

**BEFORE THE DISCIPLINARY BOARD OF  
THE SUPREME COURT OF THE STATE OF NEW MEXICO**

In the Matter of

**DENNIS W. MONTOYA, ESQ.**

Disciplinary No. 04-2010-594

An Attorney Licensed to  
Practice Law Before the Courts  
of the State of New Mexico

**SPECIFICATION OF CHARGES**

1. Rule 17-105 of the New Mexico Supreme Court Rules Governing Discipline empowers Counsel for the Disciplinary Board to file a specification of charges against an attorney with the Disciplinary Board.

2. Dennis W. Montoya (hereinafter "Respondent") is an attorney licensed by the Supreme Court of New Mexico.

3. The factual allegations set forth in the Specification of Charges state acts of professional misconduct by Respondent in violation of Rules 16-101, 16-104(B), 16-105(B), 16-105(C), 16-107(A), 16-107(B), 16-108(G), 16-114(B), 16-115(A), 16-115(B), 16-303(A)(1), 16-303(D), 16-401(A), 16-401(B), 16-503(B), 16-503(C), 16-505(A), 16-804(C), and 16-804(D) of the Rules of Professional Conduct.

4. Pursuant to Rule 17-309 of the Supreme Court Rules Governing Discipline, cause exists to conduct a hearing on the following charges so that the Disciplinary Board and the Supreme Court may determine whether further action is appropriate.

## BACKGROUND

5. Cody Utley ("Utley") and Tresa Kosec ("Kosec") met in Utah in the fall of 1996 and began living together in November of 1996. Kosec had a daughter, Brionna Kosec ("Brionna") from a previous relationship. Utley did not adopt Brionna.

6. In 1998, Utley, Kosec and Brionna moved to Farmington, New Mexico. Utley and Kosec had a son together, Thomas Utley ("Thomas"), born in Farmington on August 29, 1999.

7. On November 5, 2002, Utley was killed in an automobile accident while driving from a site at which he was working for his employer, Key Energy, Inc. ("Key Energy") to a motel where he was staying. A passenger in the car, Craig Hopkins ("Hopkins") suffered serious injuries. The accident occurred when a tire on the vehicle Utley was driving failed.

8. Kosec and Utley never married. New Mexico does not recognize common law marriages, unless the marriage is established in compliance with the law of a state which does recognize common law marriages.

9. By statute, §30-1-4.5, Utah law permits the recognition of common law marriages "if a court or administrative order establishes that the marriage arises out of a contract between a man and a woman..." who meet the following five (5) criteria:

- a. are of legal age and capable of giving consent;
- b. are legally capable of entering a solemnized marriage under the provisions of this chapter;
- c. have cohabited;

- d. mutually assume marital rights, duties, and obligations; and
- e. who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

The statute further provides that the determination must occur during the relationship or within one year following termination of the relationship.

10. Utlely and Kosec did not utilize the Utah statutory procedure to establish the legality of their relationship before Utlely was killed.

11. In March of 2003, Kosec retained Respondent and Ronald R. Adamson, Esq. ("Adamson") for representation on claims arising from the accident which killed Utlely, including recovering life insurance proceeds, worker's compensation and a wrongful death suit against the seller and the manufacturer of the tire that failed.

12. Kosec was referred to Respondent by and through Adamson. Adamson acted as co-counsel with Respondent in representing Kosec on claims arising from Utlely's death.

13. Neither Respondent nor Adamson utilized the Utah statutory procedure to obtain recognition of the marriage within one year of Utlely's death.

14. On June 25, 2003, Kosec was charged with felony possession of drugs (methamphetamine). She was represented on these criminal charges by Adamson. Respondent was aware of the charges and of Kosec's use of illegal drugs.

15. In May of 2004, Kosec was incarcerated for two weeks for failure to appear at a hearing in the criminal case. In June or July of 2004, Kosec was again incarcerated for two weeks, this time for failing a court-ordered drug test.

16. Kosec completed inpatient drug rehabilitation in August of 2004 and was dismissed from probation in November of 2005.

17. During 2003 and 2004, Respondent collected life insurance proceeds and settled the worker's compensation case.

18. In December of 2005, Respondent and Adamson settled with one of the two defendants in the wrongful death suit. In none of these settlements did Respondent have a guardian appointed for Thomas or have any money set aside for Thomas' benefit. All of the monies recovered were paid directly to Kosec in her individual capacity.

19. On October 25, 2004, Respondent and Adamson, along with lawyers representing other plaintiffs asserting claims as a result of the accident which killed Utey and injured Hopkins, filed suit in the Fourth Judicial District against Bridgestone/Firestone, Inc ("Bridgestone") and Bumper to Bumper Auto Salvage ("Bumper to Bumper"). Bridgestone was the manufacturer of the tire that failed; Bumper to Bumper sold the tire.

20. In approximately September of 2007, Respondent and Adamson agreed to a settlement with Bridgestone, the remaining defendant in the wrongful death suit, for \$550,000. In this settlement, for the first time, Respondent and Adamson sought the appointment of a guardian ad litem

("GAL") to protect the interests of the minor beneficiary, Thomas, and to obtain court approval of the settlement.

21. Although the wrongful death suit had been filed in the Fourth Judicial District, as a result of various judicial issues, the case was assigned to Hon. Linda M. Vanzi ("Judge Vanzi"), a district court judge in the Second Judicial District. Judge Vanzi granted the motion to have Kathleen M.V. Oakey, Esq. ("Oakey") appointed GAL.

22. As a result of Oakey's investigation, Judge Vanzi held a hearing on December 3, 2007 which resulted in the proceeds of the Bridgestone settlement being deposited into the court registry along with the balance of funds Respondent held in his trust account concerning the Utley matter. It also resulted in the court directing Oakey to pursue any claims she found to be viable on Thomas' behalf as a result of the actions and conduct of Respondent and Adamson in the handling of the claims arising from Utley's death.

23. On or about January 31, 2008, Judge Vanzi filed a disciplinary complaint concerning the actions and conduct of Respondent and Adamson in the handling of the claims arising from Utley's death.

COUNT I  
(Fee Agreements)

24. The above and foregoing allegations are incorporated herein as if fully set forth.

25. On March 14, 2003, Kosec met with Brandon C. Cummings ("Cummings"), Respondent's contract paralegal, at Adamson's office in

Farmington. Respondent was not present at this meeting. At that meeting, Cummings had Kosec sign multiple fee agreements for representation on **"A PERSONAL INJURY CASE ARISING FROM THE FACT THAT THE DECEASED, Cody Utley, WAS THE VICTIM OF Wrongful Death/Motor Vehicle Accident on 11-06-2002."** Kosec's signature on all of the fee agreements was dated March 14, 2003.

26. One of the fee agreements was signed by Kosec and by Cummings for Respondent; Cummings signature was dated March 14, 2003. This agreement provided for a 33 and 1/3% contingent fee, with a higher fee percentage only if the case went to trial or was appealed. This agreement also provided that Kosec would deposit \$25,000 for costs with Respondent upon receipt of life insurance or other proceeds.

27. Another of the fee agreements contained Kosec's and Cummings' signatures dated March 14, 2003 and Respondent's signature above Cummings. Respondent's signature was not separately dated. This fee agreement also provided for a 33 and 1/3% contingent fee, with a higher fee percentage only if the case went to trial or was appealed. This agreement also provided that Kosec would deposit \$25,000 for costs upon receipt of life insurance or other proceeds.

28. A third fee agreement signed by Kosec on March 14, 2003 did not contain Cummings' signature at all. Respondent signed this fee agreement; his signature was dated March 16, 2003. This fee agreement provided for a 33 and 1/3% contingent fee, with a higher fee percentage only if the case went to trial

or was appealed. This agreement also provided that Kosec would deposit \$25,000 for costs upon receipt of life insurance or other proceeds.

29. The fourth version of the fee agreement also contained Kosec's signature dated March 14, 2003. It also contained Respondent's signature dated March 16, 2003. This fee agreement contained a different page two than any of the other versions. Not only were the subparagraphs identified differently, but also the contingency fee was set at 40%, with an even higher percentage if the case went to trial or was appealed. This fee agreement did not provide for a deposit of costs by Kosec.

30. The 40% fee agreement was not a separate agreement signed by Kosec. Rather, the page reflecting the 40% fee was inserted to replace a page showing a 33 and 1/3% fee in one of the agreements Kosec signed on March 14, 2003. This was done without Kosec's knowledge or consent.

31. At various times, Respondent and Adamson utilized the terms of different versions of the fee agreement. Respondent did require Kosec to make a cost deposit of \$25,000 upon receipt of life insurance proceeds from Prudential, as required by the fee agreements listing a 33 and 1/3% contingent fee. The proposal Respondent submitted to the GAL for distributing the proceeds of the final settlement, with Bridgestone, claimed a 40% fee.

32. On October 25, 2004, Respondent and Adamson had Arthur Vargas, Esq. ("Vargas") appointed personal representative for the wrongful death suit Respondent planned to file as a result of Utley's death.

33. A fifth version of the fee agreement was signed on May 16, 2004 by Arthur Vargas, Esq. ("Vargas"), when he was appointed personal representative of the wrongful death estate of Uteley. The fee agreement signed by Vargas provided for a 40% contingency fee; the section on cost deposits was marked through with an "x." Vargas signed this fee agreement as personal representative more than one year after Kosec paid the \$25,000 cost deposit to Respondent from life insurance proceeds.

34. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-104(B), by failing to explain the fee arrangement to the extent necessary to permit the client to make informed decisions about the representation;

b) Rule 16-105(B), by failing to communicate the basis or rate of the fee to the client;

c) Alternatively, Rule 16-105(C), by failing to accurately state the percentage or percentages that would accrue to him in the case of settlement;

d) Rule 16-107(B), by engaging in a conflict of interest by representing a client which the representation was materially limited his interest in obtaining a higher fee; and

e) Rule 16-804(D), by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.



35. The witnesses presently known to disciplinary counsel are as follows:

Dennis W. Montoya, Esq.  
P.O. Box 15235  
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder  
5414 S. 2500 W.  
Roy, Utah 84067-1661

Kathleen M. V. Oakey, Esq.  
P.O. Box 6695  
Albuquerque, NM 87197-6695

Ronald R. Adamson, Esq.  
217 N. Schwartz Ave.  
Farmington, NM 87401-5546

COUNT II  
(Misrepresentations to Probate Court)

36. The above and foregoing allegations are incorporated herein as if fully set forth.

37. On March 18, 2003, Respondent filed in the Eleventh Judicial District, San Juan County, an Application for Informal Appointment of Personal Representative in the *Matter of the Estate of Cody Utley*, Case No. PB 2003-18 ("Application").

38. The Application Respondent filed alleged that Petitioner, Tresa Kosec, was the "wife of the decedent, Cody Utley, and the mother of decedent's children, Brionna Kosec and Thomas Utley...." It further stated that no personal representative had been appointed and Petitioner was not aware of any demand for notice of any probate or appointment proceeding. The Application requested an order that Utley died intestate and an order "determining the heirs."

39. On April 3, 2003, Hon. Thomas J. Hynes, 11<sup>th</sup> Judicial District Judge signed the Order for Informal Administration, Appointment of Personal

Representative, Order of Intestacy, and Determination of Heirship ("Order"). This Order was prepared and submitted by Respondent. No hearing was held on the Application before the Order was entered.

40. The Order specifically stated that the findings were "based upon the statements in the Application...." The order prepared by Respondent including the following findings:

- Applicant (Kosec) is the wife of Cody Utley, deceased;
- Brionna Kosec and Thomas Utley are the minor children of the deceased; and
- Deceased was married to Applicant (Kosec) at the time of his death.

41. The Order included the following orders:

- Application for appointment of Kosec as personal representative is granted;
- Decedent died intestate; his heir-at-law is his wife named above.

42. Prior to filing the Application, while dealing with issues concerning the collection of life insurance for Kosec, Respondent learned that there was no marriage certificate between Utley and Kosec. Kosec advised Respondent that there was no marriage certificate and that she and Utley had a common law marriage.

43. Respondent was aware that Kosec and Utley had lived together in Utah, that they considered themselves husband and wife and that they were raising a family together. Respondent researched Utah law and knew that Utah provided a procedure for declaring the validity of a marriage which had not been solemnized.

44. Respondent thought that Kosec and Utley had an established common law marriage and that, in order for that marriage to be recognizable in New Mexico, he needed to have a court acknowledge that the marriage had been established

45. Respondent discussed these matters with Cummings, his paralegal, and his co-counsel Adamson.

46. The Application filed by Respondent to have Kosec appointed personal representative did not alert the court that there was any issue regarding the marriage of Kosec and Utley. It did not allege that the claim that Kosec was Utley's wife was based on a claim that a common law marriage had been established in Utah. Nor did it ask the court to recognize the establishment of the marriage under the Utah statute. Instead, the Application stated the conclusion that Kosec was the wife of Utley without any indication to the court that there was no certificate of marriage, as required by New Mexico law.

47. The application also alleged that Brionna Kosec was a legal heir of Utley. The application did not advise the court that Brionna was not the biological child of Utley, that she had not been adopted by Utley, or that

Respondent was relying upon a theory of "de facto" adoption for Brionna's claim as an heir.

48. The Order prepared by Respondent and presented to the Court stated that, "[b]ased upon the statements made in the Application, the Court Finds...." The stated findings included that Kosec is the wife of Utlej and that Brionna and Thomas are Utlej's minor children.

49. The "order" portion of the Order prepared by Respondent specifically stated that Kosec was the heir-in-law of Utlej.

50. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-101, competence, by failing to take appropriate steps to have the common law marriage between Kosec and Utlej established under the terms of the Utah statute;

b) Rule 16-303(A)(1), by knowingly making a false statement of fact or law to a tribunal;

c) Rule 16-303(D), by failing in an *ex parte* proceeding to inform the tribunal of all material facts known to him that would enable the tribunal to make an informed decision;

d) Rule 16-804(C), by engaging in conduct involving fraud, deceit, dishonesty or misrepresentation; and

e) Rule 16-804(D), by engaging in conduct prejudicial to the administration of justice.

51. The witnesses presently known to disciplinary counsel concerning this Count are as follows:

Dennis W. Montoya, Esq.  
P.O. Box 15235  
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder  
5414 S. 2500 W.  
Roy, Utah 84067-1661

Kathleen M. V. Oakey, Esq.  
P.O. Box 6695  
Albuquerque, NM 87197-6695

Ronald R. Adamson, Esq.  
217 N. Schwartz Ave.  
Farmington, NM 87401-5546

COUNT III  
(Misrepresentation to Worker's Compensation Court)

52. Respondent also represented the Estate of Cody Utley in pursuing worker's compensation benefits.

53. In pleadings filed in the worker's compensation case, Respondent misrepresented that Brionna was Utley's child and that she was named "Brionna Utley."

54. Respondent knew that Brionna was not Utley's natural child and that she had not been adopted by Utley. Respondent knew that Brionna's legal last name was "Kosec"

55. Respondent did not advise the worker's compensation court that Brionna was not Utley's child or that he relying on a theory of "de facto" adoption to represent that Brionna was Utley's child.

56. Respondent did not advise the worker's compensation court that Brionna's legal last name was Kosec, not Utley.

57. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-303(A)(1), by knowingly making a false statement of fact or law to a tribunal;

b) Rule 16-804(C), by engaging in conduct involving fraud, deceit, dishonesty or misrepresentation; and

c) Rule 16-804(D), by engaging in conduct prejudicial to the administration of justice.

58. The witnesses presently known to disciplinary counsel concerning this Count are as follows:

Dennis W. Montoya, Esq.  
P.O. Box 15235  
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder  
5414 S. 2500 W.  
Roy, Utah 84067-1661

Kathleen M. V. Oakey, Esq.  
P.O. Box 6695  
Albuquerque, NM 87197-6695

#### COUNT IV

(Misrepresentations in the Wrongful Death Suit)

59. On October 25, 2004, a wrongful death suit was filed concerning claims arising from the accident in which Utley was killed.

60. Both the Complaint and the Amended Complaint were signed by Respondent.

61. Both the Complaint and the Amended Complaint specifically alleged that Kosec was the lawful wife of Utley.

62. Both the Complaint and the Amended Complaint alleged that Brionna was the "lawful daughter of Utley."

63. Neither the Complaint nor the Amended Complaint advised the court that Respondent was relying on a theory that Kosec was the common law wife of Utley based upon Utah law.

64. Neither the Complaint nor the Amended Complaint advised the court that Brionna was not Utley's natural daughter and had not been adopted by Utley.

65. Later, Respondent would represent to the GAL that he was not relying on a claim that Kosec and Utley were married for her claims, but rather was claiming Kosec was entitled to a loss of consortium under *Lozoya v. Sanchez*, 133 N.M. 579, 66 P.3d 948 (2003).

66. On or about June 14, 2006, Kosec's deposition was taken in the wrongful death suit. Kosec testified that Brionna's father was Clifford Bruin. She also testified that Utley never adopted Brionna.

67. On or about June 13, 2007, Respondent submitted a Settlement Position Letter to a Mediator selected and agreed upon by the parties. In the introductory section, Respondent alleged that Utley's death left "Tresa Kosec without her life partner. Brionna Kosec was left without the only father she had ever known. Thomas Utley no longer had a father."

68. In subsequent sections of the settlement letter, Respondent specifically and repeatedly referred to "Cody Utley's wife and two children."

Respondent did not advise the court that Respondent was relying on a theory that Kosec was the common law wife of Utley based upon Utah law or that Brionna was not Utley's natural daughter and had not been adopted by Utley.

69. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-303(A)(1), by knowingly making a false statement of fact or law to a tribunal;

b) Rule 16-804(C), by engaging in conduct involving fraud, deceit, dishonesty or misrepresentation; and

c) Rule 16-804(D), by engaging in conduct prejudicial to the administration of justice.

70. The witnesses presently known to disciplinary counsel concerning this Count are as follows:

Dennis W. Montoya, Esq.  
P.O. Box 15235  
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder  
5414 S. 2500 W.  
Roy, Utah 84067-1661

Kathleen M. V. Oakey, Esq.  
P.O. Box 6695  
Albuquerque, NM 87197-6695

COUNT V  
(Misrepresentations to Guardian Ad Litem)

71. The above and foregoing allegations are incorporated herein as if fully set forth.



72. On September 12, 2007 Respondent filed a motion to have Oakey appointed GAL for Thomas in the wrongful death suit. (Even though Respondent had also named Brionna as a plaintiff to make a claim for her for loss of consortium, he negotiated a settlement which included no proceeds for her, but did not dismiss her from the suit or seek the appointment of a GAL for her.)

73. The motion Respondent filed to have Oakey appointed GAL alleged, inter alia, that “[b]ecause the claims made and settlements reached involve a minor child, judicial approval of the proposed settlement is required...”, that Respondent represented the minor child, that the GAL would be acting as an arm of the court, and that the GAL should determine the reasonableness and fairness of the settlement and the manner in which the settlement monies should be held and used on behalf of the minor child.

74. After her appointment as GAL, Oakey began to investigate the proposed settlement. In the course of carrying out her duties, Oakey spoke to and corresponded with Respondent. In response, Respondent made various misrepresentations to Oakey.

75. In a letter dated October 15, 2007, Respondent advised Oakey that the Prudential life insurance proceeds had been paid to Kosec as the “named” beneficiary and as the “listed” beneficiary. Neither statement was true; no beneficiary was named in the policy.

76. In a letter dated October 19, 2007, Respondent represented to Oakey that he had been unable to obtain any documents from Prudential and

that Prudential "had closed their file years ago." When Oakey contacted Prudential directly, she was advised that there would be no problem in retrieving and providing a copy of the file. Prudential provided a copy of its file to Oakey upon receipt of a court order Oakey obtained for release of the file.

77. Oakey made inquiries about the costs for which Respondent was seeking reimbursement. One cost concerning which Oakey made inquiry was the amount paid to BCC Legal Services, Inc. ("BCC") BCC was the litigation support paralegal enterprise owned and operated by Cummings, Respondent's contract paralegal. Respondent advised Oakey in his October 19, 2007 letter that he had been unable to contact BCC because it was no longer in business and the entire staff was attending various law school.

78. At that time, Cummings was a student at the University of New Mexico Law School.

79. On September 12, 2007, Respondent had entered an appearance as Cummings' lawyer in *State of New Mexico v. Brandon C. Cummings*, Case No. DW495707 (Metro Court 2007).

80. Oakey obtained Cummings cell phone number from Kosec and was able to contact Cummings.

81. In his October 15, 2008 letter to Oakey, Respondent provided a settlement distribution statement for the Bumper to Bumper settlement for \$97,500. On the settlement statement provided by Respondent to Oakey, the signature line stated that the original had been signed by Kosec. In the body of

the October 15, 2008 letter, Respondent stated that Kosec had received the sum of \$38,061.25.

82. Kosec would have received that sum, \$38,061.25 only if Respondent had charged a 40% fee on the Bumper to Bumper settlement, as he later proposed on the Bridgestone settlement.

83. In fact, the Bumper to Bumper settlement statement Kosec actually signed showed that Respondent took only a 33 and 1/3% fee and that Kosec received \$45,000 from that settlement, not \$38,061.25.

84. Respondent submitted an accounting to the GAL showing he had charged a forty percent (40%) fee on the Bumper to Bumper settlement in order to bolster his claim for a forty percent (40%) fee on the much larger Bridgestone settlement.

85. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-303(A)(1), by making false statements of material fact to a tribunal by making false statements to the GAL acting as an arm of the court;

b) Alternatively, Rule 16-401(A), by making a false statement to a third person in connection with the representation of a client;

c) Rule 16-804(C), by engaging in conduct involving misrepresentation, deceit or dishonesty; and

d) Rule 16-804(d), by engaging in conduct prejudicial to the administration of justice.

86. The following witnesses are presently known to disciplinary counsel:

Dennis W. Montoya, Esq.  
P.O. Box 15235  
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder  
5414 S. 2500 W.  
Roy, Utah 84067-1661

Kathleen M. V. Oakey, Esq.  
P.O. Box 6695  
Albuquerque, NM 87197-6695

Brandon C Cummings  
Unknown at this time

COUNT VI  
(Conflict of Interest)

87. The above and foregoing allegations are incorporated herein as if fully set forth.

88. In the course of representing Kosec, Respondent assisted her in recovering life insurance proceeds from The Prudential Insurance Company of America ("Prudential") from a policy that covered Utley through his employment with Key Energy (other misconduct which occurred in the process of obtaining life insurance proceeds is addressed in Count VII, *infra*).

89. Following the exchange of several letters, the proceeds were obtained and paid to Kosec in her individual capacity.

90. The proceeds were obtained for Kosec by Respondent's contract paralegal, Cummings, submitting the order appointing Kosec personal representative of Utley's estate and an affidavit signed by Kosec in which she

swore she was the common law wife of Utley and that, specifically, she lived with Utley in the State of Utah from November 1996 through July 1998.

91. Respondent's purpose in submitting the order appointing Kosec as the personal representative of Utley's estate and Kosec's affidavit to Prudential was to aid in establishing Kosec's claim. Establishing Kosec's claim to the life insurance proceeds was detrimental to the interests of Thomas because Prudential had advised that if Kosec was not married to Utley, the insurance proceeds would go to the children (Brionna had also been listed as Utley's child in documents submitted by Respondent and his staff to obtain the proceeds) and that a guardian would need to be appointed or Prudential could hold the funds until the children reached majority.

92. On or about July 1, 2003, the proceeds of the Prudential life insurance on the life of Utley were paid directly to Kosec in her individual capacity in the amount of \$73,806.97. None of this money was set aside for Thomas or paid to Kosec as the personal representative of Utley's estate.

93. In March of 2004, a worker's compensation proceeding brought by Respondent settled for a lump sum payment of \$55,000. The net proceeds of this settlement were paid to Kosec in her individual capacity by check dated April 3, 2004. None of the proceeds was set aside for Thomas or paid to Utley's estate.

94. The Complaint and the Amended Complaint filed in the wrongful death action against Bridgestone and Bumper to Bumper asserted claims on

behalf of the Wrongful Death Estate of Cody Utley as well as individual loss of consortium claims for Kosec, Brionna, and Thomas.

95. In November of 2005, Respondent settled with Bumper to Bumper for \$97,500.00. The net proceeds of this settlement were paid to Kosec in her individual capacity. None of the proceeds was set aside for Thomas (or Brionna) or paid to Vargas, the personal representative of Utley's wrongful death estate.

96. In July of 2007, Respondent negotiated a settlement of the wrongful death claim against Bridgestone for the sum of \$550,000. It was this settlement which was brought before Judge Vanzi and which led to the filing to the underlying complaint in this proceeding.

97. Respondent's proposed distribution statement allocated \$450,000 to Kosec and \$100,000 to Thomas.

98. The interests of Kosec and Thomas in the various claims and settlements obtained as a result of Utley's death were in conflict with regard to the distribution of the settlement funds by Respondent. Respondent continued to represent both Kosec and Thomas and prior to the Bridgestone settlement and failed to obtain court approval of the settlements for the minor heir's interest or have a GAL appointed for Thomas.

99. After Oakey was appointed GAL by Judge Vanzi, she began to investigate the proposed Bridgestone settlement. This led her to question the previous settlements, from which no money was set aside for Thomas.

100. On November 28, 2007, Respondent wrote to his co-counsel, Ronald Adamson, as well as to defense counsel in the wrongful death suit, advising them that he had been informed that the GAL:

"intends to argue that no proceeds of the proposed settlement should go to her. Ms. Oakey apparently believes that all proceeds of the settlement should go to Thomas Utley. Obviously, this is not acceptable to Ms. Kosec.

Therefore, it seems likely that the proposed settlement is about to be torpedoed. If you would like to discuss this before the December 3<sup>rd</sup> hearing, I would be happy to talk with any of you."

101. After previously settling three (3) claims for a total of \$226,290.80, without ensuring that any of the proceeds were set aside for Thomas, Respondent continued to pursue Kosec's interests at the expense of Thomas' interests in the settlement with Bridgestone.

102. Established New Mexico case law requires that attorneys pursuing claims in which a minor is a beneficiary exercise reasonable care to ensure that the minor beneficiary actually receives the proceeds. Competent representation of the interests of a minor beneficiary requires an attorney to ensure that funds are set aside for the minor.

103. Respondent failed to take steps to ensure that funds were set aside for Thomas from the claims arising from his father's death, including claims for loss of guidance and counseling, his claim as an heir of Utley's estate and his claim as a statutory beneficiary under the New Mexico Wrongful Death Act.

104. All proceeds paid directly to Kosec prior to court approval of the Bridgestone settlement were spent by Kosec. This included the proceeds of the Bumper to Bumper settlement, which occurred after Vargas was appointed as personal representative of the wrongful death estate of Utley. Some of the proceeds were spent on illegal drugs.

105. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

- a) Rule 16-101, by failing to provide competent representation in the distribution of settlement proceeds;
- b) Rule 16-101, by failing to seek court approval of settlements which should have benefited the minor, Thomas;
- c) Rule 16-107(A), by representing the substantially adverse interests of Kosec, Brionna and Thomas;
- d) Rule 16-107(B), by representing a client when the representation was materially limited by Respondent's responsibilities to another client or third person;
- e) Rule 16-108(G), by making aggregate settlements of the claims of Kosec and Thomas (and purportedly for Brionna) without obtaining the consent of each client after consultation (or court approval for the minor client);
- f) Rule 16-114(B), by failing to seek the appointment of a guardian or conservator or take other protective action for Thomas in the negotiation and distribution of settlement proceeds; and



g) Rule 16-804(D), by engaging in conduct prejudicial to the administration of justice.

106. The following witnesses are presently known to disciplinary counsel:

Dennis W. Montoya, Esq.  
P.O. Box 15235  
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder  
5414 S. 2500 W.  
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4112 State Road 68  
Ranchos de Taos, NM 87557-8836

Arthur O. Beach, Esq.  
P.O. Box AA  
Albuquerque, NM 87103-1626

#### COUNT VII

(False Statements; Aiding Unauthorized Practice of Law)

107. The above and foregoing allegations are incorporated herein as if fully set forth.

108. In the latter part of 2002 and early part of 2003, following Utley's death, Kosec corresponded with The Prudential Insurance Company of America ("Prudential") concerning a policy of life insurance covering Utley through Key Energy. Utley had not named a beneficiary for the policy on his life.

109. The first letter from Prudential was addressed to Kosec as "Tresa Utley." It requested that she complete a Beneficiary Statement. Kosec signed

the statement as "Tresa K. Kosec-Utley" and listed her relationship to Utley as "wife."

110. On December 16, 2002, Kosec submitted a Preferential Beneficiary's Affidavit attesting that she was the surviving spouse of Utley. She signed the affidavit, "Tresa Utley."

111. By letter dated December 31, 2002, Prudential informed Kosec that it could not make a determination of eligibility for benefits because the death certificate for Utley listed him as not married and did not list a surviving spouse. The letter requested a copy of Kosec's marriage certificate to Utley.

112. Subsequent letters from Prudential informed Kosec that because Utley was not married and no beneficiary was named in the policy, the proceeds would go to the minor children. The letters referred to both Thomas and Brionna as Utley's minor children and stated that a guardian would need to be appointed to receive the funds for them or the funds could be held by Prudential until they reached majority.

113. On April 10, 2003, Prudential wrote to Respondent acknowledging a telephone conversation with Respondent on March 17, 2003 in which it was discussed that the death certificate listed Utley as unmarried, that Utley's residence at the time of his death was in New Mexico, and that New Mexico does not recognize common law marriage. The letter further stated that Respondent had advised Prudential that Utley and Kosec had lived together in Utah and Utah does recognize common law marriage. Prudential requested "tax forms,

household bills, medical bills or any other information you can provide as verification of this marriage.”

114. By letter dated April 17, 2003, Cummings, Respondent’s contract paralegal, wrote to Prudential and demanded copies of the Prudential policies. Cummings enclosed with the letter a copy of Letters of Administration and Acceptance and Order for Informal Appointment of Personal Representative, Order of Intestacy, and Determination of Heirship appointing Kosec as Utle’s personal representative and heir. This was the Order Respondent obtained by representing that Kosec was Utle’s wife, without informing the district judge that there was an issue as to the establishment of a common law marriage between Kosec and Utle under Utah law. Cummings “demanded” release of the life insurance proceeds to Respondent and threatened suit if the proceeds were not promptly released.

115. On May 5, 2003, Respondent wrote to Prudential and threatened to file suit for bad faith unless Prudential released the life insurance proceeds.

116. Following an exchange of additional letters, on June 10, 2003, Cummings wrote to Prudential on Respondent’s letterhead enclosing an affidavit executed by Tresa Kosec. The affidavit stated, *inter alia*, that Kosec was the common law wife of Utle and that they lived together in Utah from November 1996 through July 1998. In his letter to Prudential, Cummings referred to Kosec’s “cohabitation” with Utle in Utah and stated, “Pursuant to Utah law, this

residency establishes the common-law marriage of Ms. Kosec-Utley and Mr. Utley." (Emphasis added)

117. This statement was incorrect and misleading; Utah law, §30-1-4.5, permits the recognition of a marriage that has not been solemnized if a court or administrative order establishes that certain criteria have been met. The statute does not provide that residency alone can establish a common law marriage under Utah law.

118. Cummings statement constituted the unauthorized practice of law. His June 10, 2003 letter to Prudential stated a legal opinion upon which he expected Prudential to rely to release the life insurance proceeds.

119. Life insurance proceeds totaling more than \$73,000 were paid directly to Kosec, not to or through the Estate of Cody Utley. None of the proceeds were set aside for Thomas.

120. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-101, competence, by failing to properly distribute the life insurance proceeds through Utley's estate;

b) Rule 16-401(A), by making a false statement of material fact or law to a third person through his legal assistant, by representing to Prudential that Kosec was the wife of Utley under Utah law and submitting an affidavit to that effect;

c) Rule 401(B), by failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client;

d) Rule 16-503(B), by failing to make reasonable efforts to ensure that his paralegal's conduct was compatible with the Rules of Professional Conduct;

e) Rule 16-503(C), by ordering or, with knowledge of the specific conduct, ratifying the conduct of his paralegal; and

f) Rule 16-505(A), by assisting another person to engage in the unauthorized practice of law.

121. The witnesses presently known to disciplinary counsel are as follows:

Dennis W. Montoya, Esq.  
P.O. Box 15235  
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder  
5414 S. 2500 W.  
Roy, Utah 84067-1661

Kathleen M. V. Oakey, Esq.  
P.O. Box 6695  
Albuquerque, NM 87197-6695

Brandon C. Cummings  
Unknown at this time

COUNT VIII  
(Failure to Provide Adequate Information to Client)

122. The above and foregoing allegations are incorporated herein as if fully set forth.

123. Respondent did not inform Kosec that the money received from the various settlements, or some portion, did not belong to her but to Thomas, or that she had a fiduciary to distribute the money to the child.

124. Respondent took no actions to discharge the duty he owed to Thomas as a statutory beneficiary of the wrongful death suit to protect Thomas' interest in receiving proceeds obtained for him.

125. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-101, by failing to provide competent representation;  
and

b) Rule 16-104(B), by failing to explain the matter to the extent necessary to permit the client to make informed decisions about the representation.

126. The witnesses presently known to disciplinary counsel are as follows:

Dennis W. Montoya, Esq.  
P.O. Box 15235  
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder  
5414 S. 2500 W.  
Roy, Utah 84067-1661

COUNT IX  
(Failure to Account for Funds)

127. The above and foregoing allegations are incorporated herein as if fully set forth.

128. In November of 2003, Respondent filed a worker's compensation claim for the Estate of Cody Utley, naming Kosec as Utley's wife and personal representative and both Thomas and Brionna as Utley's children.

129. Respondent settled the worker's compensation claim for the Estate of Cody Utley in early 2004 for \$55,000.00.

130. Respondent's accounting of the proceeds of this settlement showed that the net distribution to Kosec was \$26,270.47 and that the net proceeds were distributed directly to Kosec.

131. Contrary to the representation on the accounting, the check given to Kosec was in the amount of \$23,135.24.

132. At no time did Respondent distribute the remaining \$3,135.23 or provide an accounting for that amount.

133. One of the attachments to Respondent's October 15, 2008 letter to the GAL was what Respondent represented was "[a]n item by item breakdown of all expenses showing the remaining balance as \$68,785.54." ("Cost Log") (Emphasis added)

134. The Cost Log included items totaling more than \$40,000 which had not in fact been paid, including items Respondent later stated he had no intention of paying.

135. The Cost Log included duplicate items.

136. On or about January 9, 2008, Respondent provided the GAL a copy of his trust ledger for the Utley matter.

137. The ledger failed to include at least two trust account checks written in connection with the Utley matter, check no. 1522 to Cummings for \$1,000 dated February 4, 2004 and check no. 1524 to Paul Leischer for \$35.00.

138. At the time check nos. 1522 and 1524 were written, Respondent had not entered into a fee agreement with Kosec and had not received any funds from which these costs could be paid. These costs related to the Utley matter were paid using the funds of other clients.

139. The trust ledger listed check no. 1550 as being written to Respondent's firm for \$15,129.16. In fact, check no. 1550 was written to Respondent's firm for \$23,129.16. This check was written for attorney's fees from the settlement of the Bumper to Bumper claim for \$97,500.

140. Although check no. 1550 was written for more than was shown on the trust ledger, it did not disburse the entire attorney's fee Respondent claimed from the Bumper to Bumper settlement. Respondent has produced two different settlement statements (Attorney's Final Account of Litigation Proceeds) for the settlement of the claim against Bumper to Bumper. On the version signed by Kosec, the attorney's fees were calculated at 33 and 1/3% and the total, including gross receipts tax, was \$34,693.75; on the other, the version provided to the GAL, the attorney's fees were calculated at 40% and the total, including gross receipts tax, was \$41, 632.50.



141. Under either version of the accounting for the Bumper to Bumper settlement, a portion of the attorney's fee Respondent claimed remained in the trust account and was commingled with client funds.

142. On April 7, 2008, at the GAL's request, Respondent deposited into the court registry the sum shown on his trust ledger as balance being held in connection with the Utley matter. In fact, there was \$8,000.00 less in the trust for the Utley matter.

143. Respondent deposited funds belonging to other clients into the court registry.

144. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

- a) Rule 16-105(C), by failing to provide a written statement upon the conclusion of a contingent fee matter showing the remittance to the client and the method of its determination;
- b) Rule 16-115(A), by failing to safeguard client funds, by paying Utley expenses using the funds of other clients and by depositing funds belonging to other clients into the court registry;
- c) Rule 16-115(A), by failing to keep funds belonging to him separate from client funds;
- d) Rule 16-115(A), by failing to generate and maintain complete and accurate trust account records;

e) Rule 16-115(B), by failing to promptly deliver funds owed to a client.

145. The witnesses presently known to disciplinary counsel are as follows;

Dennis W. Montoya, Esq.  
P.O. Box 15235  
Rio Rancho, NM 87174-0235

Kathleen M. V. Oakey, Esq.  
P.O. Box 6695  
Albuquerque, NM 87197-6695

#### FACTORS IN AGGRAVATION

146. Respondent's misconduct displayed a selfish or dishonest motive.

147. Respondent engaged in a pattern of misconduct.

148. Respondent committed multiple disciplinary violations.

149. Respondent has refused to acknowledge the wrongful nature of his misconduct.

150. Respondent's clients, especially the minor child Thomas, were vulnerable to Respondent's misconduct.

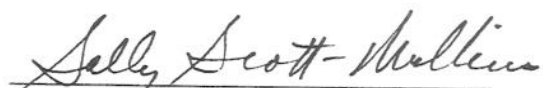
151. Respondent has substantial experience in the practice of law, having been licensed in New Mexico since 1985.

152. It is anticipated that this matter will be prosecuted by deputy chief disciplinary counsel Sally E. Scott-Mullins.

**WHEREFORE**, by reason of the foregoing, it is respectfully requested pursuant to Rule 17-309 NMRA, that a hearing committee be assigned to hear evidence and make findings of fact and recommendations to the Disciplinary

Board and, if any of the charges are sustained, the Respondent be disciplined and assessed the costs of this proceeding.

Respectfully submitted,



Sally Scott-Mullins  
Deputy Chief Disciplinary Counsel  
20 First Plaza NW, Suite 710  
Albuquerque, NM 87102  
(505) 842-5781

Done this 28<sup>th</sup> day of April, 2010  
In Albuquerque, New Mexico