



New Mexico D.R.E Aleman Sub-Committee Meeting Minutes

January 29th, 2021
Albuquerque, New Mexico

I. Call to order:

Charles Files called to order the first meeting of the New Mexico D.R.E Sub-Committee (Aleman) at 10:06 on January 29th, 2021 in the Sandia Ballroom at the Marriott Uptown in Albuquerque, New Mexico.

II. Roll call:

Conducted a roll call. The following D.R.E. Sub-Committee members were present:

Aaron Baca- Deputy District Attorney 13th Judicial District Attorney's Office Valencia County and prior New Mexico Traffic Safety Resource Prosecutor
Judge Tina Garcia (Ret)- Valencia County Magistrate Court
Charles Files-New Mexico State DRE Coordinator
Eva Fortanez- United States Assistant District Attorney
Greg Gaudette- Criminal Defense Attorney
Brett Barnes- New Mexico Traffic Safety Resource Prosecutor
Jeres Rael- Experienced Assistant District Attorney and prior New Mexico Traffic Safety Resource Prosecutor
Tim McCarson- Senior DRE/DRE Instructor (arrived at 1050 hours)

The following D.R.E. Sub-Committee members were not present:

None

The following guests were present:

Judge Kevin Fitzwater- New Mexico Judicial Outreach Liaison

III. Mission of the NMDRE Sub-Committee:

The NMDRE Program and NMDRE Committee has previously identified an inconsistent interpretation by law enforcement, prosecution, and judges of the New Mexico Court of Appeals case State v. Aleman (145 N.M. 79, 194 P.3d 110), which concerns the admissibility of the DRE protocol and DRE testimony in the state of New Mexico. The sub-committee was created to attempt to utilize the DRE Committee's subject matter experts to find a consistent interpretation of the Aleman case so as to be a resource for impaired driving enforcement stakeholders in New Mexico.

IV. D.R.E. 'Script' for Prosecutors:

Initial discussion regarding the formation and practical use of a DRE 'script' to assist prosecutors with DRE trials. Charles Files explained the NMDRE program has a "Work Product" script to assist prosecutors with DRE trials. This script dates back at least ten years but has continuously been altered over time. The latest update was February 2020. The script

can be altered to meet the Committee's interpretation of the Aleman case, after discussion at this meeting.

Criminal defense attorney Greg Gaudette discussed the possibility of the script being considered discoverable. The sub-committee discussed this possibility and agreed. The sub-committee concluded that once the script was complete, a discussion would commence regarding its proper dissemination.

V. State v. Aleman- Toxicology:

The first point of discussion surrounded toxicology and its weight in DRE/DWI-Drug cases in New Mexico. We are aware of instances in New Mexico in which the Aleman case has been interpreted to mean that absent toxicology, a DRE's testimony should be inadmissible.

Following discussion, it is the position of the NMDRE Committee that Aleman reads that a DRE's testimony should be offered by prosecution regardless of the availability, or lack of, toxicology results.

VI. State v. Aleman- Expert Testimony:

The next discussion surrounded expert testimony of DREs. The position of the NMDRE Committee is that Aleman reads that the DRE protocol in New Mexico is non-scientific and is not subject to a Daubert analysis. The exception of this is the Horizontal Gaze Nystagmus test which has been deemed to be scientific, and subject to a Daubert analysis.

The position of the NMDRE Committee is that prosecutors should motion to qualify a DRE as an expert, based on specialized knowledge, at every DRE trial. This should be done with the expectation that testimony regarding specific eye movements by a DRE will likely not be admissible in a trial. As such, the aforementioned script will be structured to aid a prosecutor to ask questions consistent with the foundation for motioning a court to qualify a DRE as an expert in drug impairment recognition based on his or her specialized knowledge, training, experience, and education.

VII. Horizontal Gaze Nystagmus:

The question as to the admissibility of the Horizontal Gaze Nystagmus through a DRE qualified as an expert (specialized knowledge) was discussed. Specifically, the language in State v. Aleman discusses the testimony of Drs. Citek, Kerrigan, and Burns and states that the court was "*Satisfied that (the Drs.) testimony explains the relationship between certain eye movements and impairment by drugs or alcohol. (and that) As a result, the State laid an adequate foundation for the admission of the HGN test results to establish the presence of a certain category of drugs and to show that the Defendants' ability to operate a motor vehicle was impaired.*" Specifically, the question was discussed regarding whether or not that case sets the standard for all future cases or was limited to the Aleman case.

Following discussion, it is the position of the NMDRE Committee that Horizontal Gaze Nystagmus is scientific per Aleman and it should be expected that a DRE testimony regarding specific eye movement will not be admitted unless he or she is subjected to a Daubert hearing.

Officer McCarson mentioned Dr. Citek offers a week-long certification course in the field of optometry. This will be explored further by Officer McCarson and Charles Files as possible training for DREs in the future.

VIII. Prosecutor Education:

The Sub-Committee recognizes the Committees' interpretation of the Aleman case is not, and cannot, be all-inclusive. Each case is different and comes with a separate set of facts and circumstances. The NMDRE Committee hopes to use the interpretations discussed during the sub-committee meeting to serve as a resource for prosecutors across New Mexico. Prosecutor education has been and continues to be identified as a variable in DWI-drug cases. The NMDRE Program will continue to work with the Administrative Office of the District Attorneys and Traffic Safety Resource Prosecutor to train prosecutors and promote the importance of the NMDRE program.

IX. ** Adjourned **

Meeting end time 12:45

Minutes submitted by Charles Files, BRV Consulting

Minutes approved by <Name> *Voting Item at next Committee meeting

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