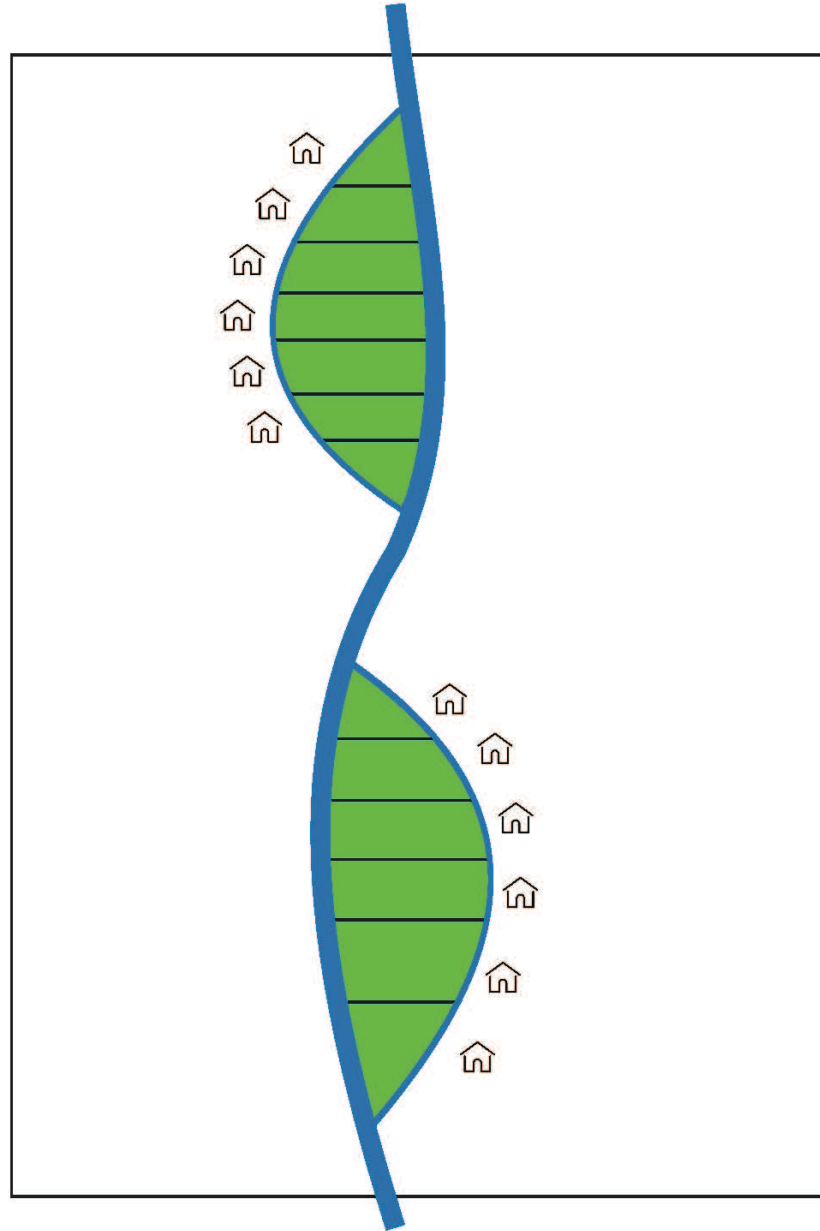



**ETHICS — *MORE THAN TOM CATRON:
LAND GRANTS AND THE UNETHICAL
PRACTICES OF ATTORNEYS IN NEW
MEXICO***

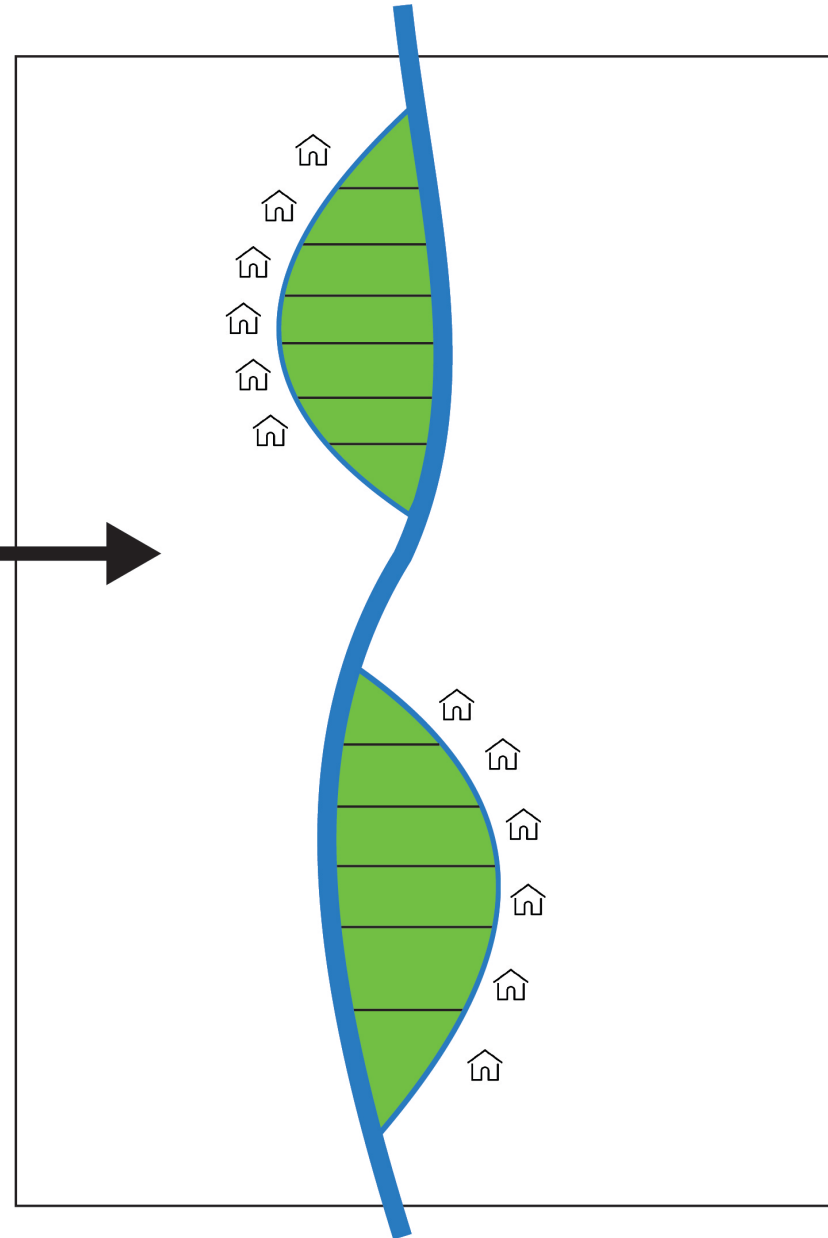
David Benavides, NM Legal Aid

True Common Lands



Tenancy in Common


46 Co-owners
Each Having
a $1/46^{\text{th}}$
“Undivided”
Share



PARTITION LAW - 1876

Suit can ONLY take place if the land is a tenancy-in-common. Plaintiff must be a co-tenant.

Plaintiff is trying to "extract" his or her share from the whole.

The usual result is the SALE of the whole piece of land held in common and division of the proceeds.

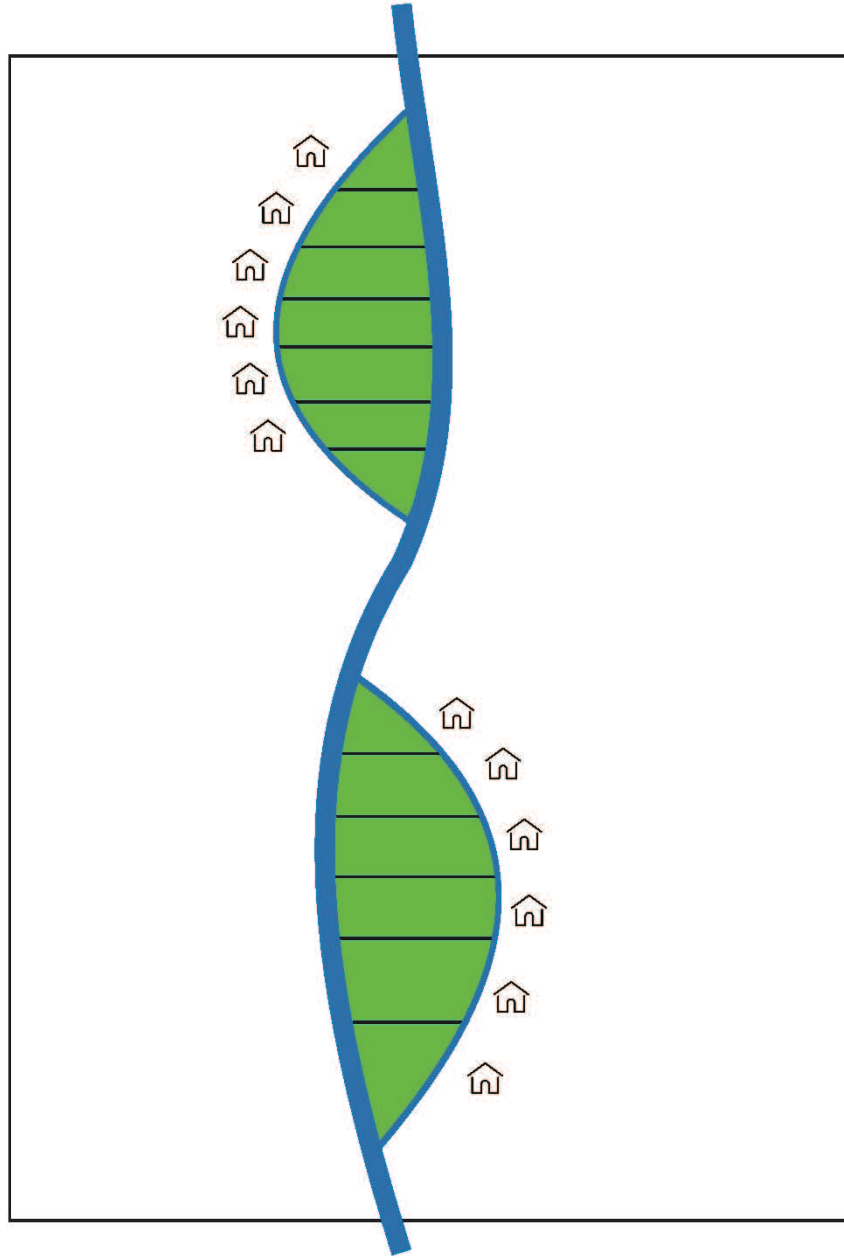
Plaintiff does not need the consent of any of the other co-tenants.

Classic example: Family land after parents die
Different Legal Traditions, Individual Rights


N. M. S.A. 1978, Ch. 42, Art. 5 Partition

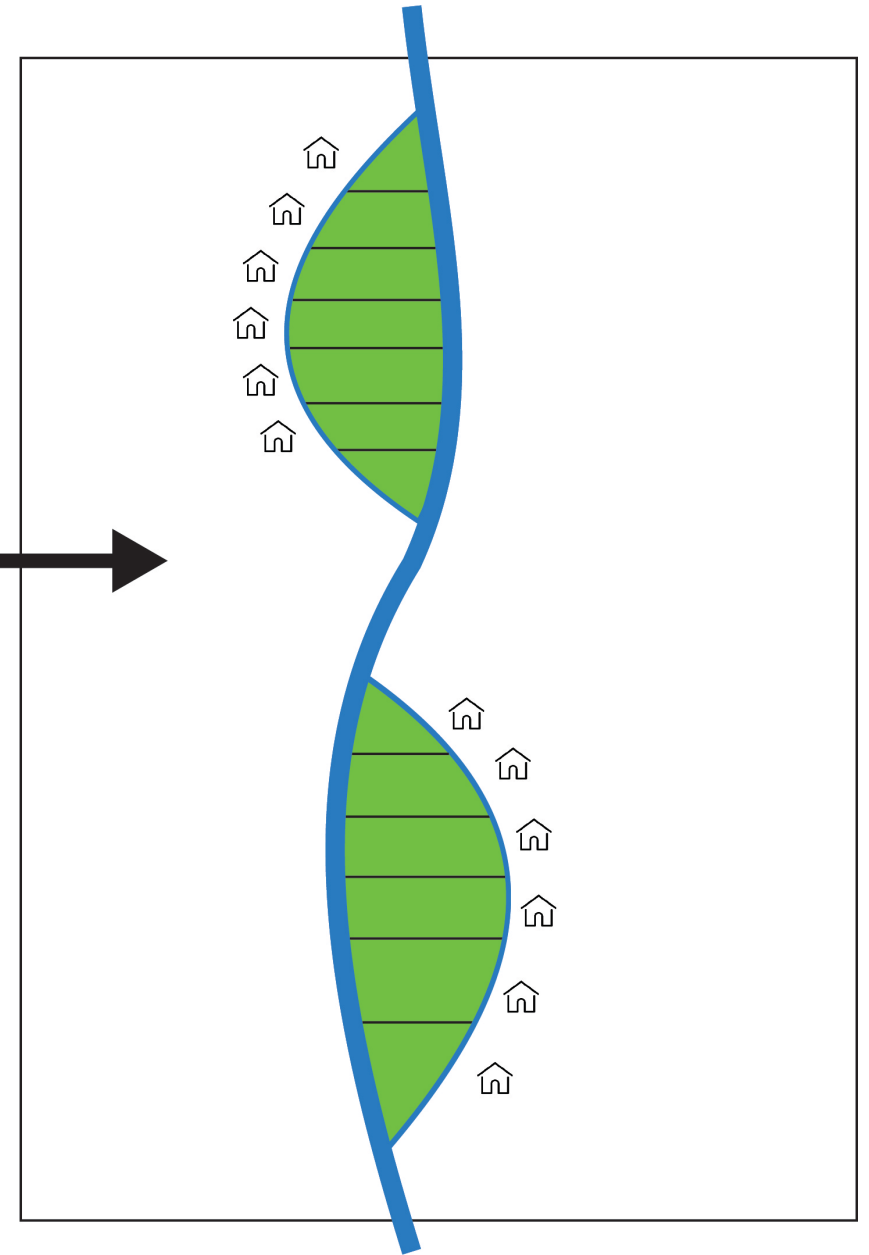
- § 42-5-1. Complaint; prayer
- § 42-5-2. Parties to action
- § 42-5-3. Unknown persons made parties
- § 42-5-4. Intervention
- § 42-5-5. Decree; binding effect
- § 42-5-6. Commissioners; appointment; qualifications; oath; partition of land; report
- § 42-5-7. **Finding that property cannot be partitioned**; appraisal; report of commissioners; contest of report; hearing; **sale**
- § 42-5-8. Allocation of costs of partition; definition
- § 42-5-9. Death of party does not abate suit

True Common Lands



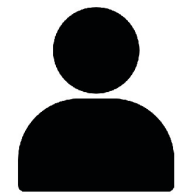
Tenancy in Common


46 Co-owners
Each Having
a 1/46th
“Undivided”
Share

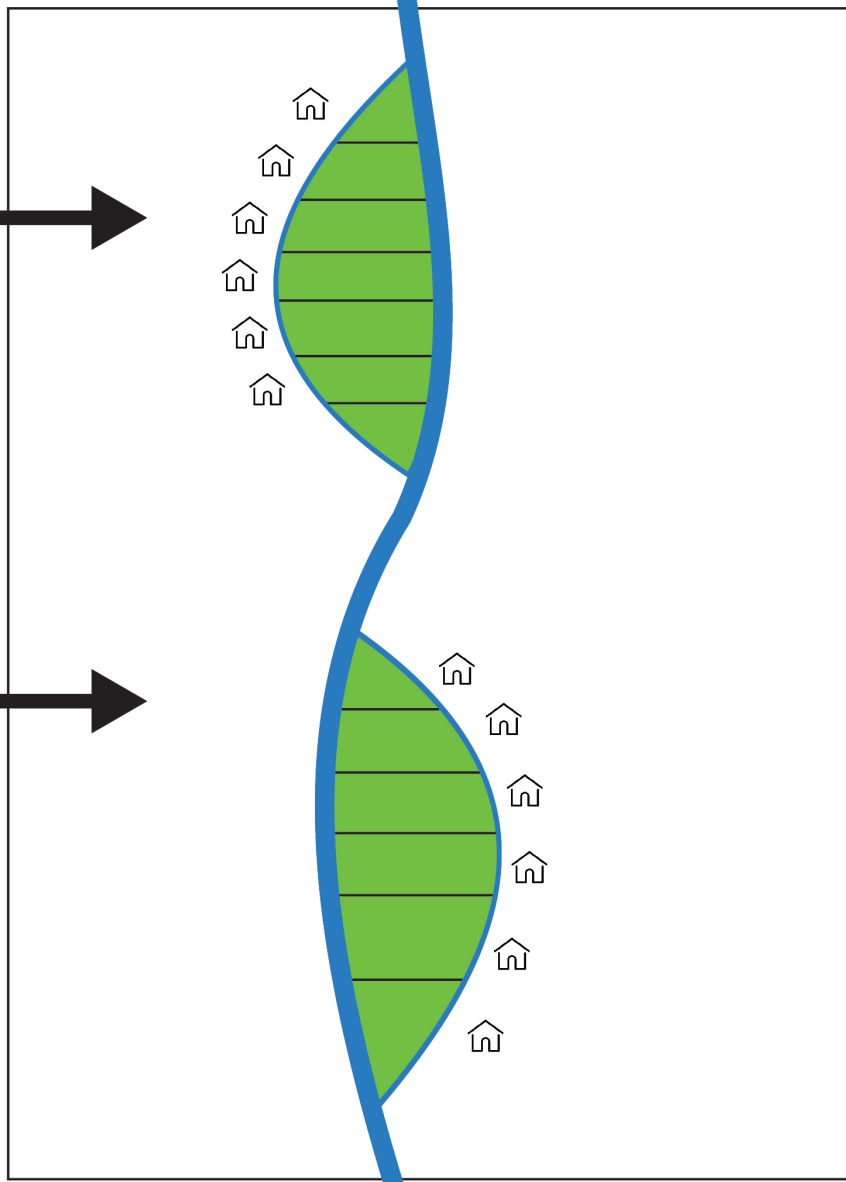


Tenancy in Common

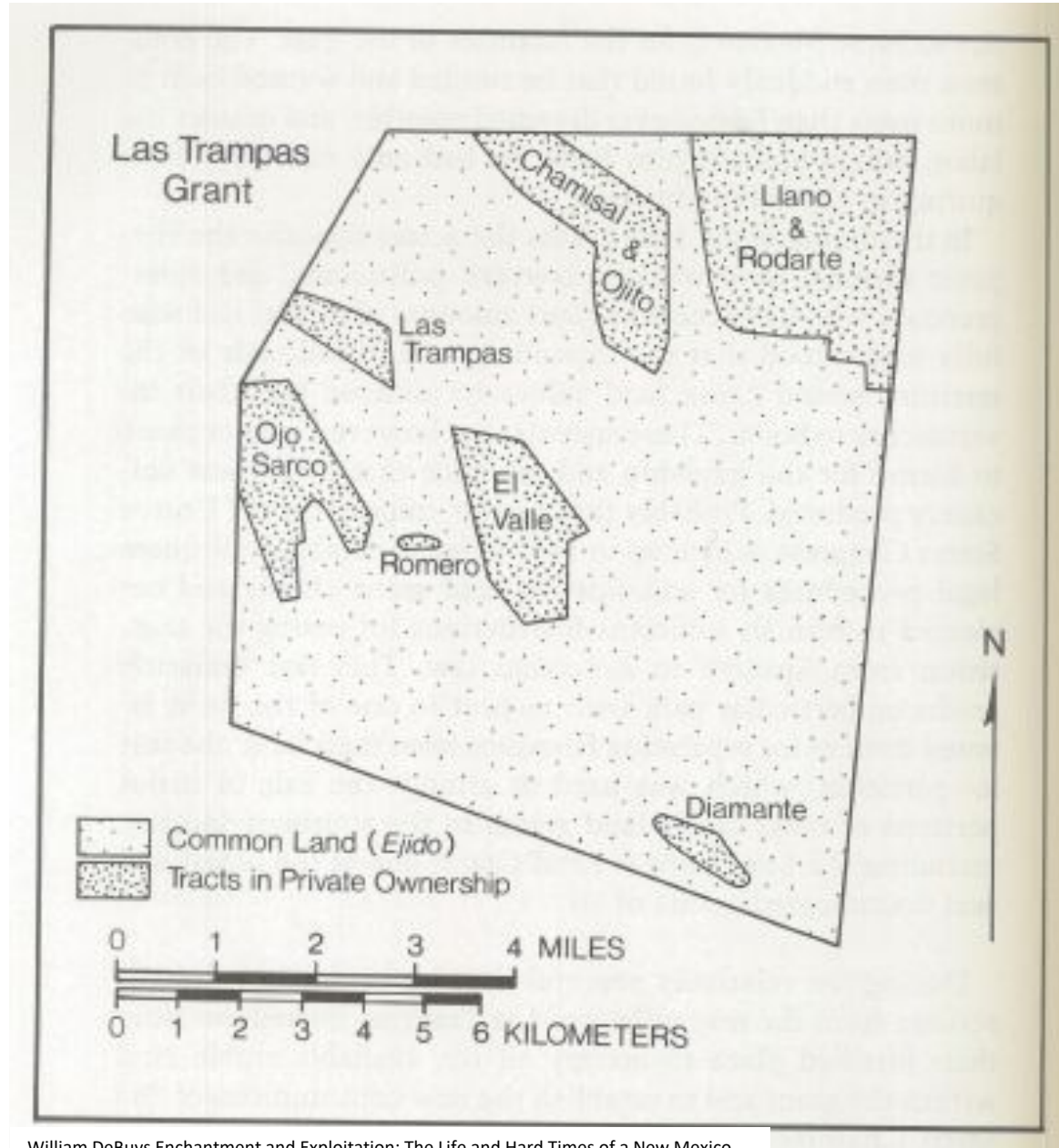
Attorney with a 40% undivided share of the land



46 Co-owners, each with a 1/46 undivided share of the remaining 60% of the land



Las Trampas Grant



Patented
Acreage:
28,131.67
(GAO Report)

CANDOR TOWARD YOUR CLIENT, ADVICE
ABOUT THE LAW AND THE PROBABLY
EFFECT OF DIFFERENT COURSES OF
ACTION.

16-104

16-104. Communication.

A. Status of matters. A lawyer shall:

“(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent...”

“(2) **reasonably consult with the client about the means by which the client’s objectives are to be accomplished;**

(3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.”

“B. Client’s informed decision-making. **A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.**”

16-201

6-201. Advisor.

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as **moral, economic, social and political factors**, that may be relevant to the client’s situation.”

Committee Commentary

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

OBLIGATION OF ZEALOUS ADVOCACY FOR CLIENT

Annotations

The 2008 amendment, approved by Supreme Court Order No. 08-8300-029, effective November 3, 2008 added the last sentence in the ninth paragraph to require a lawyer to "zealously protect and pursue a client's legitimate interests".

Preamble — A Lawyer's Responsibilities

"As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. **As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.** As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others."

16-107.
CONFLICT OF INTEREST; CURRENT CLIENTS

A. Representation involving concurrent conflict of interest. Except as provided in Paragraph B of this rule, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a **personal interest** of the lawyer.

Committee Commentary

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests.

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to **consider, recommend or carry out** an appropriate course of action for the client will be materially limited as a result of the lawyer's other **responsibilities or interests**.

16-107.
**CONFLICT OF INTEREST; CURRENT
CLIENTS**

B. Permissible representation when concurrent conflict exists. Notwithstanding the existence of a concurrent conflict of interest under Paragraph A of this rule, a lawyer may represent a client if:

- (1) the lawyer **reasonably believes** that the lawyer will be able to provide **competent and diligent** representation to each affected client;
- (2) the representation is **not** prohibited by law;
- (3) the representation **does not** involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives **informed consent**, confirmed in **writing**.

Committee Commentary

Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.

ACQUISITION BY THE
LAWYER OF AN INTEREST
IN THE SUBJECT-MATTER OF
THE LITIGATION

16-108 (I)

Committee Commentary

Paragraph I states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like Paragraph E, the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires.

“Proprietary interest in cause of action. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien authorized by law to secure the lawyer’s fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.”

16-109. DUTIES TO FORMER CLIENTS

“A. Subsequent representation. A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a **substantially related** matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

B. Subsequent representation; former law firm. A lawyer shall not knowingly represent a person in the same or a **substantially related** matter in which a firm with which the lawyer formerly was associated had previously represented a client:

- (1) whose interests are **materially adverse** to that person; and
- (2) about whom the lawyer had acquired information protected by Rule 16-106 NMRA and Paragraph C of Rule 16-109 NMRA of the Rules of Professional Conduct that is material to the matter, unless the former client gives **informed consent, confirmed in writing.**”

Committee Commentary

Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.

NO EXCESSIVE OR UNJUST
FEES

16-105

Committee Commentary

A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 16-108(A) NMRA of the Rules of Professional Conduct. However, a fee paid in property instead of money may be subject to the requirements of Rule 16-108(A) because such fees often have the essential qualities of a business transaction with the client.

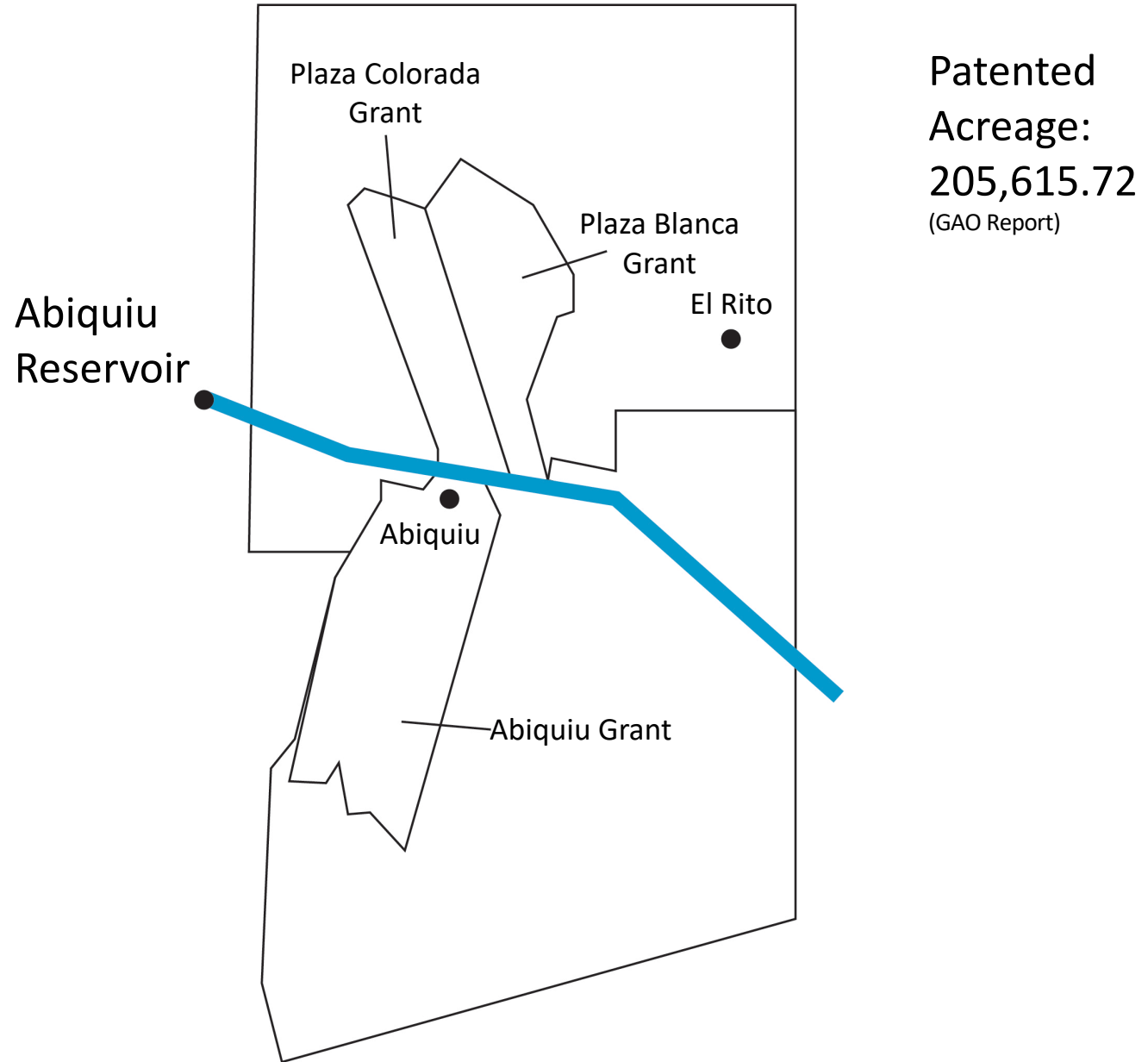
An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest.

16-105. Fees.

“A. Determination of reasonableness. A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses.”

“E. **Prohibited fee arrangements.** A lawyer shall not enter into an arrangement for, charge, or collect: (1)...which is contingent upon the securing of a divorce or upon the amount of alimony or support, **or property settlement in lieu thereof...**”

Juan Jose Lobato Land Grant



ALLOTMENT

A remedy where certain parties ask court to exclude their shares from the sale.

The New Mexico partition statute did not expressly provide for an allotment remedy; however, it could have been raised as an equitable remedy.

- Recognizing the considerable inequity of allowing one co-tenant to, in effect, displace an entire community without its consent, a court may well have viewed the allotment remedy as a fair compromise.
- Doubtful that the grantees--now without a lawyer--were aware that allotment was an option – if they were even aware of the partition suit.

LAWYERING IN COMPLIANCE WITH ETHICS RULES

1, The foremost alternative is that the lawyer negotiate with the clients, preferably under court supervision, for a FIXED TRACT OF LAND assessed at the proper fractional value of the whole grant which would then be conveyed to the lawyer separately after all services are rendered.

2. Another good faith alternative to a traditional partition sale would have been for the lawyer to contract that in any future partition suit, he would plead that the court partition only the lawyer's interest and treat all the other interests as ALLOTMENTS to be set aside from the sale under the equitable remedy of allotment

- The only known record of this type of agreement was with the Juan Jose Lovato Grant, a grant covering some 205,000 acres.
- 1894, in accordance with the agreement, Howard's half was physically set off--the northern half of the grant. It was not "mixed in" with the heirs' land, and so Howard could not sue for partition. The heirs retained their half and were not at risk of losing it to a lawyer-initiated partition sale.
- In return for obtaining a decree quantifying each heir's fractional interest, Howard in 1901 received one-quarter of the southern half of the grant.