"ME"

I am broken, we are all broken

By Briggs Cheney

Is there a lesson in a Pandemic? Will that lesson stick, or will the storm be weathered and it will be back to my life as it has always been? Is it too late in my life to change course?

"There is a crack in everything. That's how the light gets in." Those are Leonard Cohen's words in his album Anthem. For me, the last nine months have revealed, once again, that crack in my life. I have seen the light shine through the crack before and I have tried to learn the lesson, but I have always ended up ignoring the light.

That crack is one of my greatest character defects – I have forgotten "me". I have put "me" last.

Don't misunderstand. When I say I have put "me" last, I am not saying I have put everyone ahead of me, or that I have dedicated myself to others, forgetting myself. That is not what I am saying. I have been selfish and self-centered, and I have sought and surrounded myself with material things and all the trappings of success I could gather up. No doubt, part of the problem.

Then what am I saying? As I compose this article – in these first few paragraphs – I am not exactly sure. If I have been selfish and self-centered. If I have acquired all the things I thought I needed or deserved. How have I ignored "me"? who is this "me"?

"Me" is that eight-year old boy who watched out his window as the other boys in the neighborhood gathered on the corner across the street from my house to go play baseball at the park, and they didn't call me." "Me" was that little boy being alone, not understanding, trying to face that fear of not knowing what to do.

The crack in "me" was how I dealt with feeling alone - feeling being the operative word.

It has been a long time since I was eight-years old, and I have done okay. More than okay. But it is how I got there – got to today - that is part of that crack. Where I could go from here?

Both my parents were alcoholics. I know they loved me, but it is so hard to love when you struggle with the disease of addiction. I learned how to survive on my own – alone.

My middle school counselor – God, I wish I could remember his name – gave me a crash course in social skills – "Keep your mouth shut. Just listen. They will start to like you." He was right. It worked. I had friends, I was voted best looking in my high school class and went off to college, and here I am, a lawyer.

Along the way, like my parents, the disease of addiction caught up with me. And like them, I was an alcoholic. And like my parents, I put my family through what I had suffered through as a child. My greatest regret.

Many know my story and it is not one I am ashamed of, but a story for another day, other than to say that today I am in recovery, and have been, for going on twenty-four years. In those years, I have learned a lot about myself, some of it hard to face.

That lesson I learned in middle school was so simple and so quickly reinforced it became part of "me." I need to say again, because it is important to me personally, while I know my parents loved me, that love was hard to find and I had to find support outside of my family – through friends, by doing what was expected of me and receiving reinforcement and learning that working hard and being dedicated resulted in reward. It became part of "me."

For those who know me well, there is another side of "me" that is inconsistent with my middle school counselor's advice – "keep your mouth shut and just listen." I can be a renegade. I can buck authority. I can take a stand when I may be the lone – or next to lone – voice. Perhaps, just maybe, that is where the hope for fixing my crack resides in "me".

On those occasions when the renegade comes out, when I do what seems foolish or against the odds, when I don't "keep my mouth shut and just listen", I feel alive, I feel purpose, I feel "me".

Fifteen days after 911, my first best friend in this world, Bill Giese, dropped dead of a massive heart attack. Bill was 27 days my senior – he was 54 years old. Bill was a Captain for Southwest Airlines, a long-distance runner, a specimen of fitness, and he dropped dead.

Bill was not my first friend or colleague to leave life prematurely, but Bill was my first best friend in life and his passing stunned me. As most of us do on those occasions, we search our souls and vow to re-evaluate our priorities. I promised myself that things would change for "me" and here I am – 19 years later – writing that I am still broken.

So, who is this "me" that I suppressed so many years ago? This "me" who every once in a while has escaped the cave and stepped out into the sunshine and experienced life beyond "keep your mouth shut and just listen"? I am not sure who "me" is or could be.

In this last nine months , life has slowed down and I have felt like I have been treading water – waiting. We have all had to adjust our personal and professional lives and it has not been easy for any of us. Into this vacuum, there has been no shortage of podcasts, advice and tools made available to help us. Gosh knows, my writing this personal piece about "me" is part of that effort. Of course, I hope it helps someone, but what I do know as I get to the last paragraph is that volunteering to share my own personal story has helped me. So, I thank you for the chance to help me find "me".

It is probably fair to say that we are all broken in one way or another. We all have cracks and every once in a while the light shines in and we have a chance, we have a moment to make a change in our lives. Can I seize that moment, will I seize that moment and follow the light? Yes, I am broken, but is this my chance to be broken better?

About the Author:
Not by design but happenstance, Briggs' career in the law has been that of being a lawyer's lawyer.

Following graduation from law school at UNM and for the better part of his 48 years of practice, Briggs has had the honor of helping lawyers throughout New Mexico - defending them in the civil arena and guiding them through the disciplinary process. Briggs has been recognized for his legal skills in representing lawyers and he has been a leader in local, state and national bars. He has tirelessly helped the struggling and suffering lawyer as others helped him.

New Mexico Judges and Lawyers Assistance Program

Help and support are only a phone call away.
Confidential Helpline Assistance – 24 hours every day
Judges: Call 888-502-1289
Lawyers and Law Students: Call 505-228-1948 or 800-860-4914

NM Judges and Lawyers Assistance Program **LAW** - **L**ead and **A**ssist with **W**ellness

The NMJLAP is a program committed to the positive health and well-being of the New Mexico legal community. The NMJLAP serves judges, lawyers, law students and their immediate family members by listening first, then offering referral sources, a peer support network, a monitoring program and education in the form of CLE trainings. At this time in the legal profession where well-being is the topic of many conversations, NMJLAP strives to be a leader in proliferating and developing the transformation in the legal community toward civility, compassion and understanding for colleagues living with any behavioral health condition. Get on board with the ABA, CoLAP and LAPs across the country to create a profession that promotes work/life balance, civility amongst peers, and an environment that nurtures positive health and well-being of the individual.

Exciting 2019 happenings for the NMJLAP are: a presence at the June Judicial Conclave, July Bar Exam, and August State Bar Annual meeting. Look for upcoming details on our October Town Hall Meeting, NEW Facebook page and Twitter account. Visit our website at www.nmbar/jlap.org or call (505) 797-6003 to find out how you can get involved.

In the articles that follow we hope you find something that gives you pause, education, encouragement, or just makes you laugh. NMJLAP loves the NM legal community....we are ***Changed Lives, Changing Lives.*** Visit www.nmbar.org/JLAP for more information.

A Lawyer's TOOLBOX

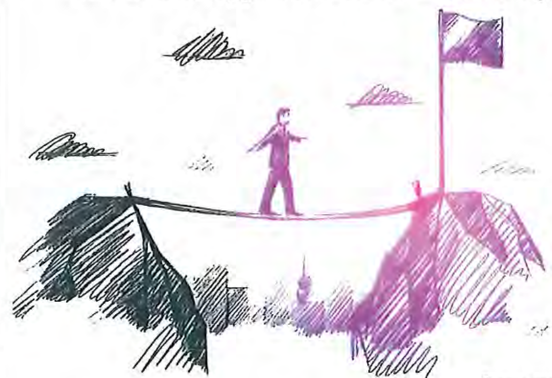
by Briggs Cheney

We are trained to help others. When asked "what do you do?" I have sometimes responded, "I make a living dealing with people who can't get along or are unwilling to compromise or, otherwise, are unwilling to accept life on life's terms." I admit to sarcasm and an unfair generalization. It has been the rare occasion that a client did not genuinely believe in his or her cause. Too often clients are wonderful people who deserve for some wrong to be righted, and because of unfair laws, economics, or the realities of the legal system there is little a lawyer can do. It is a rough racket and it often takes its toll on the lawyer.

; in other professions, lawyers have their *tools*: Westlaw; PowerPoint; SOPA; PC Law and the list goes on—the "tools of the trade." But it is a *rough racket*, and a lawyer needs a *personal* toolbox with tools that help the lawyer cope with the stresses and challenges of the practice of law. Having represented over five hundred lawyers in 46 years, I have seen almost every conceivable mistake that can be made by a lawyer and I have concluded that every lawyer should have a personal toolbox.

My practice of forty-six years has focused on helping and representing lawyers. I am also a recovering alcoholic and I have been in recovery for a very long time. The disease of addiction is very complicated, and it is not fair to blame my alcoholism on the stresses of the practice of law. It is fair to say that a significant part of the solution to the disease of addiction is learning how to live life on life's terms, and this approach is completely transferable to the practice of law. It's a great example of a skill that belongs in a lawyer's personal toolbox. I am always learning about myself, and life, and adding new tools to my personal tool box—some that you might consider for your own toolbox.

"Control is an illusion, and we all struggle with letting go of the handle and just accepting where the winds of life carry us."



Overcoming Fear

Law is a helping profession. People bring us their problems to fix and we are supposed to know what to do. Too often the solution is not clear, or we don't know what to do. We are stuck, fear sets in, and we do nothing. It is the rare occasion that doing nothing is the correct decision. When I am afraid and unsure—when I am stuck—I think back to a long-ago friend we called *Biker Steve* who was fond of saying: *"Nothing changes if nothing changes."*

Another friend, *Ilse*, now in her late 80's, offered me her several acronyms for FEAR: that we should not *F... Everything And Run,* but remember that often it is a case of *Future Events Appearing Real* and that we are *Forgetting Everything's All Right.*

Lawyers have no control over opposing counsel, witnesses, the judge or the jury, yet the lawyer feels a duty to control the outcome. When I forget this, two of my favorite tools are George Addair's wisdom—*"Everything you want is on other side of fear"*—and Gilda Radner's (of *Saturday Night Live* fame) reminder:

"I wanted a perfect ending. Now I've learned, the hard way, that some poems don't rhyme, and some stories don't have a clear beginning, middle, and end. Life is about not knowing, having to change, taking the moment and making the best of it, without knowing what's going to happen next. Delicious Ambiguity."

New Mexico School of Law

William Slease's Ethics Class

Presentation by the State Bar's JLAP

March 12, 2020

If Tenessa didn't get your attention…

By Briggs Cheney

Dixon Scholl Carrillo, PA

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DENIAL IS A RIVER IN EGYPT
by Briggs Cheney

ADenial is a river in Egypt@ doesn=t make any sense, but then again, how law firms address alcoholism and substance abuse within their firms often does not make much sense either.

If you have suffered from alcoholism or substance abuse and spent any amount of time in recovery, you=re familiar with the old phrase ADENIAL is not a river in Egypt.@ It=s a cute phrase and for this recovering alcoholic, the first time or two I heard it, I laughed along with everyone else. But as the years have gone by the significance of denial in the disease process has become no laughing matter. But denial is not limited just to the suffering alcoholic or addict; it inflicts the family and friends of the addict - and with the suffering lawyer - his or her law firm. That is the focus of this article.

I have practiced law in New Mexico for 29 years. I have kidded folks from outside the Land of Enchantment, as we call it here, that Awe=re still waiting for *Gone With the Wind* to come to our local movie house.@ While I generally say that kiddingly, for purposes of these comments, it probably has far greater meaning. This article is not a warm and fuzzy article about the suffering lawyer. I can talk long and convincingly about the disease, but the intent here is *down and dirty.* I want to talk money. In New Mexico, when it comes to dollars and cents, we are waiting for *Gone With the Wind* to make it to the Land of Enchantment. The money invested in training and compensating a lawyer in New Mexico can probably be tripled, quadrupled and more in Los Angeles, New York, Denver, Houston, and the list goes on. The point being to have a suffering lawyer suffer very long, to a law firm means money. To have a suffering lawyer putting the firm at risk with clients, both from a business standpoint, not to mention legal malpractice, means money. But that is exactly what law firms do, in the name of DENIAL, they throw money away and, more importantly, place their firm=s clients at risk.

How does this happen? How can DENIAL have this grip on the law firm too? Probably for the same reasons why a spouse or family can end up enabling a suffering alcoholic or addict. For the family it is love; they don=t want to think their family member suffers from this disease. For the law firm, it is friendship, collegiality, loyalty. And if it is not in the name of love in the family setting or friendship in the law firm setting, often it is ignorance. Ignorance of the disease or ignorance of what to do if the disease is appreciated. Raise your hands, Ahow many of us wants to rat on their fellow lawyer,@ Ahow many of us want to be responsible for a fellow lawyer losing their job at the firm when you know that the lawyer=s child just started college,@ and Ahow many of us are even sure if our law firm pal is really an alcoholic or addict - maybe he/she has just had a rough six months, a rough case or whatever.@ If you are being honest, and letting DENIAL do its thing, you raised your hands.

I said this was a *down and dirty* article - here is what every law firm should consider doing and probably in this order:

$ ***Mandatory Law Firm Awareness Programs*** - On an annual basis, require all firm employees to attend a program on alcoholism and substance abuse. This can be done at a firm lunch or at the end of a day or as part of an annual CLE of the firm. I strongly recommend a video vignette which has been produced by the State Bar of Pennsylvania= Lawyers Concerned for Lawyers Committee entitled *No Immunity.* (800/335-2572 or lclpa@epix.net)

$ ***Encourage and educate lawyers and staff (more importantly staff) on what to do if they have a concern*** - The concerned lawyer or staff has to be able to express concern to someone. It would be great if there was someone within every firm where a concerned lawyer or staff member could go with concerns. But this only works if the employee feels that the concern will be kept confidential. Beyond the firm, every state presently has an active Lawyer=s Assistance Program, either voluntary or organized under the auspices of the State Bar. There is generally a confidential hot line where a concerned employee can call with concerns.

$ ***The firm should develop a program to assist the suffering lawyer or staff member*** - All of this works only if the firm will recognize that alcoholism and substance abuse is a disease which can be treated. If the law firm employee believes that raising concern will put the suffering employees employment at risk, DENIAL will continue to live and breathe in your law firm. Addiction is a disease and can be treated, if it is not ignored. The ABA=s Commission on Lawyer Assistance Programs (COLAP) has developed a Model Program which is a starting point. (800/238-2667 ext. 5359 or www:abanet.org/Code of Professional Responsibility/colap/home.html) I said this was *down and dirty* - view this just from the standpoint of money - put a pencil to the investment you have made in your professionals. If you want to throw that away, let DENIAL live and breathe in your law firm.

I don=t expect these few words to make DENIAL really a river in Egypt, but I hope you will ask for help.

It didn't have to be this way...

BY BRIGGS CHENEY

Our friend and colleague did not have to find his personal and professional bottom the subject of front page news in every newspaper in this state. Our profession and its very cornerstone, the judiciary, did not have to be the focus of investigative reporters and radio talk shows. It didn't have to be that way and we all bear some responsibility.

There will be those who will take issue with my last statement. I understand. Let me explain. For the last nine years, at the request of our Supreme Court, I have talked at every swearing—in ceremony about the disease of addiction. I have talked to bar associations in this state and around the country. And I have not been alone. Other members of the State Bar's Lawyer Assistance have joined me. As I generally begin my talks, "If you will indulge me for a moment ...," let me make the same request here.

I am an AV-rated lawyer and have been for many years. I am listed in four editions of *Best Lawyers in America*. I have been a local, state and national bar leader. I have been honored with kind awards for my service. I have been married for 35 years, I have three very wonderful children, I have a dog and a cat (both strays), I own two used cars with more than 350,000 miles between them, I used to wear a 40-regular suit, and to many, I look pretty normal, pretty plain vanilla — "Mr. Bell Curve." I am all those things... I am also an alcoholic. I suffer from the disease of alcoholism — the disease of addiction.

> No one wants to think a loved one, a partner, a friend, a boss is a drunk or an addict. They couldn't be. Lawyers, certainly judges, are above such problems.

In 1987, while serving on the Board of Bar Commissioners, I helped create what we today call the Lawyers Assistance Committee (LAC). At the time, I was not in recovery. That is part of my own story and beyond this article. Ironically, it was that very committee which later intervened for me — the result of friends and family who had the courage to seek help from the LAC. That intervention probably saved my life.

Since its inception, the LAC has maintained a confidential hotline. Many on the committee who suffer from the disease of addiction have put aside their own anonymity to speak publicly about their own struggle with this disease. In 1991, the Supreme Court amended our Code of Professional Responsibility to relieve lawyers of the duty to report ethical violations when they are seeking help for a lawyer from the LAC. Many lawyers have been helped. Much has been done to address this disease in our profession. But the events of the last several weeks have made me realize that there is much more to be done.

For those who do not suffer from this disease, it makes no sense; it does not compute. Last weekend, I tried to respond to my barber's frustration: "How could this judge do this — throw away his career? What was he thinking?" Joe, my barber, could not understand. But I did. I understood our judge's insanity. I understood because it had made no sense for me to put those I loved so dearly and cared for so much through the torture I did. How could seemingly normal appearing individuals engage in such abnormal behavior? Because it is a disease.

I have struggled this last week trying to understand why we never had the opportunity to help our friend, our colleague, our judge. No effort was made to intervene. Why did no one call the LAC with concern? My guess: Denial. And, maybe, a fear that a call to the hotline or a member of the LAC is not *really* confidential.

The person who suffers from the disease of addiction is not the only one in the equation who suffers from denial; so does the spouse, the coworker, the partner, the legal assistant. No one wants to think a loved one, a partner, a friend, a boss is a drunk or an addict. They couldn't be. Lawyers, certainly judges, are above such problems. And if it is not that kind of thinking that causes us to look the other way — to make excuses for the destructive behavior of this disease — it is our lack of understanding about the disease.

I can understand the denial. It is harder to understand the fear or reluctance to call the hotline or one of us on the committee. Our Supreme Court's 1991 amendment to Rule 16-803(E) of the Code of Professional Responsibility and corresponding amendment to Rule 21-300(D) of the Judicial Code of Conduct, has paved the way for helping the lawyer or judge who may be in trouble.

There is possibly a lack of understanding about what happens when a call is made to the hotline or to a committee member. First, the call is **absolutely confidential**. Secondly, nothing happens unless and until the caller feels comfortable. In many instances, a caller will not (and often does not) identify the person about whom he or she is concerned. Often the call is an opportunity for the concerned caller to ask if what is being observed is truly something to be concerned about — an opportunity to get a little education about this disease. If a decision is made for one of the committee members to call on the lawyer, the individual is simply told that there has been a call of concern to the hotline. It is emphasized that the caller(s) must be someone who cares about them. But most importantly, the individual is accused of nothing. The person is not told he/she is an alcoholic or addict. Much to the contrary, the committee member simply explains what he/she has gone through personally in his or her life, that there are many of us who suffer from the disease of addiction, and if the individual would like help, or might in the future, that help is available. That is all that happens. Nothing more than to let the individual know that someone cares and that help is available.

It doesn't have to be this way. We can exercise some courage and reach out to help the suffering lawyer or we can let the lawyer find his or her bottom on their own. Our profession has witnessed first hand the consequences of our taking no action. The choice is ours.

Briggs Cheney is the chair of the State Bar Lawyers' Professional Liability Committee.

BAR BULLETIN

OFFICIAL PUBLICATION OF THE STATE BAR OF NEW MEXICO

JUNE 24, 2004 • VOLUME 43, No. 25

Supreme Court Announces Intolerance for Drug Use by Judges

The New Mexico Supreme Court recently announced the filing of a Supreme Court Order entitled "Reporting Judicial Misconduct Involving Unlawful Drugs." The order *(see page 23)* emphasizes a Code of Judicial Conduct Rule requiring a judge to comply with the law at all times. Chief Justice Petra Jimenez Maes speaking for the court said, "Use of illegal drugs by a judge reflects directly on a judge's fitness for office and will not be tolerated."

The order also clarifies existing reporting requirements by detailing a procedure for reporting such misconduct to the Judicial Standards Commission, a body charged with the responsibility of investigating complaints against judges. "Public confidence in the judiciary is vital to our democracy. The justices believe that failing to report a judge for such misconduct could only erode public confidence in the orderly administration of justice," said Chief Justice Maes.

The Chief Justice also explained that the Judicial Standards Commission has an orderly process in place for investigating complaints against judges, emphasizing the importance of allowing this independent body to conduct a fair and thorough investigation of any complaint made against a sitting judge. The commission makes recommendations to the Supreme Court concerning appropriate disciplinary action to be taken against a judge found to have violated the Code of Judicial Conduct.

Chief Justice Maes reassures the public of the Supreme Court's continued confidence in the judiciary: "The court urges the public to keep in mind that our entire state is blessed with qualified and experienced judges who are honest and dedicated public servants."

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SELECTED RULES FROM NM RULES OF PROFESSIONAL CONDUCT

16-803. Reporting professional misconduct.

A. **Misconduct of other lawyers.** A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the New Mexico Disciplinary Board.

B. **Misconduct of judges.** A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the New Mexico Judicial Standards Commission.

C. **Confidential information.** This rule does not require disclosure of information otherwise protected by Rule 16-106 NMRA, or information gained by a lawyer or a judge while participating in the New Mexico Lawyers and Judges Assistance Program, unless the information pertains to those communications requiring disclosure under Paragraph E.

D. **Cooperation and assistance; required.** A lawyer shall give full cooperation and assistance to the Supreme Court and to the New Mexico Disciplinary Board, hearing committees, and disciplinary counsel in discharging the lawyer's respective functions and duties with respect to discipline and disciplinary procedures.

E. **Alcohol, drugs, addiction, or other physical or mental health-related disorders exception.** The reporting requirements of Paragraphs A and B of this rule do not apply when a lawyer believes a judge or lawyer is impaired due to alcohol or substance abuse, or for mental, emotional, or psychological reasons, if such impairment is reported to the New Mexico Lawyers and Judges Assistance Program. The exception is inapplicable to

(1) information required by law to be reported, including information that must be reported under Paragraph G of this rule;

(2) threats of future criminal acts or violations of these rules; or

(3) disclosures of past criminal acts or violations of these rules that are believed to have resulted in substantial harm to a client.

Such information, threats, or disclosures shall be reported to the New Mexico Disciplinary Board or the New Mexico Judicial Standards Commission, even if the impairment is also reported to the New Mexico Lawyers and Judges Assistance Program. Paragraph (E)(3) of this rule does not apply to any communication that is made to, by, or among members or representatives of the New Mexico Lawyers and Judges Assistance Program.

F. **Immunity.** The duties and responsibilities of the Program Manager of the New Mexico Lawyers and Judges Assistance Program, its members of the Board, employees, agents, designees, volunteers, or reporting parties are owed to the Supreme Court and the public in general, not to any individual lawyer or another person. Nothing in this rule is to be construed as creating a civil cause of action against the aforementioned individuals, and they are immune from liability for any omission or conduct in the course of carrying out their official duties and responsibilities or failing to fulfill their duties and responsibilities under this rule. Any person who in good faith reports information in connection with the program is immune from suit for reporting the information.

G. **Judicial misconduct involving unlawful drugs; reporting requirement.** Notwithstanding the provisions of Paragraph E, any incumbent judge who illegally sells, purchases, possesses, or uses drugs or any substance considered unlawful under the provisions of the Controlled Substances Act, shall be subject to discipline under the Code of Judicial Conduct.

Any lawyer who has specific objective and articulable facts or reasonable inferences that can be drawn from those facts, that a judge has engaged in such misconduct, shall report those facts to the New Mexico Judicial Standards Commission. Reports of such misconduct shall include the following information:

(1) name of person filing the report;

(2) address and telephone number where the person may be contacted;

(3) a detailed description of the alleged misconduct;

(4) dates of the alleged misconduct; and

(5) any supporting evidence or material that may be available to the reporting person.

The Judicial Standards Commission shall review and evaluate reports of such misconduct to determine if the report warrants further review or investigation.

[As amended, effective April 1, 1991; as amended by Supreme Court Order No. 08-8300-029, effective November 3, 2008; as amended by Supreme Court Order No. 17-8300-018, effective December 31, 2017.]

16-501. Responsibilities of partners, managers and supervisory lawyers.

A. **Necessary measures.** A partner in a law firm and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

B. **Compliance with rules.** A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

C. **Responsibility for other lawyer's violations.** A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

D. **Responsibility for reporting impairment.** A partner in a law firm and any lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall take prompt action to address any concern that a lawyer in the law firm is exhibiting signs of a severe impairment of the lawyer's cognitive function. Such action may include, but is not limited to

(1) making a confidential report to or otherwise seeking assistance from the New Mexico Judges and Lawyers Assistance Program;

(2) reporting the matter to the Office of Disciplinary Counsel to consider disability inactive status proceedings under Rule 17-208 NMRA and/or the appointment of an inventorying attorney under Rule 17-213 NMRA; or

(3) speaking with the lawyer and encouraging the lawyer to seek appropriate medical care and/or testing.

This obligation also applies to observations made by a lawyer with direct supervisory authority over a subordinate lawyer. A report made under this paragraph shall be treated as confidential and handled in accordance with the confidentiality rules, policies, and procedures of the agency, entity, or program to whom the report has been made.

[As amended by Supreme Court Order No. 08-8300-029, effective November 3, 2008; as amended by Supreme Court Order No. 18-8300-017, effective December 31, 2018.]

16-502. Responsibilities of a subordinate lawyer.

A. **Responsibility for own actions.** A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

B. **Arguable question of duty.** A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

SELECTED RULE FROM NM CODE OF JUDICIAL CONDUCT

21-215. Responding to judicial and lawyer misconduct.

A. A judge who knows that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the Judicial Standards Commission.

B. A judge who knows that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the Disciplinary Board.

C. A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.

D. A judge who receives information indicating a substantial likelihood that a lawyer has committed a violations of the Rules of Professional Conduct shall take appropriate action.

[Adopted by Supreme Court Order No. 11-8300-045, effective January 1, 2012.]

Sanders, Bruin, Coll & Worley, P.A. vs. McKay Oil Corporation, et al., 123 N.M. 457, 943 P.2d 104 (1997).

In this case, the professional issue at hand was the appropriateness of a lawyer/law firm unilaterally terminating representation of a client on the eve (six weeks) of commencement of a multimillion dollar arbitration in which the client was a defendant.

The firm wrote the client, McKay, citing the firm partner's health concerns (the partner in charge of the case) as the basis for the decision to terminate. Evidence elicited in the case suggested other reasons. The client was forced to retain new counsel to takeover; obviously at great expense. The new counsel successfully defended the claims.

Subsequently, filed suit against the terminated client seeking collection of fees for work performed on the arbitration proceeding in question. The client counterclaimed, naming among the counter defendants each of the individual shareholders in the firm. The trial court granted the individual shareholders' motion for summary judgment. On certification from the Court of Appeals, the Supreme Court reversed summary judgment.

The court on certification reviewed the following issues: 1) whether attorneys can limit liability to clients while practicing within a professional corporation and whether the conduct of the attorneys in this case is of the type that should be shielded by corporate status, and 2) whether the trial court erred in granting the firm's summary judgment motion on the basis that no grounds for personal liability on the part of the attorney-shareholders could be found.

In reversing summary judgment for the individual shareholders, the court held:

> We hold that, as a general matter, membership or shareholder status in a professional corporation does not shield an attorney from individual liability for his own mistakes or professional misdeeds. However, it remains unclear from the record whether the actions taken by the attorney-shareholders in this case rose to the level of a breach of duty of any type. Therefore, we reverse the trial court's grant of summary judgment, finding material issues of fact exist as to whether the attorney-shareholders should be personally liable for their actions regarding the representation of McKay.

123 N.M. at 459.

Lawsuit Alleges Biglaw Firm Failed To Monitor Partner With Substance Abuse Problem

The partner is also facing charges of impaired driving causing death after a hit-and-run incident left a 16-year-old girl dead.

By KATHRYN RUBINO

Feb 7, 2020 at 10:42 AM

(Image via iStock)

The Biglaw firm of Dentons is facing a $25 million lawsuit alleging self dealing, conflict of interest, and gross overbilling. The case, filed last week in Calgary, was brought by Laurie Venning and the Venning Group of companies. They alleged that Venning paid Dentons $22 million for legal services and ~$12 million in disbursements since 2010, with $7.4 million of the fees for the period of time surrounding Venning's 2014 sale of Regent Energy to a private equity firm.

As reported by CBC News, the lawsuit alleges that both Dentons and partner Shane Stevenson told Venning that "within a short period of time" of the Regent Energy sale, Stevenson would come in-house at Venning Group. While that move never materialized, the complaint alleges that in anticipation of the move, Stevenson became involved as a shareholder or director in numerous of its companies. That's when Venning alleges the self-dealing and conflicts of interest began:

"Dentons and Stevenson represented to [Venning] that it was standard industry practice to grant legal counsel with equity participation in the companies for whom they acted," the lawsuit states.

Stevenson eventually became involved in 22 of Venning's companies or trusts, and the lawsuit claims that Stevenson issued shares in several companies to himself, including some instances "without the knowledge or consent of the plaintiffs."

Venning claims that Dentons never recommended he get independent legal advice in relation to these transactions, "despite the conflicts of interest that necessarily resulted, and despite the fact that some or all of these transactions were not fair and reasonable to the Venning Group."

Additionally, the complaint alleges that Stevenson has a substance abuse problem and that Dentons was aware of the issue and failed to provide proper supervision of his legal work. The allegations against Stevenson include ones that he provided legal advice under the influence of alcohol and cocaine and that Venning was not warned the legal work they got from Stevenson may be under the influence:

The lawsuit alleges Dentons failed "to ensure its partners were properly serving the Venning Group, in light of Stevenson's ongoing substance abuse issues, despite their knowledge including having sent Stevenson to multiple stays in a rehabilitation facility and that Stevenson's substance abuse was re-emerging in an alarming manner.

"Stevenson was providing advice to the Venning Group while under the influence of intoxicants and narcotics including alcohol and cocaine," the lawsuit states, adding that Dentons owed a duty to Venning to monitor the work Stevenson was doing for Venning "given Stevenson's known substance abuse history.

"[Dentons] were aware at all times that Stevenson had a heightened risk to relapse, but failed to monitor the advice he was giving, and failed to warn [Venning] they should not rely upon Stevenson's advice," the lawsuit states.

A Dentons spokesperson had the following statement about the lawsuit: "[N]othing means more to us than the integrity of our lawyers and the trust our clients have in Dentons. We intend to mount a vigorous defen[s]e to these allegations."

Stevenson's had issues with substances before. In 2009, he was charged with two separate incidents of impaired driving. Those charges were later dropped. Then, in 2018, he was arrested on charges of drunk driving that resulted in the death of a 16-year-old girl. According to police, he had a blood-alcohol level over .08 at the time of his arrest. His trial on those charges is currently scheduled for October.

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299 P.3d 388
Supreme Court of New Mexico.

Herman SPENCER, Plaintiff–Petitioner,
v.
Paul BARBER, Barber & Borg, L.L.C., and Ellen Sam, as personal representative of the Estate of Hermanda Spencer (deceased), Defendants–Respondents.

No. 33,133.
|
Feb. 28, 2013.

Synopsis

Background: Personal representative of daughter's and granddaughter's estates filed suit against father, as statutory beneficiary under Wrongful Death Act, to enforce settlement agreement relating to father's share in wrongful death settlement proceeds. Father filed counterclaim against personal representative and filed third-party claim against attorney who represented personal representative for legal malpractice, fraud, collusion, and misrepresentation. The District Court, McKinley County, Grant L. Foutz, D.J., entered summary judgment in attorney's favor, and father appealed. The Court of Appeals, 150 N.M. 519, 263 P.3d 296,affirmed in part and reversed in part. Certiorari review was granted.

Holdings: The Supreme Court, Chávez, J., held that:

[1] Rules of Professional Conduct were relevant to determine scope of attorney's duty to father, as statutory beneficiary under Wrongful Death Act;

[2] attorney owed father duty to exercise reasonable care to ensure that father received from personal representative his share proceeds from wrongful death settlement;

[3] conflict of interest arose between attorney and father, for purposes of determining scope of duty owed by attorney to father, when personal representative informed attorney that father was not entitled to any portion of wrongful death settlement proceeds due to alleged abandonment of daughter;

[4] fact issue remained whether attorney gave father adequate notice of his possible share of settlement proceeds;

[5] fact issue remained whether attorney adequately disclosed to father nature of conflict of interest;

[6] fact issue remained whether conflict of interest arose between personal representative and attorney when attorney learned that personal representative's own conduct may have contributed to cause of fatal accident, which could reduce father's share of proceeds from wrongful death settlement; and

[7] whether potential adversarial relationship existed between father and attorney was not relevant to father's claims against attorney for fraud, collusion, and misrepresentation.

Judgment of The Court of Appeals reversed; remanded to District Court.

West Headnotes (27)

[1] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

A statutory beneficiary under the Wrongful Death Act is an intended beneficiary of the agreement between the attorney and the personal representative of the decedent's estate; therefore, the statutory beneficiary may sue the personal representative's attorney when the attorney harms the statutory beneficiary by failing to exercise reasonable skill and care during the attorney's representation of the personal representative. West's NMSA § 41–2–1 et seq.

3 Cases that cite this headnote

[2] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Attorney and Client
Nature of attorney's duty

The Rules of Professional Responsibility become relevant when ascertaining the scope of the duty owed by the attorney to the personal representative of a decedent's estate in an action under the **Wrongful Death** Act and how a breach of that duty may have harmed a statutory beneficiary. West's NMSA § 41–2–1 et seq.

[3] **Judgment**
Absence of issue of fact

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.

[4] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

New Mexico Rules of Professional Conduct did not provide statutory beneficiary under **Wrongful Death** Act of cause of action for legal malpractice against attorney who represented personal representative of decedent's estate; however, Rules were relevant to determine scope of attorney's duty to statutory beneficiary. West's NMSA § 41–2–1 et seq.

1 Cases that cite this headnote

[5] **Death**
Joinder

Statutory beneficiaries under the **Wrongful Death** Act are generally not permitted to join as parties in a **wrongful death** lawsuit because the personal representative is the beneficiary's trustee, and because the personal representative and any beneficiaries should have the same interest—to recover as large an award as possible from the tortfeasors who caused the decedent's death. West's NMSA § 41–2–1 et seq.

[6] **Death**
Apportionment and distribution of amount recovered

The personal representative has a duty to act with reasonable care regarding the interests of the statutory beneficiaries and must distribute proceeds from a **wrongful death** lawsuit to the statutory beneficiaries in strict accordance with the **Wrongful Death** Act. West's NMSA § 41–2–1 et seq.

2 Cases that cite this headnote

[7] **Attorney and Client**
What constitutes a retainer

Under the **Wrongful Death** Act, although the personal representative of the decedent's estate may be, and often is, a statutory beneficiary, for purposes of the attorney-client relationship, the client is the personal representative. West's NMSA § 41–2–1 et seq.

[8] **Attorney and Client**
Skill and care required

The attorney representing a personal representative of the decedent's estate in an action for **wrongful death** owes a duty to provide services to the personal representative with reasonable skill and care. West's NMSA § 41–2–1 et seq.

1 Cases that cite this headnote

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[9] **Attorney and Client**
Nature of attorney's duty

Rules of Professional Conduct are not irrelevant in a legal malpractice lawsuit; while the Rules cannot be used to launch a malpractice claim, they still provide guidance in ascertaining the extent of lawyers' professional obligations to their clients.

1 Cases that cite this headnote

[10] **Attorney and Client**
Skill and care required

Proof of the standard of conduct is necessary to maintain an action for legal malpractice.

1 Cases that cite this headnote

[11] **Attorney and Client**
Skill and care required

One element of a legal malpractice claim is breach of a fiduciary relationship by the defendant attorney, and in order to prove this breach, a plaintiff must establish that the defendant attorney violated the required standard of conduct.

1 Cases that cite this headnote

[12] **Attorney and Client**
Skill and care required

The New Mexico Rules of Professional Conduct illustrate the standard for attorney conduct, for the purposes of a claim for legal malpractice, and plaintiffs may cite them to establish the appropriate standard of conduct for attorneys to follow.

2 Cases that cite this headnote

[13] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Attorney who represented personal representative of estate of daughter and granddaughter killed in automobile accident owed duty to father, as statutory beneficiary under Wrongful Death Act, to exercise reasonable care to ensure that father received his share proceeds from wrongful death settlement. West's NMSA § 41–2–1 et seq.

[14] **Death**
Persons for whose benefit suit may be maintained
Death
Apportionment and distribution of amount recovered

The personal representative has a nondiscretionary duty to distribute the wrongful death proceeds in the ratio prescribed by the Wrongful Death Act; therefore, any agreement to pursue a wrongful death lawsuit will, by definition, be for the benefit of the statutory beneficiaries. West's NMSA §§ 41–2–3(F), 45–2–103(A)(2).

4 Cases that cite this headnote

[15] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

An attorney representing the personal representative of the decedent's estate in an action for wrongful death has a duty to exercise reasonable care to ensure that the statutory beneficiaries actually received the proceeds of any wrongful death claim. West's NMSA §

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41–2–1 et seq.

4 Cases that cite this headnote

[16] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Conflict of interest arose between attorney for personal representative of daughter's and granddaughter's estates and father, who was statutory beneficiary under Wrongful Death Act, for purposes of determining scope of duty owed father by attorney, when personal representative informed attorney that father was not entitled to any portion of wrongful death settlement proceeds due to alleged abandonment of daughter. NMSA 1978, § 45–2–114(C) (2010).

[17] **Attorney and Client**
Particular Cases and Problems
Attorney and Client
Disclosure, waiver, or consent
Attorney and Client
Duties and liabilities to adverse parties and to third persons

The fact that an attorney representing the personal representative of a decedent's estate in an action for wrongful death identifies a conflict, actual or potential, should not, in itself, negate the duty owed to the statutory beneficiaries; instead, when such a conflict becomes apparent, the attorney can resolve the conflict by giving notice to the beneficiary that the latter cannot rely on the attorney to act for his or her benefit. West's NMSA § 41–2–1.

[18] **Attorney and Client**
Particular Cases and Problems
Attorney and Client
Disclosure, waiver, or consent

Whether the disclosure of a conflict of interest is to a client or an intended beneficiary, the purpose of the disclosure is to allow the person to make an informed decision about whether he or she in fact needs independent representation. NMRA, Rule 16–403.

[19] **Attorney and Client**
Particular Cases and Problems
Attorney and Client
Disclosure, waiver, or consent
Attorney and Client
Duties and liabilities to adverse parties and to third persons

When the attorney for the personal representative in a wrongful death gives notice of a conflict of interest to a statutory beneficiary, adequate disclosures will normally include, at a minimum: (1) the fact that the person is a beneficiary in a wrongful death lawsuit, as well as the identities of the parties to the lawsuit; (2) the amount of any settlement or verdict reached, or any settlement offers under consideration; (3) the percentage of the settlement or verdict to which the beneficiary is entitled under the statute; (4) the basic position of the adverse party; and (5) the fact that the attorney now represents the personal representative as an adverse party against the beneficiary and is not looking out for the beneficiary's interests. West's NMSA § 41–2–1 et seq.; NMRA, Rule 16–403.

1 Cases that cite this headnote

[20] **Judgment**
Attorneys, cases involving

Genuine issue of material fact remained whether attorney who represented personal representative of daughter's and granddaughter's estates in wrongful death action gave father, as statutory beneficiary under

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Wrongful Death Act, adequate notice of his possible share of settlement proceeds, thus precluding summary judgment on father's claim against attorney for legal malpractice. West's NMSA § 41–2–1 et seq.

[21] **Judgment**
⇐Attorneys, cases involving

Genuine issue of material fact remained whether attorney who represented personal representative of daughter's and granddaughter's estates in **wrongful death** action adequately disclosed to father, as statutory beneficiary under **Wrongful Death** Act, nature of conflict of interest between personal representative and father, after personal representative, who was also statutory beneficiary, informed attorney that father was not entitled to any of **wrongful death** settlement proceeds due to alleged abandonment of daughter, thus precluding summary judgment on father's claim for legal malpractice against attorney. West's NMSA § 41–2–1 et seq.; NMRA, Rule 16–403.

2 Cases that cite this headnote

[22] **Judgment**
⇐Attorneys, cases involving

Genuine issue of material fact remained whether conflict of interest arose between personal representative of daughter's and granddaughter's estate and personal representative's attorney when attorney learned that personal representative's own conduct as driver by consuming alcohol and in parking vehicle in unsafe location may have contributed to cause of fatal accident, which could reduce share of father, as statutory beneficiary under **Wrongful Death** Act, of proceeds from **wrongful death** settlement, thus precluding summary judgment in father's claim for legal malpractice against attorney. West's NMSA § 41–2–1 et seq.; NMRA, Rule 16–107(A)(2).

[23] **Attorney and Client**
⇐Particular Cases and Problems
Attorney and Client
⇐Duties and liabilities to adverse parties and to third persons

If there are statutory beneficiaries under the **Wrongful Death** Act other than the personal representative, and there is a good-faith basis to believe that the personal representative contributed to the death of the decedent, this constitutes a conflict of interest that may give rise to a legal malpractice cause of action against the attorney who represented the personal representative. NMRA, Rule 16–107(A)(2).

[24] **Attorney and Client**
⇐Duties and liabilities to adverse parties and to third persons

Whether potential adversarial relationship existed between father, as statutory beneficiary of **wrongful death** claims, and attorney who represented personal representative of daughter's and granddaughter's estates, was not relevant to claims brought by father against attorney for fraud, collusion, and misrepresentation, where none of tort claims required proof of existence of fiduciary duty.

[25] **Attorney and Client**
⇐Duties and liabilities to adverse parties and to third persons

In general, a non-client cannot maintain an action for malpractice against an attorney, but there is an exception when the non-client is the intended beneficiary of the attorney's work.

1 Cases that cite this headnote

[26] **Fraud**
Elements of Actual Fraud

Under New Mexico law, a fiduciary relationship is not an element of fraudulent misrepresentation.

1 Cases that cite this headnote

[27] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Because a non-client intended beneficiary does not have to establish a relationship of trust to bring a claim for legal malpractice, the adversarial exception to the attorney's duty to the intended beneficiary is irrelevant—the plaintiff can sue whether or not the lawyer's client is his or her adversary.

Attorneys and Law Firms

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Law Office of Carpenter & Stout, Ltd., David J. Stout, Michael B. Browde, Albuquerque, NM, for Amicus Curiae New Mexico Trial Lawyers Association.

OPINION

CHÁVEZ, Justice.

{ 1} Paul Barber and his law firm, Barber & Borg, L.L.C. (Barber), were the attorneys for Ellen Sam. Barber filed a lawsuit against numerous defendants for injuries Sam sustained when her car was struck from behind on Interstate 40 (I–40). Barber also represented Sam in her capacity as the personal representative of the estates of her daughter and granddaughter, both of whom died from injuries they sustained in the collision. At the time of the collision, Sam had stopped her car on I–40 to trade places with one of her passengers, Daniel Begay. At some time during his representation of Sam, Barber learned that Sam had been drinking alcohol before the collision and that she had "parked at night with the lights off in a lane of traffic on [I–40], following which the car was struck by a truck."

{ 2} Barber also learned at some time during the litigation that Sam, who was a statutory beneficiary of her daughter's estate, took the position that the other statutory beneficiary, her ex-husband, Herman Spencer, was not entitled to share in any **wrongful death** proceeds because he had abandoned their daughter. Based on Sam's position, Barber approached Spencer in person with a settlement agreement, which Spencer ultimately signed, that reduced Spencer's entitlement to proceeds from the **wrongful death** litigation. Spencer later hired an attorney, who wrote to Barber and challenged the validity of the agreement. Barber filed a lawsuit against Spencer on Sam's behalf to enforce the settlement agreement. Spencer then counterclaimed against Sam and filed a third-party complaint against Barber for malpractice, fraud, collusion, and misrepresentation. The district court granted Barber ***392** summary judgment on the grounds that under *Leyba v. Whitley,* 120 N.M. 768, 776, 778, 907 P.2d 172, 180, 182 (1995), Barber did not owe a duty to Spencer as a statutory beneficiary because Spencer and Sam were adverse parties, and Barber represented Sam.

{ 3} Spencer appealed, and the Court of Appeals affirmed in part and reversed in part. *Spencer v. Barber,* 2011–NMCA–090, ¶ 2, 150 N.M. 519, 263 P.3d 296. The Court of Appeals agreed that Spencer could not sue Barber for malpractice because Spencer became Sam's adverse party, thereby negating any duty that Barber owed Spencer as a statutory beneficiary. *Id.* In so holding, the Court of Appeals rejected, as "an unjustified extension" of *Leyba,* Spencer's argument that Barber violated numerous rules under the New Mexico Rules of Professional Responsibility, and therefore he was required to withdraw from representing the personal representative. 2011–NMCA–090, ¶¶ 23–24, 150 N.M. 519, 263 P.3d 296. However, the Court of Appeals reversed the summary judgment to the extent it enforced the settlement agreement because it found genuine issues of material fact regarding the allegations that Barber made material misrepresentations which induced Spencer to sign the agreement. *Id.* ¶¶ 38, 42–43. Barber did not ask us to review this portion of the Court of Appeals' opinion.

[1] [2] { 4} We granted certiorari to consider the following two questions: (1) "[w]hether the duties a lawyer owes wrongful death statutory beneficiaries are governed, in whole or in part, by the Rules of Professional Conduct"; and (2) "[w]hether an adversarial relationship precludes only contract based malpractice claims and not independent tort claims." We answer the first question by reaffirming our holding in *Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp.,* 1997–NMSC–030, ¶ 16, 123 N.M. 457, 943 P.2d 104, that the Rules of Professional Conduct provide guidance in determining lawyers' obligations to their clients. A statutory beneficiary under the Wrongful Death Act, NMSA 1978, §§ 41–2–1 to –4 (1882, as amended through 2001), is an intended beneficiary of the agreement between the attorney and the personal representative. *Leyba,* 120 N.M. at 776, 907 P.2d at 180. Therefore, the statutory beneficiary may sue the personal representative's attorney when the attorney harms the statutory beneficiary by failing to exercise reasonable skill and care during the attorney's representation of the personal representative. *See id.* at 771, 907 P.2d at 175 (stating that an intended third-party beneficiary of an attorney-client contract has a remedy against the attorney). The Rules of Professional Responsibility thus become relevant when ascertaining the scope of the duty owed by the attorney to the personal representative and how a breach of that duty may have harmed the statutory beneficiary.

{ 5} With respect to the second question, the adversarial exception we announced as dicta in *Leyba* may preclude a malpractice action, whether it is in tort or in contract. However, the adversarial exception does not preclude "traditional tort claims against an attorney for misrepresentation, fraud, and collusion, none of which depend upon a duty arising out of [the] contract" between the attorney and the personal representative. *Id.* at 773 n. 3, 907 P.2d at 177 n. 3. Therefore, in this case, Spencer's non-malpractice tort claims are not barred by *Leyba.* In addition, we conclude that the adversarial exception does not preclude Spencer's malpractice claim against Barber because there exist genuine issues of material fact regarding whether Barber failed to exercise reasonable skill and care in his representation of Sam as the personal representative, and if so, whether such failure harmed Spencer.

DISCUSSION

[3] { 6} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.,* 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582. Because this is a question of law, we review de novo. *Id.*

A. The Rules of Professional Conduct Establish the Appropriate Standard of Conduct for Attorneys in New Mexico

[4] { 7} The first issue requires this Court to determine to what extent the Rules of Professional Conduct govern the duty ***393** owed by an attorney to wrongful death statutory beneficiaries. To put this discussion in context, we first discuss the procedure for wrongful death litigation and examine our opinion in *Leyba.*

[5] [6] { 8} Wrongful death lawsuits must be brought in the name of the personal representative of an estate. Section 41–2–3; *Kilkenny v. Kenney,* 68 N.M. 266, 268, 361 P.2d 149, 150–51 (1961), *superseded by statute on other grounds as stated in* 1961 N.M. Laws, ch. 202, § 1, *as recognized in Lujan v. Regents of the Univ. of Cal.,* 69 F.3d 1511, 1519–20 (10th Cir.1995), *and State Farm Mut. Auto. Ins. Co. v. Luebbers,* 2005–NMCA–112, ¶ 42, 138 N.M. 289, 119 P.3d 169. The Wrongful Death Act identifies the beneficiaries of the lawsuit in Section 41–2–3. Statutory beneficiaries are generally not permitted to join as parties in a wrongful death lawsuit because the personal representative is the beneficiary's trustee, *Stang v. Hertz Corp.,* 81 N.M. 348, 350, 467 P.2d 14, 16 (1970), and because the personal representative and any beneficiaries should have the same interest—to recover as large an award as possible from the tortfeasors who caused the decedent's death. *See Dominguez v. Rogers,* 100 N.M. 605, 608, 673 P.2d 1338, 1341 (Ct.App.1983) (noting that would-be intervenor had "identical" interest to personal representative). The personal representative has a duty to act with reasonable

care regarding the interests of the statutory beneficiaries and must distribute proceeds from a wrongful death lawsuit to the statutory beneficiaries in strict accordance with the Wrongful Death Act. *Leyba,* 120 N.M. at 774, 778, 907 P.2d at 178, 182.

[7] [8] { 9} Although the personal representative may be, and often is, a statutory beneficiary, for purposes of the attorney-client relationship, the client is the personal representative. *See McTaggart v. Lindsey,* 202 Mich.App. 612, 509 N.W.2d 881, 884 (1993) ("[T]he personal representative can be considered the lawyer's client for the purposes of ethical duties of loyalty, confidentiality, and conflicts."). In addition, the attorney owes a duty to provide services to the personal representative with reasonable skill and care. *Leyba,* 120 N.M. at 772, 907 P.2d at 176 ("[T]he common law of torts ... recognizes an attorney's duty to provide professional services with the skill, prudence, and diligence of attorneys of ordinary skill and capacity."); *see also George v. Caton,* 93 N.M. 370, 376, 600 P.2d 822, 828 (Ct.App.1979) (describing an attorney's implied representations and duties when he takes a case). What happens if the attorney breaches his duty to the personal representative and, in so doing, harms the statutory beneficiaries? We attempted to provide a comprehensive answer to this question in *Leyba.*

{ 10} In *Leyba,* the mother of a deceased adult son hired two attorneys to represent her as the personal representative of her son's estate in a wrongful death lawsuit against medical providers. 120 N.M. at 770, 907 P.2d at 174. The attorneys ultimately settled the litigation and disbursed the settlement funds to the personal representative. *Id.* At the time they disbursed the funds, the attorneys knew that the sole statutory beneficiary of the decedent's estate under the Wrongful Death Act was the decedent's infant son. *Id.* The personal representative misappropriated the proceeds, leaving only a small fraction of the proceeds for the decedent's son. *Id.* The minor child's conservator sued the attorneys for legal malpractice. *Id.* at 769, 907 P.2d at 173. We upheld the right of the statutory beneficiary to sue the attorneys. *Id.* at 770, 776, 907 P.2d at 174, 180. In so doing, we concluded that the attorneys owed a duty to the statutory beneficiary as an intended beneficiary of the agreement between the attorneys and the personal representative. *Id.* We assumed that the statutory beneficiary's contractual remedy was based on the "duty running from the attorney to the client [the personal representative,] rather than from the attorney to the third party [the statutory beneficiary]." *Id.* at 771, 907 P.2d at 175. We explained the duty as follows: "As with any service contract, an implied term of an attorney's contract to provide professional services for the benefit of a third party is the promise to render services with reasonable skill and care." *Id.*

{ 11} At issue in *Leyba* was whether the attorneys exercised reasonable skill and care ***394** in advising the personal representative regarding her fiduciary duty to disburse the funds to the statutory beneficiary. *Id.* The personal representative and the attorneys presented conflicting evidence regarding whether the attorneys told the personal representative about her fiduciary responsibilities. *Id.* However, it was undisputed that the attorneys did not provide written instructions to the personal representative regarding her responsibilities in connection with the settlement proceeds. *Id.*

{ 12} The personal representative's duty was to distribute the wrongful death proceeds to the sole statutory beneficiary. *Id.* at 774, 907 P.2d at 178. The attorneys' duty was "to exercise reasonable care to ensure that the statutory beneficiaries actually receive[d] the proceeds of any wrongful death claim." *Id.* at 778, 907 P.2d at 182. In *Leyba,* the conservator invited us to hold that "in the event of a minor statutory beneficiary, attorneys pursuing wrongful death claims have a duty to distribute the proceeds to a conservator." *Id.* We declined her invitation and simply held that "what is reasonable is a question of fact to be determined in light of all [of] the surrounding circumstances." *Id.*

{ 13} Complicating this case, however, was the dicta in our opinion discussing the adversarial exception. After holding that an attorney in a wrongful death action owes a duty to act with due care regarding the interests of the intended beneficiaries, we engaged in a discussion of when and under what circumstances such a duty may be negated. *Id.* at 776–78, 907 P.2d at 180–82. This was described as the "adversarial exception," which arises when the attorney is presented with a conflict of interest. *Id.* at 776, 907 P.2d at 180 (internal quotation marks omitted). We agreed with the court in *Jenkins v. Wheeler,* 69 N.C.App. 140, 316 S.E.2d 354, 358 (1984), that the adversarial exception does not operate to negate the attorney's duty of reasonable care to the intended beneficiary; instead, a breach of that duty occurs when the attorney continues to represent conflicting interests. *Leyba,* 120 N.M. at 777, 907 P.2d at 181. We suggested that "any such conflict should be resolved by notice to the nonclient that the latter cannot rely on the attorney to act for his or her benefit." *Id.*

{ 14} In this case, Spencer argues that the Rules of Professional Conduct should define the duty owed by the attorney to the statutory beneficiaries and that duty should be the same as the duty owed to a client. Barber argues that the Rules of Professional Conduct do not apply, and

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that as long as the statutory beneficiary knows or has reason to know that he or she cannot rely on the attorney to act for his or her benefit, the attorney does not owe a duty to the statutory beneficiary. Although we agree with Spencer that the Rules of Professional Conduct are relevant in a malpractice case, we do not agree that the duties owed to a client are the same duties owed to an intended beneficiary. As we will discuss, the Rules of Professional Conduct are relevant in determining the professional responsibilities that an attorney has to his or her client. These responsibilities are relevant when an intended beneficiary pursues a malpractice case against an attorney on the basis that the attorney's breach of duty to the client harmed him or her as the intended beneficiary of the attorney-client agreement.

[9] { 15} The New Mexico Rules of Professional Conduct state that "[v]iolation of a rule should not *itself* give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." *Id.,* Scope (2008) (emphasis added); *see also Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.,* 106 N.M. 757, 762, 750 P.2d 118, 123 (1988) (holding that violations of the rules do not give rise to a private cause of action). However, this does not mean that the rules are irrelevant in a legal malpractice lawsuit. While "the Rules of Professional Conduct ... cannot be used to launch a malpractice claim[,] ... [they] still provide guidance in ascertaining the extent of lawyers' professional obligations to their clients." *Sanders,* 1997–NMSC–030, ¶ 16, 123 N.M. 457, 943 P.2d 104.

{ 16} The annotations to the American Bar Association's Model Rules of Professional Conduct support this approach. While the annotations are not legally binding in New Mexico, these annotations inform our understanding ***395** of the intent behind our rules because the relevant section of the New Mexico Rules of Professional Conduct is identical to its equivalent in the ABA Model Rules. *Compare* N.M. Rules of Prof'l Conduct, Scope, *with* ABA Ann. Model Rules of Prof'l Conduct, Preamble & Scope ¶ 20 (7th ed. 2011). The annotation to the ABA Scope notes that "most courts do look to the ethics rules as evidence of standards of conduct and care, particularly in actions for legal malpractice or breach of fiduciary duty." Model Rules of Prof'l Conduct, annotation to Preamble & Scope ("Ethics Rules as Evidence of Standards of Conduct and Care").

[10] [11] [12] { 17} Proof of the standard of conduct is necessary to maintain an action for malpractice. One element of a legal malpractice claim is "breach of [a] fiduciary relationship by the defendant attorney." *Richter v. Van Amberg,* 97 F.Supp.2d 1255, 1261 (D.N.M.2000). To prove this breach, a plaintiff must establish that the defendant attorney violated the required standard of conduct. *See id.* ("[L]egal malpractice based upon breach of duty concerns violations of a standard of conduct." (quoting *Kilpatrick v. Wiley, Rein & Fielding,* 909 P.2d 1283, 1290 (Utah Ct.App.1996))). The New Mexico Rules of Professional Conduct illustrate that standard, and plaintiffs may cite them to establish the appropriate standard of conduct for attorneys to follow. *See, e.g., CenTra, Inc. v. Estrin,* 538 F.3d 402, 410 (6th Cir.2008) ("[A] violation of the rules may be probative in establishing an independent cause of action."); *Sealed Party v. Sealed Party,* No. Civ. A. H–04–2229, 2006 WL 1207732 (S.D.Tex. May 4, 2006) at *8 (noting that while violation of Texas rules does not give rise to a private cause of action or create a presumption that a legal duty has been breached, "Texas and Federal courts regularly have referred to the Texas Rules to help define standards of attorney conduct in tort cases").

{ 18} In *Leyba* we implied that the Rules of Professional Conduct were relevant and referenced the rules in our discussion of how an attorney may avoid a conflict of interest. We stated:

> We agree that when recognition of a duty running from an attorney to the third party would burden the attorney's duty to the client in a **wrongful death** action—as when an adversarial relationship develops between the client and the third party—as a matter of public policy the attorney's duty to the third party should end. The fact that an attorney identifies a conflict, actual or potential, should not, however, in itself negate the duty owed to the statutory beneficiaries. Should a conflict arise, the adversarial exception negates duty only if the third party knows or should know that he or she cannot rely on the attorney to act for his or her benefit. *See, e.g.,* [Rules] 16–107(A), –116(A)(1), –116(D) [NMRA] (prohibiting lawyer from undertaking representation adverse to client, detailing instances in which disqualification is mandatory, and specifying procedures for terminating representation when there is a

conflict of interest).

120 N.M. at 778, 907 P.2d at 182. We cited the Rules of Professional Conduct to illustrate the standard conduct expected of a lawyer when confronted with a conflict of interest. *Id.*

{ 19} In *Sanders* we further emphasized that the Rules of Professional Conduct are relevant to a legal malpractice case. There we recognized that the termination of an attorney-client relationship, when carried out negligently, can serve as the basis for a legal malpractice claim. 1997–NMSC–030, ¶¶ 14, 15, 123 N.M. 457, 943 P.2d 104. The defendant attorneys in *Sanders* argued that the Rules of Professional Conduct governing withdrawal from the representation of a client could not be used to bring a malpractice case. *Id.* ¶ 16. We agreed that these rules could not be used as a basis for civil liability, but we emphasized that "such professional rules still provide guidance in ascertaining the extent of lawyers' professional obligations to their clients." *Id.* (citing *Wood v. Parker,* 901 S.W.2d 374, 379 (Tenn.Ct.App.1995) (holding that Rules of Professional Conduct are relevant in a legal malpractice claim based on alleged negligent withdrawal)). Therefore, in this case, although the Rules of Professional Conduct cannot be used as a basis for civil liability, the rules ***396** may be used to explain Barber's professional obligations to Sam as the personal representative, and by extension to the intended beneficiaries. The determination of whether or not Barber conformed to the standard of conduct required by the Rules of Professional Conduct will depend on the evidence introduced at trial.

B. A Conflict of Interest Arose When Sam, as the Personal Representative, Sought to Challenge Spencer's Entitlement to a Full Share of the Wrongful Death Proceeds in Favor of Sam's Receiving a Larger Share

[13] { 20} In this case, as in *Leyba,* the contract at issue is the agreement between the attorney in a **wrongful death** lawsuit and his client, the personal representative, who is responsible for suing on behalf of the statutory beneficiaries under Section 41–2–3. On May 5, 2006, Sam filed suit for her own injuries and as personal representative of Hermanda's and Lydia's estates against seven defendants: the truck driver who struck Sam's car, the trucking company who employed the truck driver, the company's owner, three insurance providers, and Sam's passenger, Daniel Begay. *Sam v. Kalenik,* No. CV 2006–242–2 (N.M. 11th Judicial Dist. Court Apr. 26, 2006) (the *Kalenik* litigation). Barber represented Sam both in her individual capacity for her personal injuries and as personal representative in the *Kalenik* litigation.

{ 21} Because Hermanda died as an unmarried adult with no surviving children, her parents would ordinarily share equally in any recovery for her **wrongful death.** Section 41–2–3(F) (providing that if specific subsections do not apply, **wrongful death** proceeds "shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons"); NMSA 1978, § 45–2–103(A)(2) (1993) (amended 2012) (providing that intestate estate of decedent without surviving spouse or descendants is distributed equally to decedent's parents). In addition, under the facts of this case, Hermanda, who briefly survived her daughter, was a statutory beneficiary of the **wrongful death** proceeds of Lydia's estate. Because Hermanda died before the proceeds were paid, Hermanda's share of the proceeds belongs to her estate, and would ordinarily also be distributed to her surviving parents, Sam and Spencer. Sections 41–2–3(F), 45–2–103(A)(2).

[14] [15] { 22} As we previously stated, the personal representative has a nondiscretionary duty to distribute the **wrongful death** proceeds in the ratio prescribed by the **Wrongful Death** Act. *Leyba,* 120 N.M. at 776, 907 P.2d at 180. Therefore, any agreement to pursue a **wrongful death** lawsuit will, by definition, be for the benefit of the statutory beneficiaries. We made this rule explicit in *Leyba:*

> [T]here can be no other purpose of an attorney-client agreement to pursue claims for **wrongful death** than to benefit those persons specifically designated by the Act as statutory beneficiaries. We conclude therefore that ... the very nature of a **wrongful death** action is such that we will imply in law a term in every agreement between an attorney and personal representative that the agreement is formed with the intent to benefit the statutory beneficiaries of the action.

Id. It is unnecessary to analyze in each **wrongful death** case whether the attorney for the personal representative actually intended to benefit the statutory beneficiary. Under the rule laid out in Leyba, the statutory beneficiary is always the intended beneficiary of the agreement between the personal representative and her attorney. *Id.* As a result, Barber, acting as Sam's attorney in her capacity as personal representative, had "a duty to exercise reasonable care to ensure that the statutory beneficiaries actually receive[d] the proceeds of any **wrongful death** claim." *Id.* at 778, 907 P.2d at 182.

[16] { 23} However, according to Barber, Sam had taken the position that her ex-husband, Spencer, had abandoned Hermanda and their other children, and therefore Spencer was not entitled to share in any **wrongful death** proceeds. *See* NMSA 1978, § 45–2–114(C) (2004) (amended 2012) (precluding a parent from inheriting from a child through intestate succession unless he "has openly treated the child as his and has not *397 refused to support the child"); *see also Perry v. Williams,* 2003–NMCA–084, ¶¶ 20–22, 133 N.M. 844, 70 P.3d 1283 (applying the policy of Section 45–2–114(C) to bar recovery under the **Wrongful Death** Act by a father who had abandoned his child).

{ 24} It is not clear from the record when Barber learned that Sam disputed Spencer's entitlement to his share of any **wrongful death** proceeds. However, upon learning that there was a dispute regarding Spencer's entitlement to a portion of the proceeds, Barber could not simply distribute such proceeds from the **wrongful death** lawsuit to either Spencer or Sam. *See* Rule 16–115(E) NMRA ("When in the course of representation a lawyer is in possession of property in which two or more persons ... claim interests, the property shall be kept separate by the lawyer until the dispute is resolved."). As we have made clear in the commentary to Rule 16–115(E):

> Paragraph E also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Id. cmt. 4.

{ 25} This procedure was followed by the attorneys in *Perry,* where the mother prosecuted a **wrongful death** lawsuit to its conclusion and subsequently sued the child's father, seeking a declaration that he was not entitled to share in the **wrongful death** proceeds because he had abandoned their child. *See* 2003–NMCA–084, ¶¶ 2–3, 133 N.M. 844, 70 P.3d 1283 (describing procedural history). In this case, Barber learned that Sam intended to contest Spencer's right to share in the **wrongful death** proceeds before he concluded his representation of Sam in the case. This knowledge created a conflict of interest for Barber because Sam wanted to oppose the distribution mandated by statute. *See McTaggart,* 509 N.W.2d at 884 (finding a conflict of interest in attorney's representation of decedent's mother both as personal representative and as claimant against other beneficiaries); *Home Ins. Co. v. Wynn,* 229 Ga.App. 220, 493 S.E.2d 622, 624, 626 (1997) (upholding verdict against attorney for representing decedent's widow both as fiduciary and on her own behalf, where the two roles created conflicting incentives).

{ 26} Even if Barber was not aware of this particular conflict at the outset of his representation of Sam, in *Leyba* we acknowledged the possibility that a conflict might develop as a case progresses. 120 N.M. at 777, 907 P.2d at 181. We recognized that when the interests of the personal representative and the beneficiaries are adverse, or become adverse, there is an adversarial exception to the attorney's ordinary duty of care toward the beneficiaries. *Id.* at 777–78, 907 P.2d at 181–82.

[17] { 27} However, in *Leyba* we made it clear that just because the attorney has identified a conflict does not mean that he does not have a duty to the beneficiaries or that these duties are automatically discharged. *Id.* at 778, 907 P.2d at 182. We noted that if an attorney finds himself or herself in a conflicted situation and takes no action to resolve the conflict, "rather than applying the adversarial exception to deny the existence of a duty to the nonclient," a court should find that a duty exists and

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"a breach of that duty ... arise[s] out of continuing representation of conflicting interests." *Id.* at 777, 907 P.2d at 181. "The fact that an attorney identifies a conflict, actual or potential, should not ... in itself negate the duty owed to the statutory beneficiaries." *Id.* at 778, 907 P.2d at 182. Instead, when such a conflict becomes apparent, the attorney can resolve the conflict by giving "notice to the nonclient that the latter cannot rely on the attorney to act for his or her benefit." *Id.* at 777, 907 P.2d at 181.

***398** { 28} Insofar as the **wrongful death** litigation is concerned, Barber's client was Sam *as the estates' personal representative,* who had a duty to distribute **wrongful death** proceeds in accordance with the **Wrongful Death** Act. As statutory beneficiaries, Sam and Spencer were identically situated—they both were intended beneficiaries of the agreement between Sam, as personal representative, and Barber. When Sam, as statutory beneficiary, announced that she wanted all of the proceeds from the **wrongful death** lawsuit because she alleged that Spencer had abandoned Hermanda, this position conflicted with her fiduciary duty as personal representative.

{ 29} The Georgia Court of Appeals addressed a similar situation in *Home Insurance Co.,* 493 S.E.2d at 624, in which it upheld a jury verdict against a widow who had brought and settled claims both on her own behalf and as a fiduciary for her husband's estate, of which she was one of several beneficiaries. When she settled the lawsuit, she had an improper incentive to allocate the settlement to claims for which she was the only beneficiary. *Id.* at 626. The court wrote:

> An agent cannot place herself in a position in which her duty and interests conflict with those of her principal.... The trustee must avoid being placed in such a position, and if she cannot avoid it, she may resign, may fully inform the beneficiaries of the conflict, or may request the court to appoint a guardian ad litem to protect the unprotected interests. If she fails to do any of these things, she proceeds at her own peril.

Id. The court also upheld the verdict against the woman's lawyer. *Id.* at 624; *see also McTaggart,* 509 N.W.2d at 884 ("[D]ual representation [of one person as claimant and personal representative] is improper if representation of the claimant would adversely affect representation of the fiduciary."); *In re Birnbaum,* 118 Misc.2d 267, 460 N.Y.S.2d 706, 707 (Sur.Ct.1983) ("[W]here the attorney represents his client in both capacities [as a beneficiary and a fiduciary], he may not act to advance the *personal* interests of a fiduciary in such a way as to harm ... the estate.").

{ 30} Spencer asserts that if Barber wished to continue representing Sam in her individual capacity, he was obligated to withdraw from his representation of Sam as the personal representative. Barber contends that he no longer owed Spencer a duty as an intended beneficiary once he told Spencer that he was Sam's attorney and not Spencer's. We do not agree that the only way Barber could avoid the conflict of interest was to withdraw from his representation of Sam as the personal representative, nor do we agree that Barber negated his duty to Spencer by choosing to protect Sam's interest as a statutory beneficiary over Spencer's interest by giving notice to Spencer that he was Sam's lawyer and not Spencer's.

{ 31} Barber could have declined to represent Sam in her claim that Spencer was not entitled to his statutory share of the **wrongful death** proceeds, or he could have deferred the legal battle until after the **wrongful death** case was concluded, similar to the situation in *Perry.* However, Barber did not choose either of these approaches. When Barber approached Spencer with the settlement agreement, the **wrongful death** litigation had not been settled. In addition, the agreement listed Sam as a party to the agreement both in her individual capacity (as a statutory beneficiary) and as the personal representative (as fiduciary to the intended beneficiaries). Striking an agreement between Sam as the fiduciary and Spencer as the beneficiary was not prohibited provided that Barber, acting on behalf of Sam as the personal representative, complied with Restatement (Second) of Contracts Section 173 (1981), which provides:

> If a fiduciary makes a contract with his beneficiary relating to matters within the scope of the fiduciary relation, the contract is voidable by the beneficiary, unless
>
> (a) it is on fair terms, and
>
> (b) all parties beneficially interested manifest assent with full understanding of their legal rights and of all relevant facts that the fiduciary knows or should know.

See also Moody v. Stribling, 1999–NMCA–094, ¶ 33, 127

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N.M. 630, 985 P.2d 1210 (citing Section 173 for proposition that "contracts *399 entered into between a fiduciary and beneficiary are suspect"). We also believe that Comment a to Restatement Section 173 informs the duty in this case. Comment a provides:

> The rule stated in this Section applies to any fiduciary, including a trustee, an agent, a guardian, or an executor or administrator.... When a fiduciary makes a contract with the person beneficially interested, it is not enough that he make a complete disclosure of the facts known to him. The person beneficially interested must be put on an equal footing, with full understanding of his legal rights and of all relevant facts that the fiduciary knows or should know. If that person is not of competent age and understanding, this may be difficult if not impossible to achieve. If it is impossible, the fiduciary is precluded from making a contract with him within the scope of the fiduciary relation.

Restatement (Second) of Contracts § 173 cmt. a.

{ 32} This is consistent with the New Mexico rule on dealing with an unrepresented person. Rule 16–403 NMRA states that an attorney should not give legal advice to an unrepresented person, but the commentary goes on to explain:

> Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Rule 16–403 cmt. 2. Therefore, under Rule 16–403, an attorney may meet with a beneficiary, explain whom he represents, and negotiate a settlement, provided that the attorney and the personal representative first put the beneficiary on an "equal footing" as required by Restatement Section 173 comment a.

[18] { 33} It is not sufficient for the attorney to simply tell the intended beneficiary that he or she needs his or her own counsel. The attorney must provide any intended beneficiaries with disclosure that is sufficient for them to understand *why* they need independent representation. This Section 173 disclosure is analogous to the one that an attorney must provide to a client to obtain the client's informed consent to a conflicted representation. *See, e.g.,* Rules 16–107(B)(4); –108(A)(3), (B), (F)(1), & (G) NMRA (requiring informed consent of clients to potential conflicts). Whether the disclosure is to a client or an intended beneficiary, the purpose of the disclosure is to allow the person to make an informed decision about whether he or she in fact needs independent representation.

[19] { 34} Comment 7 to Rule of Professional Conduct 16–100 NMRA states that for the purpose of obtaining informed consent, adequate communication will ordinarily include "disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives." When the attorney for the personal representative gives notice to a statutory beneficiary as required by *Leyba,* adequate disclosures will normally include, at a minimum: (1) the fact that the person is a beneficiary in a **wrongful death** lawsuit, as well as the identities of the parties to the lawsuit; (2) the amount of any settlement or verdict reached, or any settlement offers under consideration; (3) the percentage of the settlement or verdict to which the beneficiary is entitled under the statute; (4) the basic position of the adverse party, e.g., "she does not believe that you are entitled to any money because you

abandoned your child"; and (5) the fact that the attorney now represents the adverse party against the beneficiary and is not looking out for the beneficiary's interests.

***400** [20] [21] { 35} In this case, there exist genuine issues of material fact about whether Barber satisfied his obligation to safeguard Spencer's possible share of the *Kalenik* settlement and whether Barber's disclosures to Spencer were adequate. By March 13, 2007, several of the *Kalenik* defendants had offered to settle the claims of both estates for a total of $900,000. March 13, 2007 was the date that Barber contacted Spencer for the first time. Barber contends that he mailed a letter to Spencer on May 4, 2006, presumably to notify Spencer about the pending **wrongful death** action. Because this letter is not in the record, we do not know what notice Barber intended to give Spencer. Nevertheless, Barber states that the letter was returned marked "insufficient address," making it clear that whatever notice Barber sent did not reach Spencer.

{ 36} In any event, on March 13, 2007, Barber went to Spencer's place of employment without first contacting or scheduling an appointment with Spencer and waited until Spencer arrived. Once Spencer arrived, Barber met with him in a public location, where Barber presented a five-page written "Settlement Agreement and Release" to Spencer. The agreement sought to resolve "any questions about distribution of the proceeds of the **wrongful death** claims." The agreement does not describe the issues that existed with respect to the distribution of the proceeds. In addition, the agreement sought Spencer's release of the *Kalenik* defendants and his release of Sam and her attorneys for all potential claims and causes of action, including **wrongful death** claims.

{ 37} Barber told Spencer that he was Sam's attorney and that he wished to settle any claims that Spencer had to Hermanda's **wrongful death** settlement. Spencer inquired about the amount of the settlement, which Barber said would be " 'a large or very large amount,' " but Barber did not tell Spencer the amount of the offer. *Spencer,* 2011–NMCA–090, ¶ 5, 150 N.M. 519, 263 P.3d 296. Spencer signed the agreement that day for the payment of $20,000, plus Sam's release of Spencer's outstanding child support payments. *Id.* ¶ 6.

{ 38} That evening Barber sent an e-mail message to the defense attorneys in the *Kalenik* litigation, accepting their offers to settle the case for $900,000. *Id.* ¶ 9. Each estate was paid $450,000 as **wrongful death** damages. In addition, Hermanda's estate received a present value[1] of $143,776.72 from Lydia's estate, representing the **wrongful death** proceeds that would have been due to Hermanda as Lydia's mother. As such, Hermanda's estate received a total of $593,776.72. Sam paid $162,446.55 from that amount in fees, costs, and taxes, owed Spencer $20,000, and kept $411,330.17.

{ 39} Barber contends that he satisfied his obligations under *Leyba* because he claims that he told Spencer he represented Sam and not Spencer, and Spencer was entitled to meet with a lawyer and have a judge decide the portion of the settlement to which Spencer was entitled. Barber also stated that he told Spencer that "he would normally be entitled to a share of the **wrongful death** recovery.... [H]owever, that it was Ellen Sam's position that he was not entitled to any recovery under either estate because he had abandoned the children." Spencer denies that Barber told him about Sam's allegations that Spencer had abandoned Hermanda. However, the parties agree that Barber did not tell Spencer the size of the anticipated settlement. There is no indication that Barber said that he represented Sam against Spencer, or that Spencer was entitled to either 50% of Hermanda's **wrongful death** estate under the relevant statute or to 50% of the proceeds received by Hermanda's estate for Lydia's **wrongful death**. The disputed and missing statements go directly to the adequacy of Barber's notice to Spencer, which is at the heart of this case. Therefore, on this record, we cannot conclude that Barber was entitled to judgment as a matter of law.

C. A Conflict May Arise When the Personal Representative May Be Liable for the Death of the Decedent

[22] { 40} Spencer also contends that Barber breached his duty to Spencer when ***401** Barber continued to represent Sam after learning that she may have contributed to the **wrongful deaths** of Hermanda and Lydia. Barber does not contest the allegation that the collision occurred when Sam stopped the car at night in a traffic lane on I–40 with the car lights off. However, Barber contends that "[t]he issue of Sam's alleged negligence, in regard to the issues in *Kalenik,* was for determination in that suit, through comparative fault defenses to be presented by defendants, who nevertheless chose to pay full value in settling the claims."

{ 41} Whether the settlement reached with the *Kalenik* defendants represented the full value of the defendants' exposure is not at issue in this case, but we conclude that Sam's potential liability created a potential conflict of interest in this case. Any liability of the *Kalenik* defendants would be reduced by Sam's percentage of liability, if any. In addition, to the extent that Sam contributed to the cause of the deaths of Hermanda and Lydia, she too would be liable for fair and just damages to the remaining statutory beneficiaries. A conflict of interest may exist if "representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a *third person.*" Rule 16–107(A)(2) (emphasis added); *see also* Pa. Ethics Op. 00–75, Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, 2000 WL 33678415 at *3 (Nov. 1, 2000) (applying equivalent Pennsylvania rule to attorney who represented client both as individual and as personal representative of an estate, where attorney's representation of personal representative might have created responsibilities to third parties).

[23] { 42} The relevant third party in a **wrongful death** lawsuit is the statutory beneficiary, whom we have defined as an intended beneficiary of the relationship between the attorney and the personal representative. If there are statutory beneficiaries other than the personal representative, and there is a good-faith basis to believe that the personal representative contributed to the death of the decedent, this constitutes a conflict of interest that may give rise to a malpractice cause of action. The North Carolina case of *Jenkins,* upon which we relied in *Leyba,* provides a good example of this kind of conflict. In that case, an attorney represented a client who was the executor of two separate estates simultaneously. 316 S.E.2d at 358. One estate had a viable cause of action against the other for **wrongful death**, and the executor stood to inherit from the tortious estate, but not from the injured estate. *Id.* at 357–58. The executor chose not to sue the tortfeasor's estate, and an heir of the injured estate sued the executor and her attorney for breach of their duties. *Id.* at 356. The court found that the complaint stated a malpractice cause of action against the attorney. *Id.* at 358.

{ 43} In this case, there are genuine issues of material fact regarding whether Barber had a conflict of interest in his representation of Sam and, if so, whether he handled the conflict of interest with due care and skill without harming the statutory beneficiaries. Sam was driving the car immediately prior to the accident that caused Hermanda's and Lydia's deaths. Barber admits, on information and belief, that there is evidence that Sam had been drinking alcohol before the collision and that she may have stopped the car in an unsafe location and manner. Barber, however, denies that Sam's conduct proximately caused the death of Hermanda and Lydia. Therefore, based on the record before us, summary judgment in favor of Barber was inappropriate.

D. If a Tort Does Not Depend on the Existence of a Fiduciary Duty, the *Leyba* Analysis Is Inapplicable

[24] { 44} The parties agree that Spencer's complaint raises non-malpractice causes of action against Barber, including fraud, collusion, and misrepresentation. The Court of Appeals affirmed the district court's grant of summary judgment for Barber on these claims, appearing to treat them not as independent claims, but as an alternative basis for the malpractice claim. *See Spencer,* 2011–NMCA–090, ¶¶ 32–34, 150 N.M. 519, 263 P.3d 296 (addressing tort claims). The Court of Appeals appeared to find that the adversarial relationship between Barber and Spencer barred the claim. *Id.* ¶¶ 30–31. The Court also emphasized that *Leyba* does ***402** not distinguish "between a contract-based claim of malpractice and a tort-based claim of malpractice." *Spencer,* 2011–NMCA–090, ¶ 32, 150 N.M. 519, 263 P.3d 296.

[25] { 45} This statement is accurate, but the Court of Appeals' analysis misreads our opinion in *Leyba.* In general, a non-client cannot maintain an action for malpractice against an attorney. *Garcia,* 106 N.M. at 761, 750 P.2d at 122. There is an exception when the non-client is the intended beneficiary of the attorney's work. *Leyba,* 120 N.M. at 771–72, 907 P.2d at 175–76. We determined that an intent to benefit non-client beneficiaries can be inferred in **wrongful death** cases, and therefore beneficiaries in these cases can sue the personal representative's attorney for malpractice. *Id.* at 776, 771, 907 P.2d at 180, 175. We left an exception for cases in which the parties were in an adversarial position, where no such intent could be inferred. *Id.* at 778, 907 P.2d at 182.

[26] { 46} However, none of this analysis, including the adversarial exception, is necessary if the plaintiff brings a cause of action in which he or she can prevail, even if he or she was *not* the intended beneficiary of the attorney's work. For example, under New Mexico law, a fiduciary relationship is not an element of fraudulent misrepresentation. *See Williams v. Stewart,* 2005–NMCA–061, ¶ 34, 137 N.M. 420, 112 P.3d 281 (listing elements of fraud as including "(1) a misrepresentation of fact, (2) either knowledge of the falsity of the representation or recklessness on the part of the party making the misrepresentation, (3) intent to deceive and to induce reliance on the misrepresentation, and (4) detrimental reliance on the misrepresentation"). We see no reason that this situation should be any different if the defendant is an attorney.

[27] { 47} Because the plaintiff does not have to establish a relationship of trust to bring the claim, the adversarial exception is irrelevant—the plaintiff can sue whether or not the lawyer's client is his or her adversary. We acknowledged the difference between malpractice and other tort actions in *Leyba,* writing that even if a non-client's malpractice claims were barred, "a third party has traditional tort claims against an attorney for misrepresentation, fraud, and collusion, none of which depend upon a duty arising out of contract." 120 N.M. at 773 n. 3, 907 P.2d at 177 n. 3. These are precisely the claims that Spencer has put forth in this case.

{ 48} Spencer's independent tort claims were not fully briefed, and we express no opinion on them except that they are in no way subject to *Leyba*'s adversarial exception. However, we note that the Court of Appeals, in considering the issue of the enforceability of Spencer and Barber's agreement, found genuine issues of material fact concerning possible misrepresentations by Barber. *Spencer,* 2011–NMCA–090, ¶ 38, 150 N.M. 519, 263 P.3d 296. These issues would presumably also be at play in Spencer's tort claims.

CONCLUSION

{ 49} Based on our review of the record in this case, we conclude that there exist genuine issues of material fact regarding whether Barber is liable for malpractice to Spencer. We further conclude that Spencer's independent tort claims are not barred by *Leyba.* Therefore, we reverse the opinion of the Court of Appeals and remand to the district court for proceedings consistent with this opinion.

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

WE CONCUR: PETRA JIMENEZ MAES, Chief Justice, RICHARD C. BOSSON, CHARLES W. DANIELS, and BARBARA J. VIGIL, Justices.

All Citations

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Footnotes

1 Some of the proceeds were structured in an annuity for future payments to Sam.

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