Mexico Supreme Court and be an active member of the Bar in good standing. A successful candidate will attend all Air Board meetings, have strong communication skills, knowledge of board governance and Robert’s Rules of Order, The NM Open Meetings Act, and knowledge of environmental rules and regulations including the Clean Air Act. Prior experience with, or advising, board and commissions is preferred. Please submit a resume to the attention of “Air Board General Counsel Application”; c/o Angela Aragon; Executive Assistant; P.O. Box 2248, Albuquerque, NM 87103 or amaragon@cabq.gov. Application deadline is December 31, 2021.

UNM Compliance Director

The UNM Office of Compliance, Ethics & Equal Opportunity (CEEO) seeks a highly qualified and experienced professional for the role of Compliance Coordinator. This role reports to the Chief Compliance Officer and has the following duties: develop, implement, and evaluate compliance activities and initiatives of several compliance entities across the University; perform risk analysis, testing, audits, and surveys on UNM compliance controls; develop, coordinate, and conduct education and training regarding compliance programs; leads compliance committee efforts across the University to streamline and coordinate UNM’s compliance efforts. JD strongly preferred. Please see the UNM Jobs website at unjobs.unm.edu for further details and to apply. The University of New Mexico is an affirmative action employer, making decisions without regard to color, religion, sex, sexual orientation, gender identity, national origin, age, veteran status, disability, or any other protected class.

8th Judicial

District Attorney’s Office Assistant Trial — Senior Trial

The 8th Judicial District Attorney Office is accepting applications for a full-time Assistant Trial Attorney/ Senior Trial Attorney in Taos, NM. Requirements: Assistant Trial Attorney: Attorney licensed to practice law in New Mexico plus a minimum of one (1) year relevant prosecution experience. Senior Trial Attorney: Attorney licensed to practice law in New Mexico plus a minimum of five (5) years relevant prosecution experience. Work performed: Incumbent will prosecute all cases, including high level and high profile cases. As experience allows, applicants should possess expertise in one or more areas of criminal prosecution; lead special prosecutions assigned by the District Attorney; supervises and mentors other attorneys and staff. Applicant may alternatively be a division/bureau head in a main or satellite office who handles cases as well as substantial administrative duties and tasks. Can act on behalf of the District Attorney as directed. Salary will be based upon experience, position applied for, and the current District Attorney Personnel and Compensation Plan. \$55,000 to \$70,000. Please submit resumes/letters of interest to Suzanne Valerio, District Office Manager by mail to 105 Albright Street Suite L, Taos, NM 87571 or by email to svalerio@da.state.nm.us no later than November 30, 2021

UNM Clery Act Coordinator

The UNM Office of Compliance, Ethics & Equal Opportunity (CEEO) seeks a highly qualified professional with criminal law or law enforcement experience for the role of Clery Act Coordinator. This role ensures compliance with the federal Jeanne Clery Act. Duties include: development and updates to UNM’s Clery policies and procedures; preparation and publication of the Annual Security and Fire Safety Report; gathers crime and disciplinary data from various internal and external sources; registers and trains all Campus Security Authorities. JD preferred. Please see the UNM Jobs website at unjobs.unm.edu for further details and to apply. The University of New Mexico is an affirmative action employer, making decisions without regard to color, religion, sex, sexual orientation, gender identity, national origin, age, veteran status, disability, or any other protected class.

Associate Attorney

Experienced 5-10 year attorney for mid-sized defense firm. Salary range \$80,000-120,000 depending on qualifications and experience. Looking for candidates who can handle cases from beginning to end. Excellent benefits. Nice work environment. Send resume to jstiff@stifflaw.com

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Contact Marcia Ulibarri,
at 505-797-6058 or email mulbarri@sbnm.org

Eleventh Judicial District Attorney's Office, Div II

The Eleventh Judicial District Attorney's Office, Division II, Gallup, New Mexico is seeking qualified applicants for Trial Attorney. The Trial Attorney position requires advanced knowledge and experience in criminal prosecution, rules of evidence and rules of criminal procedure, trial skills, computer skills, ability to work effectively with other criminal justice agencies, ability to communicate effectively, ability to re-search/analyze information and situations. New Mexico State Bar license preferred. The McKinley County District Attorney's Office provides a supportive and collegial work environment. Salary is negotiable. Submit a letter of interest and resume to District Attorney Bernadine Martin, Office of the District Attorney, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter to bmartin@da.state.nm.us. Position will remain opened until filled.

Associate Attorney And Paralegal

Peak Legal Group, LLC has immediate openings for an associate/litigation attorney and two paralegals for our growing family law formation and reformation legal practice. Our Westside law firm practices in all areas of Family Law, in addition to adoptions, assisted reproductive technology and foster parent representation. Experience or a defined interest in these areas is preferable, but not mandatory. We are looking for hard working, dedicated team members who would enjoy working in a family-oriented law firm that works hard and plays hard. We offer a great work environment, a competitive salary and a generous benefits package. Send your resume, cover letter and list of references to sheryl@pklegalgrp.com

Paralegal

The City of Albuquerque Legal Department is seeking a Paralegal to assist an assigned attorney or attorneys in performing substantive administrative legal work from time of inception through resolution and perform a variety of paralegal duties, including, but not limited to, performing legal research, managing legal documents, assisting in the preparation of matters for hearing or trial, preparing discovery, drafting pleadings, setting up and maintaining a calendar with deadlines, and other matters as assigned. Excellent organization skills and the ability to multitask are necessary. Must be a team player with the willingness and ability to share responsibilities or work independently. Starting salary is \$21.31 per hour during an initial, proscribed probationary period. Upon successful completion of the proscribed probationary period, the salary will increase to \$22.36 per hour. Competitive benefits provided and available on first day of employment. Please apply at <https://www.governmentjobs.com/careers/cabq>.

Legal Secretary

The City of Albuquerque Legal Department (Litigation Division) is seeking a Legal Secretary to assist assigned attorneys in performing a variety of legal secretarial/administrative duties, which include but are not limited to: preparing and reviewing legal documents; creating and maintaining case files; calendaring; provide information and assistance, within an area of assignment, to the general public, other departments and governmental agencies. Please apply at <https://www.governmentjobs.com/careers/cabq>.

Litigation Paralegal

25 years experience - available for employment or contract work. Full service litigation support; pleadings/motions/discovery requests and responses; identify and gather records & bills; medical records chronology; damage analysis; demand letters; trial preparation; and more. Rates negotiable. Strong work ethic, very reliable, and exceptional work product. Well-versed in legal and medical terminology. Send inquiries to lsmclegal216@gmail.com.

Service

Forensic Genealogist

Certified, experienced genealogist: find heirs, analyze DNA tests, research land grants & more. www.marypenner.com, 505-321-1353.

Legal Researcher & Writer

A licensed attorney available to GHOST-WRITE for your law firm! Email lrriver@lucyriverlaw.com for contract legal RESEARCH and WRITING services.

Miscellaneous

Want To Purchase

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

Search for Will

I am looking for a Will and/or Trust created for Cathy J. McGinnis, deceased. If you have executed the original of either, and/or have the originals or copies, please contact me at 505- 872-0505. Marcy Baysinger, Attorney, Pregenzer, Baysinger, Wideman and Sale.

2021 Bar Bulletin Publishing and Submission Schedule

The Bar Bulletin publishes twice a month on the second and fourth Wednesday. Advertising submission deadlines are also on Wednesdays, three weeks prior to publishing by 4 pm.

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, three weeks prior to publication.**

**For more advertising information, contact:
Marcia C. Ulibarri at 505-797-6058 or
email mulibarri@sbnm.org**

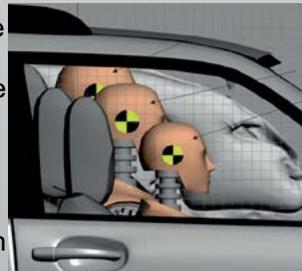
The publication schedule can be found at
www.sbnm.org.

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Every vehicle accident case you handle has the potential to be on one of the 235 racks or in one of our six inspection bays at the firm's Forensic Research Facility. We continually study vehicle safety through the use of engineering, biomechanics, physics and innovation.



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*Happy
Holidays!*

We wish all of you the very best in 2022!
We are continuing our safe and remote work on
behalf of our clients in their family law matters
across New Mexico. We look forward to meeting
our colleagues and clients more frequently
in person in the coming year.

~ The Attorneys
and Staff at
Atkinson & Kelsey, PA



Lidiya I. Bayliyeva



Jon A. Feder



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