



## Administrative Office of the Courts

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July 25, 2024

Supreme Court rules on legal duties of lawyers to non-clients without legal representation

**SANTA FE** – The state Supreme Court ruled today that an ethical rule for attorneys in dealing with non-clients does not establish a legal responsibility for lawyers that could result in liability for alleged malpractice in their professional actions.

In a unanimous opinion, the Court affirmed a district court’s determination in a legal malpractice case that Rule 16-403 of the Rules of Professional Conduct does not create a duty to a non-client for purposes of civil liability.

“A determination of legal duty is a question for the district court to resolve, and the Rules of Professional Conduct do not create a legal duty,” the Court wrote in an opinion by Justice C. Shannon Bacon.

Under the rule, attorneys working on behalf of a client are not to give legal advice to unrepresented non-clients and should make a reasonable effort to correct a non-client’s misunderstanding about the lawyer’s role in a particular legal matter.

In today’s opinion, the justices resolved a question of law posed on appeal in a lawsuit brought by Jason Waterbury in Santa Fe County against Gini Nelson, an estate planning attorney. Waterbury was a neighbor and friend of Nelson’s client, John Emry. Waterbury regularly communicated with the attorney because he assisted Emry with his estate planning.

At one point, Nelson prepared documents for Emry that gave Waterbury authority to act on behalf of Emry for personal and estate planning matters. Emry also changed his will to make Waterbury the beneficiary of a \$2 million bank account. Waterbury emailed Nelson asking for a document or letter regarding his designation as the bank account beneficiary but the attorney did not respond.

After Emry’s death, Waterbury was sued by Emry’s daughter for allegedly exerting undue influence over her father in estate decisions. Waterbury also never received money from the account because the bank determined that Emry, rather than Waterbury, should have signed the beneficiary documents.

Waterbury sued Nelson for legal malpractice, contending that he lost a significant amount of money because of the attorney’s failure to answer his email. He argued that Nelson had a legal

duty of care to him. The Court disagreed, pointing to its previous decisions on questions related to an attorney's duty to non-clients.

“Imposing an affirmative duty to warn a non-client about potential claims of undue influence is not consistent with the aim of Rule 16-403,” the Court wrote. “Rule 16-403 directs lawyers to be clear with non-clients about whom they represent as to avoid misunderstanding. To conclude otherwise would have significant policy implications for the legal profession by substantially enlarging attorneys’ exposure to liability in interactions with non-clients.”

The Court stated that “a finding of duty here could expose estate planning attorneys, in particular, to greater liability for malpractice given the exponential number of beneficiaries and claims.”

The justices determined that Nelson “does not owe either a statutory or common law duty to” Waterbury. “Rather, duty is a matter of law determined by courts based on policy, and policy does not support a duty by an attorney to a non-client or non-statutory beneficiary,” the Court explained. “Further, our case law is clear that Rule 16-403 cannot be used to establish a duty.”

To help clarify the matter, the Court directed that Uniform Jury Instructions be revised by one of its rule-making committees to reflect that the Rules of Professional Conduct can be cited in lawsuits to establish the “appropriate standard of conduct for attorneys to follow” after a court determines there is a legal duty of care imposed on attorneys in a particular situation. The justices explained that the current juror instructions wrongly “suggests duty is not determined as a matter of law, but instead by a jury who may be guided by the Rules of Professional Conduct.”

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To read the decision in *Waterbury v. Nelson*, No. S-1-SC-40066, please visit the New Mexico Compilation Commission's website using the following link:

<https://nmonesource.com/nmos/nmsc/en/item/530398/index.do>