Summer 1990

Professional Responsibility - Attorneys Are Not Liable to Their Clients' Adversaries: Garcia v. Rodey, Dickason, Sloan, Akin & (and) Robb, P.A.

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Recommended Citation
Available at: https://digitalrepository.unm.edu/nmlr/vol20/iss3/12
I. INTRODUCTION

In Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A., the New Mexico Supreme Court found that attorneys cannot be held liable to an adverse party for negligence, negligent misrepresentation, violating the former Code of Professional Responsibility or the Attorney’s Oath, constructive fraud and promissory estoppel. Garcia was a case of first impression in New Mexico. Therefore, the court based its decision on the law of a majority of other jurisdictions that an attorney owes no duty to a third party unless that third party is an intended beneficiary of the attorney’s actions. This note examines the cases upon which the court based its decision, the court’s application of these cases in Garcia, Garcia’s implications for future cases, Garcia’s effect upon the public’s perception of the Bar, and the Bar’s response to the public’s perception.

II. STATEMENT OF THE CASE

J. Placido Garcia was the Superintendent of the Socorro Consolidated School District of New Mexico. When his contract with the school district expired, it was not renewed. Garcia filed a civil rights lawsuit in the federal district court against the school board members in their official and individual capacities. The board members raised Eleventh Amendment immunity and good faith immunity defenses in their answer.

2. Id.
4. Id.
5. Garcia, 106 N.M. at 759, 750 P.2d at 120. Garcia brought his claim under 42 U.S.C. §1983 (1982), which states:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

6. The Eleventh Amendment of the United States Constitution reads: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. “While the Amendment by its terms does not bar suits against a State by its own citizens, ... an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.” Edelman v. Jordan, 415 U.S. 651, 662-63 (1974) (citations omitted).

7. When public officials make improper decisions affecting a person’s rights, good faith immunity allows the officials to be excused from liability for their actions if the officials believed their acts to be correct, and if a reasonable person would believe so, as well. Wood v. Strickland, 420 U.S. 308 (1975). This is done so as not to burden officials by making them personally liable for their good-faith mistakes. Id.
first and second amended answers, and pretrial order. However, the board members did not pursue either defense at trial, and neither defense was ruled upon.

During trial, the judge was concerned that explaining and distinguishing the claims against the board members in their official capacities and against the board members individually would confuse the jury. He recommended that Garcia drop his claims against the board members in their individual capacities, thereby eliminating the board members' good faith immunity defense. The board members' attorney was present but did not participate in the discussion. The next day, the court again asked Garcia's attorney about dropping the claims. Garcia's attorney said he had discussed the matter with his client and co-counsel and that they had agreed to drop the claims against the board members in their individual capacities. The board members' attorneys stated that they did not object to this decision.

While discussing the final version of the jury instructions, the court stated that the instructions only concerned the board members in their official capacities. The court also mentioned that it assumed if the plaintiff was entitled to a verdict, that verdict would be recoverable. The board members' attorney agreed. The attorney also agreed that the school district would not claim "some kind of immunity or something" if the plaintiff won. When the court offered the parties a chance to preserve the record, the defendants did not object to the court’s failure to rule on the Eleventh Amendment or good faith immunity defenses.

The jury awarded Garcia $180,000 against the board members in their official capacities. The board members appealed and raised the Eleventh Amendment immunity defense for the first time since the pre-trial order. The Tenth Circuit Court of Appeals held that Eleventh Amendment immunity may be raised for the first time on appeal because it is jurisdictional.

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8. Garcia, 106 N.M. at 759, 750 P.2d at 120.
9. Id.
10. Id.
11. Id. The defense would be eliminated because it is only used by individual members of the state body when they have been sued in their individual capacities. See supra note 7.
12. Garcia, 106 N.M. at 759, 750 P.2d at 120.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id. United States District Court Judge Thomas R. Brett asked that “if the plaintiff were recovering, then all at once the school district will not respond or claim some kind of immunity or something.” Id.
20. Garcia, 106 N.M. at 759, 750 P.2d at 120.
21. Id. at 759-60, 750 P.2d at 120-21.
22. Garcia v. Board, 777 F.2d at 1405 (citing Edelman, 415 U.S. at 677-78). Edelman stated that “the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.” Edelman, 415 U.S. at 677-78 (citing Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466-67 (1945)). A successful claim of lack of jurisdiction means that no court may hear the merits of the action, such as in this case. U.S. CONST. art. III, §2, cl. 1.
Amendment immunity defense, "[w]e sympathize with the trial court and the plaintiff when they have been 'sand bagged' as they were on this issue."\(^{23}\)

After finding that the board could raise the immunity issue, the court looked at whether the board's attorney had waived the immunity. The court held that, because Eleventh Amendment immunity may only be waived by the state, the board's attorney could not waive it without state authorization.\(^{24}\) New Mexico has waived its sovereign immunity only for certain claims brought under the Tort Claims Act.\(^{25}\) García's claims arose under the Civil Rights Act of 1871,\(^{26}\) not the New Mexico Tort Claims Act. The Tenth Circuit further held that school boards are considered arms of the state and are protected by Eleventh Amendment immunity, thereby relieving the board of liability and leaving García no recourse against the board.\(^{27}\)

García then sued the board members' attorneys and the attorneys' law firm. He alleged that he would not have dropped his claim against the board members in their individual capacities had he known his claims would be barred by Eleventh Amendment immunity.\(^{28}\) Because this immunity was successfully raised on appeal, García claimed he was deprived of his favorable jury verdict without any recourse.\(^{29}\) García contended that the attorneys' conduct "constituted a duty . . . to [García] and was not privileged."\(^{30}\) He claimed that this breach of duty entitled him to recover money damages for negligence, negligent misrepresentation, violation of the Code of Professional Responsibility and the Attorney's Oath, constructive fraud, promissory estoppel, and breach of contract.\(^{31}\)

The defendants moved to dismiss the claims for failure to state a claim upon which relief could be granted.\(^{32}\) The court granted the motions, and García appealed to the New Mexico Supreme Court.\(^{33}\) However, he

\(^{23}\) García v. Board, 777 F.2d at 1406. The García court disagreed with the characterization of the attorneys' actions as "sandbagging." García, 106 N.M. at 760, 750 P.2d at 121. The court noted that the board's attorneys had raised the Eleventh Amendment immunity issue in four separate documents, and that "as the appellate court itself recognized, this defense can be raised at any time regardless of whether the trial court addressed it." Id.

\(^{24}\) García v. Board, 777 F.2d at 1407.

\(^{25}\) Id. The claims upon which the state may be sued are set forth in N.M. STAT. ANN. §§41-4-13 to -25 (Repl. Pamp. 1986).


\(^{27}\) García v. Board, 777 F.2d at 1407.

\(^{28}\) García, 106 N.M. at 760, 750 P.2d at 121. The Tenth Circuit went one step further and stated that "the trial court might have reconsidered its recommendation that [García] drop his claim against the [board members] in their individual capacities." 777 F.2d at 1406.

\(^{29}\) García, 106 N.M. at 760, 750 P.2d at 121.

\(^{30}\) Id. The court did not state the specific conduct of which García complained. Presumably, García's complaint was with the fact that the board's attorney said that the board would not raise immunity and later did.

\(^{31}\) Id.

\(^{32}\) Id.

\(^{33}\) Id.
did not brief the breach of contract theory in the New Mexico appeal, and it was deemed abandoned.34

III. LAWS OF NEW MEXICO AND OTHER JURISDICTIONS, AND NEW MEXICO'S APPLICATION OF THOSE LAWS IN GARCIA

The Garcia court first discussed the duty attorneys owe to their client's adversaries. Because this was the first time the New Mexico Supreme Court had addressed the issue, the court reviewed other jurisdictions' decisions. Based upon these decisions, the court found that the board's attorney owed no duty to Garcia and held that "an attorney cannot be held liable on a cause of action in negligence to his client's adversary."35 The court also found the lack of duty that defeated the negligence claim barred Garcia's negligent misrepresentation, constructive fraud, and promissory estoppel claims.36 New Mexico courts hold that actions for negligent misrepresentation, constructive fraud, and promissory estoppel require a duty, or reasonable reliance based upon a duty, as an element necessary for recovery.37 The court further found, after reviewing the law of other jurisdictions, that a breach of the Code of Professional Responsibility or the Attorney's Oath does not give rise to a private cause of action for damages against attorneys.38

A. Negligence and an Attorney's Duty

The court focused on an attorney's duties to third parties in general.39 Because this was a case of first impression, the court reviewed other jurisdictions to determine what duty is owed to an attorney's adversary.40 From this review, the court concluded that no duty is owed and dismissed the negligence claim.41

The general elements of negligence are: a duty to adhere to a certain standard of conduct for the protection of others, a failure to perform this duty, and a showing that the failure was the cause of injury.42 Whether a duty is owed is determined by the relationship of the parties and whether policy considerations should protect one party from another's conduct.43 When dealing with liability to third parties in a contractual setting, privity of contract is no longer required to create a duty or to

34. Id.
35. Id. at 761, 750 P.2d at 122.
36. Id. at 761-63, 750 P.2d at 122-24.
37. See infra, sections II.B. and II.C.
38. See infra section II.D.
40. Id. at 761, 750 P.2d at 122.
41. Id.
sustain a negligence claim based upon the transactions giving rise to that claim.\textsuperscript{44} Therefore, courts look to various policy considerations including "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that he suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, and the policy of preventing future harm."\textsuperscript{145}

An attorney's duty to a third party does not depend upon the existence of an attorney-client relationship.\textsuperscript{46} The third party who claims that the attorney owed him a duty need only show another basis for that duty.\textsuperscript{47} This basis may exist if the third party was an intended beneficiary of the attorney's conduct,\textsuperscript{48} if the harm to the third party was reasonably foreseeable,\textsuperscript{49} or if the third party foreseeably relied upon the advice.\textsuperscript{50} There may be a basis for the duty when an attorney negligently drafts a will or examines a title.\textsuperscript{51} In these situations, a third party can recover. However, when the third party is the attorney's client's adversary, there is no basis for a duty.\textsuperscript{52}

No jurisdiction has held that an attorney owes a duty of care to an adverse party in litigation.\textsuperscript{53} An attorney is an advocate whose "paramount and exclusive duty is to his adversary in litigation." An attorney's duty to a client, among other things, is to zealously assert the client's position.\textsuperscript{55} Attorneys have also

\begin{itemize}
  \item \textsuperscript{44} Holland, 95 N.M. at 496, 623 P.2d at 1010 (citing Steinberg v. Coda Roberson Constr. Co., 79 N.M. 123, 440 P.2d 798 (1968) and Stotlar v. Hester, 92 N.M. 26, 582 P.2d 403 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978)).
  \item \textsuperscript{45} Wisdom v. Neal, 568 F. Supp. 4, 7 (D.N.M. 1982) (quoting Steinberg, 79 N.M. at 125, 440 P.2d at 798). See also Weaver, 95 Cal. App. 3d at 179, 156 Cal. Rptr. at 751 (adding that the defendant's moral blameworthiness, the burden on the defendant or society if liability is imposed or withheld, respectively, and the availability of insurance for the risk are factors to be weighed).
  \item \textsuperscript{46} Wisdom, 568 F. Supp. at 8. In Wisdom, the attorneys for the decedent's estate distributed the estate incorrectly. Id. at 5. The decedent's brothers and sisters filed suit against the attorneys for legal malpractice. Id. The attorneys claimed that there was no attorney-client relationship. Id. at 5-6. Citing Holland, the court explained that an attorney-client relationship need not exist for an attorney to be liable for legal malpractice. Id. at 8.
  \item \textsuperscript{47} Wisdom, 568 F. Supp. at 8.
  \item \textsuperscript{48} Donald v. Garry, 19 Cal. App. 3d 769, 771, 97 Cal. Rptr. 191, 192 (1971); Brody v. Ruby, 267 N.W.2d 902, 906 (Iowa 1978).
  \item \textsuperscript{49} Fox v. Pollack, 181 Cal. App. 3d 954, 961, 226 Cal. Rptr. 532, 535 (1986).
  \item \textsuperscript{50} Friedman, 412 Mich. at 9, 312 N.W.2d at 593; Goodman v. Kennedy, 18 Cal. 3d 335, 342-43, 134 Cal. Rptr. 375, 380, 556 P.2d 737, 742 (1976).
  \item \textsuperscript{51} Annotation, Attorney's Liability, to One Other Than His Immediate Client, for Consequences of Negligence in Carrying Out Legal Duties, 45 A.L.R. 3d 1181 (1972); Garcia, 106 N.M. at 761, 750 P.2d at 122.
  \item \textsuperscript{52} See Berlin v. Nathan, 64 Ill. App. 3d 940, ___, 381 N.E.2d 1367, 1376 (1978), cert. denied, 444 U.S. 828 (1979); Tappan v. Ager, 599 F.2d 376, 378 (10th Cir. 1979); Norton v. Hines, 49 Cal. App. 3d 917, 921, 123 Cal. Rptr. 237, 240 (1975) (adverse party not being an intended beneficiary of attorney's actions); Bickel v. Mackie, 447 F. Supp. 1376, 1381 (N.D. Iowa), aff'd, 590 F.2d 341 (8th Cir. 1978) (opposing party cannot reasonably rely on opposing counsel).
  \item \textsuperscript{53} See generally Bickel, 447 F. Supp. at 1381; Tappan, 599 F.2d at 378, 379; Weaver, 95 Cal. App. 3d at 178, 156 Cal. Rptr. at 751. See also Berlin, 64 Ill. App. 3d at ___, 381 N.E.2d at 1376 (no jurisdiction has found liability to third-party adversary without malicious prosecution).
  \item \textsuperscript{54} Tappan, 599 F.2d at 378.
  \item \textsuperscript{55} SUP. CT. RULES ANN. 16-101 (Preamble) (Repl. Pamp. 1988); see also Nelson v. Miller, 227 Kan. 271, ___, 607 P.2d 438, 451 (1980) (quoting Norton, 49 Cal. App. 3d at 921-24, 123 Cal. Rptr. at 240-41) (adding that an attorney may promote a client's interests in a manner as favorable to the client's position as the law and ethics will permit).
\end{itemize}
been called "quasi judicial officer[s] of the court, with a grave and heavy responsibility in the administration of justice." 56 Although courts may hold other professionals liable for their negligence which affects third parties, the adversary system sets attorneys apart from other professionals. 57 If attorneys were liable for negligence to an adversary, attorneys would be preoccupied with protecting themselves from their client's adversary, instead of vigorously pursuing the case for their client. 58 Liability for negligence would also ruin the attorney's "value to the court" in administering justice. 59

The conflict of interest that would arise from a duty to an adversary would also impair the client's right to free access to the courts. 60 The policy of freedom of access to the courts may even outweigh any policy against filing meritless actions. 61 Attorneys must have the same freedom as their clients have to start lawsuits, or clients will not get their fair day in court. 62 To make an attorney carry a heavier burden in initiating lawsuits would make the attorney both a predictor and insurer of success of a claim, making it likely that "only the rare attorney would have the courage to take other than the 'easy' case." 63

After reviewing the cases from other jurisdictions concerning an attorney's duty, the Garcia court announced that as a matter of law, an attorney has no duty to an adverse party. 64 An attorney's only loyalties are to the attorney's client and the legal system. 65 Because of this exclusive loyalty, an adverse party is obviously not an intended beneficiary of an

57. Bickel, 447 F. Supp. at 1381; Friedman, 412 Mich. at 10, 312 N.W.2d at 594.
58. Goodman, 18 Cal. 3d at 344, 134 Cal. Rptr. at 381, 556 P.2d at 743.
59. Berlin, 64 Ill. App. 3d at ____, 381 N.E.2d at 1376. The court stated that "liability only for negligence, for the bringing of a weak case, would be to destroy [the lawyer's] efficacy as advocate of his client and his value to the court, since only the rare attorney would have the courage to take other than the 'easy' case." Id.
60. Friedman, 412 Mich. at 7-8, 312 N.W.2d at 591-92; Weaver, 95 Cal. App. 3d at 179, 156 Cal. Rptr. at 751-52.
61. See, e.g., Tappen, 599 F.2d at 378-79. Garcia cites nine cases that support this proposition. Six of these were lawsuits by doctors who had completed a successful defense against malpractice claims. These doctors brought suit against the attorneys who had prosecuted the malpractice claims. Without discussing the merits of the malpractice claims, the courts in those six cases held that, even if the malpractice claims were meritless, the policy of freedom of access to the courts outweighs against filing meritless claims. Friedman, 412 Mich. at 4, 312 N.W.2d at 588; Weaver, 95 Cal. App. 3d at 172-77, 156 Cal. Rptr. at 747-50; Spencer v. Burglass, 337 So. 2d 596, 598 (La. Ct. App. 1976), cert. denied, 340 So. 2d 990 (La. 1977); Nelson, 227 Kan. at ____, 607 P.2d at 440-41; Brody, 267 N.W.2d at 903; Bickel, 447 F. Supp. at 1378. See also Berlin, 64 Ill. App. 3d at ____, 381 N.E.2d at 1369; Tappen, 599 F.2d at 377 (doctors countersued while malpractice action was pending). Courts are also unwilling to hold attorneys liable because this would encourage retaliation suits, which doctors are using in an effort to reduce the number of meritless malpractice claims brought against them. Bickel, 447 F. Supp. at 1384.
62. Weaver, 95 Cal. App. 3d at 180, 156 Cal. Rptr. at 752 (citing Norton, 49 Cal. App. 3d at 923, 123 Cal. Rptr. at 241).
63. Berlin, 64 Ill. App. 3d at ____, 381 N.E.2d at 1376; Spencer, 337 So. 2d at 601.
64. Garcia, 106 N.M. at 761, 750 P.2d at 122.
65. Id.
attorney’s words and conduct. Neither can adverse parties justifiably rely upon an opposing attorney’s words or conduct to protect them from harm. Therefore, an attorney owes no duty to his adversary and cannot be liable for negligence. The court agreed with the proposition that a duty to the adverse party would interfere with the attorney-client relationship and the client’s interests. Further, the court appears to commend this freedom from liability so that each client will have an attorney who is unafraid to bring an action and who will be a vigorous advocate.

B. Negligent Misrepresentation in New Mexico

The court reviewed the New Mexico authorities, including the negligent misrepresentation section of the Restatement (Second) of Torts. Finding that duty was an element of negligent misrepresentation, the court held that, as a matter of law, attorneys cannot be liable to their adversaries for negligent misrepresentation.

New Mexico has adopted Restatement (Second) of Torts as its law of negligent misrepresentation. The Restatement states that a person who gives information is liable for any loss that comes to a third party if the person giving the information does not use care in getting or com-

66. Id.
67. Id. (citing Tappen, 599 F.2d at 379). In fact, the court noted that the attorneys did not surprise Garcia with the Eleventh Amendment immunity defense because the attorneys raised it in four previous documents of record. Garcia, 106 N.M. at 760, 750 P.2d at 121.
68. Garcia, 106 N.M. at 761, 750 P.2d at 122.
69. Id.
70. Id.
71. Id. at 761-62, 750 P.2d at 122-23 (citing RESTATEMENT (SECOND) OF TORTS §552 (1977)).
72. Id. at 762, 750 P.2d at 123.
73. Stotlar, 92 N.M. at 29, 582 P.2d at 406. The Restatement reads in pertinent part:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

RESTATEMENT (SECOND) OF TORTS §552 (1977). Comment (h) states:

[It is not necessary that the maker should have any particular person in mind as the intended, or even the probable, recipient of the information. . . . It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it.

After Garcia was decided, New Mexico also adopted the Restatement’s measure of damages for negligent misrepresentation, which are out-of-pocket and reliance damages, but not expectation damages. First Interstate Bank of Gallup v. Foutz, 107 N.M. 749, 751, 764 P.2d 1307, 1309 (1988).
municating the information.\textsuperscript{74} Further, the person is liable if the third party receiving the information expected to receive the information and justifiably relied on it in a transaction.\textsuperscript{75}

New Mexico adopted the Restatement in \textit{Stotlar v. Hester}.\textsuperscript{76} The \textit{Stotlar} court held that a party need not be in privity of contract with a third party in order to be held liable to that third party for negligent misrepresentation.\textsuperscript{77} However, absent fraud, succeeding on the claim requires that the person giving the information owe a duty to the recipient.\textsuperscript{78} The recipient, in turn, must have a right to rely upon the information.\textsuperscript{79}

Three years later, in \textit{Holland v. Lawless},\textsuperscript{80} the court based its decision on \textit{Stotlar}. \textit{Holland} held that an estate's attorney who made misrepresentations to a purchaser of the estate's land could be liable for negligent misrepresentation.\textsuperscript{81} The court of appeals found liability possible for

\textsuperscript{75} Id.
\textsuperscript{76} 92 N.M. 26, 29, 582 P.2d 403, 406 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978). The defendant, Hester, appraised a house for the co-defendants, Campbells. \textit{Id.} at 27, 582 P.2d at 404. The plaintiffs bought the house based upon Hester's appraisal, and the plaintiffs later sued Hester, claiming that the appraisal was erroneous and negligently done. \textit{Id.} The district court granted summary judgment for Hester, and the court of appeals reversed. \textit{Id.} at 27, 31, 582 P.2d at 404, 408.
\textsuperscript{77} \textit{Id.} at 28, 582 P.2d at 405 (citing Steinberg v. Coda Roberson Constr. Co., 79 N.M. 123, 440 P.2d 798 (1968)). Before \textit{Steinberg}, the person claiming negligent misrepresentation had to be in privity of contract with the person making the representation. In other words, a third party to the transaction could not raise the claim. \textit{Steinberg} held that privity of contract had no place in tort law and should not be considered when deciding a case brought under a negligence theory. \textit{Steinberg}, 79 N.M. at 124, 440 P.2d at 799.
\textsuperscript{79} \textit{Stotlar}, 92 N.M. at 28, 582 P.2d at 405.
\textsuperscript{81} \textit{Id.} at 497, 623, P.2d at 1011. In \textit{Holland}, the defendant Schollenbarger was the administrator of Carlos de la Fuente's estate. \textit{Id.} at 492, 623 P.2d at 1006. Defendant Lawless was the estate's attorney. \textit{Id.} The probate court allowed the plaintiff to lease the decedent's residence, which was in danger of foreclosure. \textit{Id.} From the discussion plaintiff had with Lawless, the plaintiff believed that 60% of his rent payments would be applied to a future purchase of the land for $40,000. \textit{Id.} Later, the claim which threatened foreclosure was settled, and a new administrator was appointed. \textit{Id.} The plaintiff filed suit against the estate to force the new administrator to sell the residence, or for damages. \textit{Id.} The trial court dismissed the complaint. \textit{Id.} The New Mexico Supreme Court affirmed, holding that neither Lawless nor Schollenbarger had authority to make the lease and option to buy. \textit{Id.} (quoting Matter of Estate of De La Fuente, 93 N.M. 87, 596 P.2d 856 (1979)). Plaintiff then sued Lawless and Schollenbarger, among others, alleging breach of contract, legal malpractice, negligence, and negligent misrepresentation. \textit{Id.} at 492, 623 P.2d at 1006.

The trial court granted all of the defendants' motions for summary judgment on the breach of contract and legal malpractice claims, saying that the breach of contract claim was \textit{res judicata} and that the malpractice claim was not warranted because there was no attorney-client relationship. \textit{Id.} The court dismissed the negligence and misrepresentation counts against the attorney because he owed no duty to the plaintiff without an attorney-client relationship. \textit{Id.} at 492-93, 623 P.2d at 1006-07. The New Mexico Court of Appeals affirmed the ruling that the attorney owed no duty to the plaintiff because no attorney-client relationship existed. \textit{Id.} at 495, 623 P.2d at 1009. Instead, the attorney represented the estate's administrator. \textit{Id.} The court of appeals therefore upheld the lower court's dismissal of the negligence action. \textit{Id.}
negligent misrepresentation despite the fact that there was no attorney-client relationship, and that the attorney owed no duty to the purchaser because of the attorney-client relationship. After quoting extensively from Stotlar, the court of appeals reaffirmed its adoption of the Restatement. It then held that the fact finder must determine whether the attorney’s statements to the purchaser concerning the land purchase constituted negligent misrepresentation. The court remanded the issue, holding that the trier of fact must determine: (1) whether the statements were false, (2) whether the attorney acted negligently, and (3) the scope of liability.

Unlike Holland, the court in Garcia ruled that the attorney’s lack of duty which precludes liability for negligence also precludes liability for negligent misrepresentation. While agreeing that privity of contract was not necessary for negligent misrepresentation, the court found that there was no reliance on the board members’ attorneys’ statements because there can never be justifiable reliance on such statements by an adverse party.

By holding that attorneys are not liable to their adversaries for negligent misrepresentation, Garcia takes the matter out of a jury’s hands. Although it appears that Garcia ignores Holland by leaving nothing for the fact finder, Holland is ignored only if one considers the parties in Holland to be adversaries. In Holland, the plaintiff was a contracting party, not an adversary of the estate which Lawless represented. In Garcia, the parties were in direct opposition by virtue of the adversary process. The Garcia court was only concerned with an attorney’s duty to his client’s adversary.

Still, other than Stotlar and Holland, the Garcia court used only one case, Bickel v. Mackie, to support its negligent misrepresentation decision. Bickel, like most of the decisions upon which Garcia relied, involved a doctor filing suit against an attorney after the attorney represented a client in suing the doctor for malpractice. Neither Bickel nor the other decisions cited by Garcia discuss whether an attorney is liable for negligent misrepresentation when that attorney has made an affirmative

82. Id. at 497, 623 P.2d at 1011.
83. Id. at 496-97, 623 P.2d at 1010-11.
84. Id. at 497, 623 P.2d at 1011. It is unclear where the court found the duty to make the attorney liable for negligent misrepresentation. Presumably, the court found a duty outside of the attorney’s position as an attorney.
85. Id. Judge Sutin filed a dissenting opinion, but did not question the court’s reasoning in reversing the negligent misrepresentation claim. Instead, he stated that the plaintiff did not allege negligent misrepresentation, but false representation, which requires the speaking party to intend to make a false statement. Id. at 500, 623 P.2d at 1014 (Sutin, J., dissenting).
86. Garcia, 106 N.M. at 762, 750 P.2d at 123.
87. Id. (citing Bickel, 447 F. Supp. at 1381).
88. 447 F. Supp. 1376 (N.D. Iowa), aff’d, 590 F.2d 341 (8th Cir. 1978).
misstatement of fact. In *Holland*, the only case that came close to such a fact pattern, the New Mexico court found the attorney liable.

The court may have ignored the fact that *Garcia* involved an affirmative misstatement of fact because it was more concerned with protecting attorneys, thereby making attorneys unafraid to pursue their clients' interests. If another case like *Garcia* arose, and the *Garcia* court had allowed liability, attorneys would be hesitant to raise the Eleventh Amendment immunity on appeal, for fear of being made liable. Instead, an attorney might attempt to defeat an adverse judgment using other more time-consuming or costly means. If the attorney's client would be adversely affected by these means, the client would then be forced to bring a malpractice and disciplinary action, thus consuming more time and court resources, and making the innocent client pay for the attorney's mistake.

C. Constructive Fraud and Promissory Estoppel in New Mexico

Although the elements of constructive fraud and promissory estoppel are different, *Garcia* struck both theories of recovery because the board’s attorney owed no duty to the plaintiffs. The court did not have to look outside the jurisdiction to find the elements for either claim, and therefore quickly dismissed both claims.

1. Constructive Fraud

Constructive fraud is a breach of a legal or equitable duty, irrespective of the moral guilt of the fraud feasor. Liability is based on the notion that if one speaks at all, there is a duty to give reliable information. The court dismissed this claim in two sentences. First, the court noted that a legal or equitable duty would create a conflict of interest with an attorney's duty to her client. The court then stated that, "as we have already noted, defense counsel owes no duty to his client's adversary." *Garcia*’s extension of its duty analysis to constructive fraud appears to be consistent with New Mexico law. To allow liability based upon

92. Archuleta v. Kopp, 90 N.M. 273, 276, 562 P.2d 834, 837 (Ct. App.), cert. quashed, 90 N.M. 636, 567 P.2d 485 (1977). In its original opinion, filed November 23, 1987, the *Garcia* court rejected *Garcia*’s constructive fraud claim, stating that to establish constructive fraud, a plaintiff must show a special confidential or fiduciary relationship between the parties to a transaction. *Garcia v. Rodey, Dickason, Sloan, Akin & Robb*, P.A., No. 16,667, slip op. at 9 (Nov. 23, 1987) (citing Baum v. Great Western Cities, Inc., of New Mexico, 703 F.2d 1197, 1212, (10th Cir. 1983)). Upon rehearing, the court withdrew the original opinion for the present one. The only change made was its analysis of constructive fraud. There no longer is a need for a fiduciary relationship to exist in order to be liable for constructive fraud, as *Garcia* had previously ruled. *Wolf and Klar Cos. v. Garner*, 101 N.M. 116, 118, 679 P.2d 258, 260 (1984).
93. Archuleta, 90 N.M. at 276, 562 P.2d at 837. "‘[A]ct[s contrary to public policy, to sound morals, to the provisions of a statute, etc., however honest the intention with which they may have been performed, are deemed constructive frauds, or frauds in law, and are absolutely void.’" *Id.* (quoting Leitensdorfer v. Webb, 1 N.M. (Gild.) 34, 53 (1853), aff’d, 61 U.S. (20 How.) 176 (1858)).
95. *Id.*
the standard of conduct given in the New Mexico precedents on constructive fraud would be inconsistent with Rule 11 of the New Mexico Rules of Civil Procedure. Rule 11 only requires that the attorney file the lawsuit in good faith after preliminary research and fact finding.\(^{96}\) Because constructive fraud does not consider the fraudfeasor's moral guilt, allowing liability would conflict with Rule 11's good faith standard.

2. Promissory Estoppel

*Garcia* quotes *Eavenson v. Lewis Means, Inc.*,\(^{97}\) which cites the Restatement (Second) of Contracts in analyzing the elements and "limits" of promissory estoppel.\(^{98}\) "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."\(^{99}\) The "limits" of promissory estoppel are that there must be substantial economic loss, foreseeable reliance by the promisor, and justifiable reliance upon the promise.\(^{100}\)

*Garcia* used its earlier analysis of duty, and the limits of justifiable reliance and foreseeability to strike Garcia's claim. The court stated that Garcia could not justifiably rely upon his adversary's attorney's statements because attorneys have no duty to their clients' adversaries.\(^{101}\) Nor could the board's attorneys foresee that Garcia would rely upon their statements.\(^{102}\)

*Garcia* ignores *Eavenson's* holding that reasonable reliance and foreseeability were fact issues,\(^{103}\) presumably because of *Garcia's* implicit holding that, as a matter of law, a party cannot justifiably or foreseeably

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96. Rule 11 states, in part:

> Every pleading or other paper provided for by these rules . . . shall be signed by at least one attorney of record. . . . The signature of an attorney on any pleading or other paper provided for by the rules constitutes a certificate by him that he has read the pleading or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.


97. 105 N.M. 161, 730 P.2d 464 (1986). In *Eavenson*, the plaintiff was a secretary when the defendant approached her and offered her a job with better pay and benefits. *Id.* at 162, 730 P.2d at 465. The defendant also gave her a prospective starting date. *Id.* Plaintiff accepted the offer and the defendant acknowledged this acceptance. *Id.* Plaintiff then quit her job, but the defendant would not employ her. *Id.* The court awarded recovery based upon promissory estoppel. *Id.*

98. 106 N.M. at 763, 750 P.2d at 124.


100. *Eavenson*, 105 N.M. at 162, 730 P.2d at 465 (quoting L. Simpson, Contracts (1965)). Simpson quotes Restatement of Contracts §90 (1932). Although both the Garcia and Eavenson courts use the wrong Restatement by using Simpson's quote, and both inadvertently place a "not" between "does" and "induce," the mistakes make no difference in deciding Garcia. Neither court reads the "not" into their analysis, while both rely more on Simpson's limits to promissory estoppel, especially those of reasonable and foreseeable reliance upon the promise.


102. *Id.*

rely upon his adversary's attorney's statements. However, in ignoring Eavenson, the court also appears to act inconsistently with the Garcia decision itself. The court concludes its decision by stating that remedies are available for cases such as Garcia. While no independent cause of action exists for an attorney's misconduct, "within the action out of which a grievance arises, remedies are provided for the benefit and relief of parties wronged through reasonable reliance upon misrepresentations of an adversary's attorney." Although the court does not state what remedies exist within the action, it would appear in Garcia's case that reopening the judgment under Rule 60(b) may be possible. Also, the court noted that the wronged party can invoke disciplinary proceedings.

Although the court states that means exist to redress a grievance within the proceeding, rather than by bringing an independent action, the court does not explain why there is a difference between raising a claim of reasonable reliance within a proceeding using non-pecuniary measures and raising it in an independent action. The reliance in the first action is the same, whether it is sued upon in an action for money damages or in an action for discipline. Further, in Garcia, the plaintiff cannot seek redress in the same action because all of his actions have been dismissed. To regain his award, Garcia must try to reopen the judgment dismissing his claim against the board members in their individual capacities. Even if Garcia can reopen the judgment, he will have to retry the entire case.

D. Code of Professional Responsibility and the Attorney's Oath

Presently, New Mexico's Rules of Professional Conduct (the "Rules") provide that violation of the rules invokes the disciplinary process, not a private cause of action. Garcia claimed that because the former Code

105. 106 N.M. at 763, 750 P.2d at 124.
106. Id. (emphasis added).
107. Sup. Ct. Rules Ann. 1-060(b) (1986). Under Rule 60(b)(1-3), Garcia would have had to bring the motion to reopen within a reasonable time, but no later than one year for: (1) a claim of mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; or (3) fraud, misrepresentation, or other misconduct of an adverse party. The judgment can be reopened under 60(b)(4-6) if the motion is made within a reasonable time if: (4) the judgment is void; (5) the judgment has been satisfied; or (6) any other reason that would justify relief. Id.
109. See supra note 107 and accompanying text.
111. Sup. Ct. Rules Ann. 16-101 (Scope). The Rules restate the fear that the Rules will be used as a basis for a retaliatory or antagonistic collateral proceeding by an opposing party to a suit. Id.; see also, Spencer, 337 So.2d at 600-01. The court in Spencer stated:
This conclusion [to deny liability] is based primarily on the failure of the petition to allege any facts to support the proposition that defendant's duty under [the Code of Professional Responsibility] and his oath was designed solely to prevent the risk of plaintiff's being piqued at being sued. This would be an over simplification of the ethical complexities which govern the lawyer's conduct to his client, the court and the public.

Id.
of Professional Responsibility (the "Code") did not contain the Scope portion presently contained in the Rules, the Code allowed a private cause of action based upon the Code's provisions. The court replied that the Code was intended to invoke only the disciplinary process, as evidenced by the court's later adoption of the Scope and Preamble in the Rules. Like a breach of the Rules or Code, a breach of the Attorney's Oath (the "Oath") provides only a public, not private, remedy.

Garcia tried to analogize a violation of the Code and Oath to negligence per se actions based upon a breach of statutory duty. The court stated that statutory liability does not exist unless there is an underlying common law cause of action. By virtue of its holding on the issues of duty, negligence, negligent misrepresentation, constructive fraud, and promissory estoppel, the court found that there was no underlying common law cause of action to support negligence per se based upon the Code.

Garcia also noted that allowing liability for breach of the Code or Oath would inhibit freedom of access to the courts and that "the public can avail itself of other remedies against unprofessional lawyers."

IV. IMPLICATIONS OF GARCIA

Garcia puts attorneys on notice that they cannot reasonably rely upon their adversary's words. Attorneys must presume that they cannot rely upon any statements made by opposing counsel concerning the opposing counsel's future actions in representing their clients. The party or attorney

112. Garcia, 106 N.M. at 762, 750 P.2d at 123.
113. Id. Although this decision appears to be hindsight, the court also cited Speer v. Cimosz, 97 N.M. 602, 642 P.2d 205 (Ct. App.), cert. denied sub nom., New Hampshire Insurance Group v. Speer, 98 N.M. 50, 644 P.2d 1039 (1982), which stated, in dicta, that a violation of the Code should be referred to the Disciplinary Board rather than a court. Speer, 97 N.M. at 605, 642 P.2d at 208.
117. Id.; see also, Bob Godfrey Pontiac, Inc. v. Roloff, 291 Or. 318, 630 P.2d 840 (1981) (cited with approval in Garcia, 106 N.M. at 762, 750 P.2d at 123). The Godfrey court, like Garcia, decided that there was no underlying common law cause of action in negligence which would make the breach of the Code negligence per se. Id. at ____, 630 P.2d at 846. The court further found that, absent an underlying common law cause of action, courts must create a new cause of action if the statute did not indicate whether one was created. Id. at ____, 630 P.2d at 845. The Godfrey court then held that it could not be certain that the legislature intended the court to create a new cause of action under the Code, so that its breach would be negligence per se. Id. at ____, 630 P.2d at 846. Without this certainty, Godfrey held that courts should err on the side of not creating a new cause of action. Id. at ____, 630 P.2d at 845. The court further found that a new cause of action was not needed because actions for malicious prosecution are available and give the remedy sought. Id. at ____, 630 P.2d at 849.
118. Garcia, 106 N.M. at 763, 750 P.2d at 124.
119. Id. at 762, 750 P.2d at 123. Garcia does not decide whether an expert may use the Rules or Code to determine whether an attorney has breached professional standards in a malpractice action. Although the Rules specifically state that the Rules may not be used as a basis for liability, courts have allowed experts on the duty of care to use the Rules to define the standards which lawyers must meet. See, e.g., Miami Int'l Realty Co. v. Paynter, 841 F.2d 348 (10th Cir. 1988).
must take appropriate precautions based upon this presumption. In Garcia, for example, Garcia’s attorney would have had to dismiss the action against the board members without prejudice, until he determined that the board members’ attorneys would not raise the Eleventh Amendment immunity defense.

Most attorneys, trained in the adversary system, will find the Garcia holding reasonable and logical. Attorneys will accept the need for precautions as a part of the adversary system and be glad for the protection it provides. However, Garcia also adds ammunition to the arsenal of those in the public who view attorneys with contempt. After Garcia, these persons will only see lawyers as further insulated from the system they are to uphold. What these persons will fail to realize is that they and their attorneys benefit from the Garcia holding. Clients can have confidence that their attorneys are protecting their interests only, instead of the interests of others. For this reason, the court worries less about public perception and more about the adversary system that the public must use.

The board members’ attorneys cannot be faulted for protecting their client’s best interest. Garcia holds that they cannot be held liable for allowing the dismissal based upon their assertions that they would not raise the immunity. Although the result appears inequitable, the underlying policy reasons, mentioned above, demonstrate its value.

Garcia protects an adverse party’s attorney from liability for any claim which has duty as one of its elements or involves reliance upon the attorney’s words or conduct. Therefore, the injured party’s only recourse to get monetary damages appears to be an action for fraud, malicious prosecution, or abuse of process. The party can turn to the disciplinary process for vindication. However, vindication is a hollow victory for a person who has just lost $180,000. It is also of little comfort to a corporation that has just been subjected to a strike suit, or persons, like doctors, who have been subjected to nuisance suits. In Bickel v. Mackie, the federal court for the Northern District of Iowa stated that the decision to protect attorneys from liability for their misleading statements is anomalous and might be unsatisfying because many persons will have no way to get monetary damages. However, the court stated that it would leave the decision to the Iowa state courts and legislature. The New Mexico Supreme Court has made its decision.

120. Bob Godfrey, 291 Or. at —, 630 P.2d at 854 (Linde. J., concurring).
121. Bickel, 447 F. Supp. at 1384. A “strike suit” is a term given to lawsuits filed by derivative shareholders “interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them.” Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 371 (1966). A “nuisance suit” is much like a strike suit in that the plaintiff is looking for quick dollars. It is brought by plaintiffs in all kinds of lawsuits. See, e.g., Bull v. McCuskey, 96 Nev. 706, 615 P.2d 957 (1980).
122. 447 F. Supp. at 1384.
123. Id.
After *Garcia* was decided, New Mexico’s appellate courts addressed both banks'\(^{124}\) and doctors'\(^{125}\) liabilities to third parties. Both decisions expanded these professions' duties to third parties. Although the decision concerning doctors contained a strong dissent,\(^{126}\) both decisions appear to be consistent with *Garcia*.

In *R.A. Peck, Inc. v. Liberty Federal Savings Bank*,\(^{127}\) the court of appeals held that banks may have a duty to disclose a customer’s financial status.\(^{128}\) The court stated that although banks have a duty not to disclose a customer’s status with the bank,\(^{129}\) the bank in this instance had this duty.\(^{130}\)

The court set up a two-step process to determine whether the bank had a duty to disclose the customer’s financial status. First, the court determined whether there was a relation between the plaintiff and the bank which would create the duty to disclose.\(^{131}\) The court stated that the relation exists:

1. Where there is a previous definite fiduciary relation between the parties.
2. Where it appears one or each of the parties to the contract expressly reposes a trust and confidence in the other.
3. Where the contract or transaction is intrinsically fiduciary and calls for perfect good faith. The contract of insurance is an example of this last class.\(^{132}\)

Without elaboration, the court held that the bank’s actions placed it in category 2.\(^{133}\) If this relation exists, the court stated that, under special circumstances, the court may hold the bank liable for non-disclosure to a third party.\(^{134}\)

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126. *Id.* at 518, 775 P.2d at 720 (Scarborough, J., dissenting).
128. 108 N.M. at 86, 766 P.2d at 930. The plaintiff was a contractor building a ski lodge for the bank’s customer. *Id.* at 87, 766 P.2d at 931. The plaintiff was to be paid out of the funds loaned by the bank to the customer. *Id.* When the customer did not pay the plaintiff, the bank told plaintiff to submit pay requests to the bank. *Id.* The plaintiff kept building based upon the bank’s instructions and assurances of payment. *Id.* By December of 1984, all loan funds had been disbursed, including some disbursements outside the scope of the loan agreement. *Id.* When the plaintiff submitted a pay request in March of 1985, the bank refused to pay because the loan funds were depleted. *Id.* The plaintiff sued the bank for fraud, constructive fraud, and negligent misrepresentation. *Id.* at 86, 766 P.2d at 930. The trial court dismissed for failure to state a claim upon which relief could be granted, and the plaintiff appealed. *Id.*
129. 108 N.M. at 89, 766 P.2d at 933.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* Apparently, the court based its holding on the notion that the bank had thrust itself into the transaction through its instructions. By doing so, the bank had become more than a money lender. See, *id.* at 91, 766 P.2d at 935.
134. *Id.* at 90, 766 P.2d at 934. The special circumstances include:
   (a) One who speaks must say enough to prevent his words from misleading the other party.
   (b) One who has special knowledge of material facts to which the other party
The Garcia facts do not lend themselves to any of the three categories establishing a relationship giving rise to a duty. There was no "previous definite fiduciary relation" between Garcia and Rodey. According to the Garcia court, Garcia could not repose any trust in his adversary's attorney. By no means is an adversarial relationship intrinsically fiduciary. Because no relationship giving rise to a duty existed, the court's special circumstances test for banks would not be applicable. Not even a bank would be put to the special circumstances test until the duty test was met. Therefore, Peck appears to be inapplicable to attorneys because attorneys owe no duty to adverse parties under either the Garcia or Peck duty tests.

In Wilschinsky v. Medina, the supreme court held that doctors have a duty to third parties under certain circumstances. At first glance, distinguishing Wilschinsky from Garcia appears to be more difficult than distinguishing Peck. In Wilschinsky, the plaintiff was injured in an automobile accident by a doctor's patient after the doctor injected the patient with drugs that affected the patient's ability to drive. The plaintiff brought suit in the United States District Court, but the United States District Court certified three questions to the New Mexico Supreme Court. The court defined the issue narrowly as "whether a doctor owes a duty to third parties from treatment of an outpatient when the doctor has given the patient an injection of drugs that could clearly impair the patient's ability to reason and to operate an automobile."

Wilschinsky determined the doctor's duty by examining "the likelihood of injury, the reasonableness of the burden of guarding against it, and the consequences of burdening the defendant." The court found that

does not have access may have a duty to disclose these facts to the other party.

(c) One who stands in a confidential or fiduciary relation to the other party to
a transaction must disclose material facts.

Id. The court also noted that "a bank may have a duty to disclose financial information concerning
a depositor if a bank had actual knowledge that its customer is committing fraud." Id.

136. 108 N.M. at 512, 775 P.2d at 714. The doctor injected the patient with Meperidine and
then either Vistaril or Tigan after the patient had taken Percodan. Id. Within approximately 70
minutes after the first injection, the patient had the accident. Id.

137. Id. The questions certified were:
1. Does the legal duty of a physician practicing in New Mexico to use reasonable
care in treating a patient extend only to the patient or also to others who may
foreseeably be harmed by the physician's negligent treatment of the patient?
2. If the legal duty extends to others in addition to the patient, what is the
nature and extent of the duty owed to the plaintiffs in this case?
3. If the legal duty extends to others in addition to the patient, does the New
Mexico Medical Malpractice Act . . . [N.M.S.A. 1978, §§41-5-1 to 41-5-28 (Repl.
Pamp. 1986)] apply to claims based on malpractice asserted by non-patients against
a physician who is qualified under the provisions of the Medical Malpractice Act?

Id.

138. Id. at 514, 775 P.2d at 716. The court went to great lengths to explain that the issue was not:
(1) a doctor's "duty to control a patient with known dangerous propensities;" id. at 513, 775
P.2d at 715; (2) a doctor's "duty to warn specific, identifiable third parties;" id. at 514, 775 P.2d
at 716; or (3) a doctor's liability for negligently prescribed drugs; id.

139. Id. at 513, 515, 775 P.2d at 715, 717 (citing Kirk v. Michael Reese Hosp. & Medical Center,
117 Ill. 2d 507, 526, 513 N.E.2d 387, 396 (1987)). See supra note 45 and accompanying text for
the factors used in determining negligence.
the likelihood of injury was high; that based upon standards of normal medical practice, it is not unreasonable to make the doctor carry the burden of guarding against the danger; and that "if the scope of the doctor's duty is limited to the professional standards of acceptable medical practice, the additional burden on the doctor's treatment decisions is negligible." The court made a point of stating that the doctor's duty only extends to persons injured under facts similar to those in Wil-
schinsky. The duty does not apply "to the entire public for any injuries suffered for which an argument of causation can be made."

Justice Scarborough dissented because, among other reasons, he felt that the court should not hold doctors liable to third parties in light of Garcia. Justice Scarborough stated that "[t]his court in Garcia v. Rodey was not prepared to extend the legal duty of an attorney to non-client thir[d] parties who may be injured by the services or advice of the attorney to this [sic] client." He therefore would have ruled not to extend a doctor's liability to third party non-patients.

The majority replied to Justice Scarborough by stating that it was not determining whether there was malpractice, but merely holding that the duty of a doctor is based on malpractice standards. The court specifically distinguished Garcia by stating that Garcia "specifically weighed the harm suffered by the litigant against the policy of holding lawyers to a single standard of behavior." "Here, however, we have defined the doctor's duty in terms of medical standards already in place." The court stressed, as in Garcia, that lawyers must zealously represent their clients and to allow liability to third party adversaries would create a conflict of interest. The court also noted that attorneys are liable to third parties in will drafting and examination of title cases.

Justice Ransom specially concurred in the opinion "to express chagrin that seeds of further interprofessional discord needlessly may be sewn [sic] by certain language in the dissent." He stressed that the court decided Garcia in the context of an adversary proceeding. He also quoted the portion of Garcia that stated that third parties may redress

140. Id. at 515, 775 P.2d at 717. The court also noted that the burden was reasonable because it falls under the Medical Malpractice Act, N.M. STAT. ANN. §§41-5-1 to -28 (Repl. Pamp. 1986). Id. at 515-18, 775 P.2d at 717-20. The court found that "the legislature intended [the Medical Malpractice Act] to cover all causes of action arising in New Mexico that are based on acts of malpractice." Id. at 517, 775 P.2d at 719.
141. Id. at 515, 775 P.2d at 717.
142. Id.
143. Id. at 518-20, 775 P.2d at 720-22 (Scarborough, J., dissenting). Justice Scarborough also felt that there were not enough facts to grant certiorari or to resolve the issue. Id. at 519-20, 775 P.2d at 721-22.
144. Id. at 519, 775 P.2d at 721 (Scarborough, J., dissenting).
145. Id. at 515, 775 P.2d at 717.
146. Id.
147. Id.
148. Id.
149. Id.; see supra note 51 and accompanying text.
150. Id. at 518, 775 P.2d at 720 (Ransom, J., specially concurring).
151. Id.
their grievances in the proceeding if the party is "wronged through reasonable reliance upon misrepresentations of an adversary's attorney." Justice Ransom also stated that "[i]t is certainly no extension of the liability burden of physicians under tort law to say that a doctor has a duty to refrain from optional outpatient administration of mind altering medication that, under the circumstances, gives rise to an unreasonable risk of injury to others." Justice Scarborough's only reason for refusing to extend a doctor's liability was that the court refused to do so in Garcia. However, as the Wilschinsky majority pointed out, the Garcia court accepted a lawyer's liability to third-party beneficiaries of the lawyer's work. To use this analogy, however, the majority would have to consider the injured party as a third-party beneficiary of the doctor's actions in keeping the patient off the roads. Because the court would not allow a duty to extend to the general public, this analogy does not distinguish Wilschinsky from Garcia.

Instead, the distinguishing factor appears to be the adversarial setting and the conflict of interest that would arise from a co-existing duty to a client and that client's adversary. The fact that the doctor in Wilschinsky had a duty to those injured by his patient after the injection did not affect his treatment of the patient in any way. In fact, the duty will probably insure that he treats the patient in such a way as to injure nobody, including the patient. By contrast, an attorney who has a duty to his client's adversary may act in a manner detrimental to the client. The attorney may not zealously promote her client's cause for fear of incurring personal liability. Therefore, Wilschinsky is both distinguishable from and consistent with Garcia.

As Justice Ransom noted in Wilschinsky, the Wilschinsky decision may increase claims that lawyers work under a double standard from other members of the public. Members of the public may not attempt to distinguish Garcia from the cases which followed, adding even more stains on attorneys' public images. The American Bar Association ("ABA") has expressed an increased concern with this public image. "According to a wide range of observers, ... the image of lawyers today ranges somewhere between 'poor' and 'not much worse than before.'" Further exacerbating the problem is the fact that lawyers disagree among themselves as to what is ethical conduct and what a lawyer's liability should be as compared to other professions. According to Monroe Freedman,

152. Id. (quoting Garcia, 106 N.M. at 763, 750 P.2d at 124). See supra note 106 and accompanying text.
153. Wilschinsky, 108 N.M. at 518, 775 P.2d at 720 (Ransom, J., specially concurring).
154. See supra notes 143-144 and accompanying text.
155. See supra note 149 and accompanying text.
156. See supra note 142 and accompanying text.
159. Id. Wilschinsky is an example of disagreement over a lawyer's liability to third persons as compared to doctors' liability. See supra notes 136-53 and accompanying text.
the biggest problem with lawyers' public images is that nobody has spoken directly to the public about a lawyer's duties.\textsuperscript{160}

In response to these concerns, the ABA has proposed two model creeds of professionalism and has suggested that state Bar associations adopt creeds of professionalism.\textsuperscript{161} Some individual firms have already adopted creeds for their firms.\textsuperscript{162} Other suggestions include opinion-editorial articles, television appearances, and school programs.\textsuperscript{163} However, according to some attorneys, more than public information is needed.\textsuperscript{164}

This prescription for a better image would rely on concrete actions, like speeding up trials, pushing harder for cheaper ways of settling disputes or handling routine legal transactions, and increasing pro bono work without being forced to by the courts.

It would tell the bar to stop worrying about problems only lawyers care about—like distasteful advertising or unseemly publicity-seeking—and save its energy for real problems, like speaking up for unpopular advocates, getting tougher with unethical lawyers, and implementing some real reforms in the legal system.\textsuperscript{165}

The New Mexico Board of Bar Commissioners has started its improved public image campaign by adopting a Creed of Professionalism (the "Creed").\textsuperscript{166} Violation of the Creed will bring no sanctions.\textsuperscript{167} "The Creed is intended to be self-motivating and to provide aspirational goals which the members of the Bar would voluntarily seek to achieve."\textsuperscript{168} Instead of disciplining attorneys, the Creed punishes attorneys who fall below its standards by subjecting the attorney to "the condemnation of the Bar in general."\textsuperscript{169} According to the New Mexico Board of Bar Commissioners, "[u]nlike the Rules of Professional Conduct, which established the minimum standards by which an attorney must conduct a client's business, the Creed sets higher standards or goals, which no attorney may satisfy in every instance, but which will guide and influence professional behavior throughout the Bar."\textsuperscript{170}

The Board of Bar Commissioners has gone further in promoting lawyers' images by forming the Public and Community Relations Committee (the "Committee").\textsuperscript{171} This Committee is taking steps to meet Monroe Freed-
man’s complaint that nobody is speaking to the public about the lawyer’s role in society. The Committee is presenting seminars for journalists about the Bar and the legal profession. The relations committee “hopes a successful seminar will lead to an ongoing cooperative project between the Bar and the media on an even larger scale.” While the Committee appears to be making strides to meet Freedman’s concerns, it remains to be seen whether the Creed will meet the Bar’s other concerns.

V. CONCLUSION

The Garcia court held, in a case of first impression, that an attorney cannot be liable to the attorney’s adversary for negligence, constructive fraud, or negligent misrepresentation. The basis for this decision is that attorneys owe no duty to their adversaries. Moreover, because litigants cannot justifiably rely on an adverse party’s attorney’s words, a disappointed litigant cannot bring an action for promissory estoppel. In addition, the Rules of Professional Responsibility, and the Attorney’s Oath do not have underlying common law causes of action in negligence and cannot be used independently to support liability to the adverse party. After Garcia, attorneys must be more cautious in pursuing their clients’ claims and in their negotiations with opposing counsel. However, despite possible adverse affects on the public image of lawyers, the Garcia court has helped preserve an attorney’s ability to zealously and effectively advocate a client’s position.

MATTHEW T. BYERS

172. See supra note 160 and accompanying text.
173. 28 N.M. St. B. Bull., p.3, supra note 171.
174. Id.
175. See supra note 164 and accompanying text.