A Survey of the Law of Legal Malpractice

Compiled by the Professional Liability Group of the Primerus Defense Institute

International Society of Primerus Law Firms

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Introduction

This compendium of legal malpractice law was prepared by members of the Primerus Defense Institute. Lawyers from throughout the country volunteered their time and expertise to prepare an overview of the law in all 50 states. Like any similar publication, it should not be used to provide a definitive answer to one particular set of circumstances. Rather, the intent was to prepare a basic overview of the law in each state, with the hope that the reader will find it useful and informative.

The defense of legal malpractice claims and lawsuits presents unique challenges, including the following:

- Legal malpractice is usually tort-based, but there may be an underlying contract which could also lead to a breach of contract claim. Typically, contract claims involve different statutes of limitation, different damages, and different defenses.
- When does the attorney-client relationship begin? Is it from the perspective of the attorney? Is it from the perspective of the actual client, or the "reasonable" client?
- What is the duty owed? Typically, the duty is one of "reasonable care" or "reasonable prudence". What does that mean in real life? All attorneys follow a code of ethics unique to their state of licensure. What role, if any, do these state ethics rules play in establishing the duty owed to a client? What about national standards such as those set forth in the American Bar Association's Code of Conduct? These ethical obligations guide the day-to-day practice of every attorney and may be relevant in a claim of legal malpractice.
- How far does an attorney's duty extend? Obviously, an attorney owes a duty to his or her client, but what about family members of the client? Business partners of the client? Third parties who may be injured or damaged as a result of the actions or inactions of the client?

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- The "case within a case". Attorneys deal with a myriad of issues. Some attorneys focus their practice on commercial and business matters. Some handle wills and probate. Others practice family law. Other attorneys may represent criminal defendants or specialize in the

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prosecution or defense of personal injury or product liability claims. Many attorneys do a little bit of everything. If a client brings a case against his or her attorney, there needs to be proof of a breach of duty and harm as a result. Usually, this requires that the client prove that they would have received a better result in the underlying case but for the negligence. An attorney defending a legal malpractice claim needs to be conversant with the underlying case, and may need particular expertise and experience in handling the underlying matter.

- What damages are recoverable? Can attorney fees be recovered? What economic damages are recoverable? Can non-economic damages, such as mental anguish, be recovered?
- What affirmative defenses are available? For instance, was the claim brought within the statute of limitations? Is there a "discovery rule" that would toll the statute of limitations?
- Your client/insured is an attorney. What special considerations come into play when you are defending a peer?

The members of Primerus International Society of Law Firms, Defense Institute, are qualified to defend these cases and provide reasoned and experienced advice to bring about the best possible outcome. A complete listing of the members can be found at the Primerus International Society of Law Firms located at www.primerus.com-primerus-pdi.htm.

We hope you find this compendium beneficial. Should you need further assistance or advice please contact Primerus at 1-800-968-2211 to be directed to an attorney in your jurisdiction.

Alabama

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All legal malpractice actions filed in Alabama based on acts or omissions that occurred after April 12, 1988 come within the provisions of the Alabama Legal Services Liability Act ("ALSLA"). Ala. Code §§ 6-5-570 to 6-5-581 (1975). The Legislature intended for the ALSLA to encompass all claims against a legal service provider based on the provision of legal services. "There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action . . . ." Ala. Code § 6-5-573 (1975). A legal service liability action is defined by ALSLA as "all claims for injuries or damages or wrongful death whether in contract or in tort and whether based on an intentional or unintentional act or omission."

To recover for legal malpractice, a plaintiff must prove the same elements that must be proven in a negligence action: (1) duty; (2) breach of that duty; (3) causation; and (4) damages.[1] Additionally, the plaintiff must show either that but for the defendant's negligence, he would have recovered on the underlying cause of action, or that the outcome of the case would have been different.[2]

Proving Causation

The plaintiff in a legal malpractice case must prove that the alleged breach of the standard of care caused the plaintiff's injury.[3] Causation consists of two elements, cause in fact and proximate cause. Factual or "but for" causation "is that part of causation analysis that asks if the complained-of injury or damage would have occurred but for the act or omission of the defendant. The requirement of proximate cause in a legal malpractice action means the plaintiff must prove he would have prevailed in the underlying case absent attorney negligence. As the Alabama Supreme Court put it, "the plaintiff must show that but for the defendant's negligence he would have recovered on the underlying cause of action, or must offer proof that the outcome of the case would have been different."

The proximate cause requirement in a malpractice action based on representation in a criminal case is the same as for civil matters. The plaintiff must prove that "in the absence of the alleged negligence the outcome of the case would have been different.

Alabama

Damages

The element of damages has not been much litigated in Alabama. The standard statement of the measure of damages when an attorney is found liable for malpractice is still "the loss which has resulted from his negligence."[4]

While the case law is sparse on the subject, the Alabama Supreme Court has held that there can be no recovery for emotional distress in a legal malpractice action where the alleged malpractice does not involve any affirmative wrongdoing but merely neglect of duty.[5]

Punitive damages are unavailable in a legal malpractice action in the ordinary case because punitive damages are not usually recoverable for breach of contract. Some showing of fraudulent, malicious, willful, wanton, or reckless behavior or inaction must be made to support a claim for punitive damages.[6]

The Alabama Supreme Court applied these rules and held that a compensatory damages award of $500,000 was excessive where the plaintiff presented little evidence of mental anguish and only proved $7,200 in actual monetary loss from the malpractice. The Court remitted the compensatory award to $75,000. The punitive damages award at trial had been $249,000, slightly more than the 3:1 ratio dictated by Ala. Code § 6-11-21. The Court let the punitive award stand, however, because the attorney had misappropriated the proceeds of a client's settlement check, a "particularly reprehensible act."[7]

Defenses

Statute of Limitations. The limitations period for bringing a legal malpractice action under the ALSLA is two years. Ala. Code § 6-5-574 (1975). The cause of action, according to the statute, accrues when the "act or omission or failure giving rise to the claim" occurs.[8]

The time period is tolled if the cause of action is not immediately discoverable. If the action is not discovered and could not reasonably have been discovered within two years, then suit may be filed within six months of the date of discovery of the cause of action or discovery of facts that would reasonably lead to discovery of the cause of action, but in no event may the action be filed more than four years after the act or omission. In the case of a minor under four years of age, the minor has until his eighth birthday to bring the action.[9]

No other section of the ALSLA has been intensely litigated as the statute of limitations.[10] The ALSLA appeared to change the common law in Alabama that considered the limitations period for legal malpractice as running from the time the plaintiff actually sustained damages; the statute's language refers to the act or omission giving rise to the claim, not the injury.[11] In a plurality opinion in one case the Alabama Supreme Court adopted a literal reading of the statute, and held that the limitations period begins to run when the act or omission of malpractice occurs, not when the plaintiff actually sustains injury. This holding seemed to overrule a series of cases that held that the limitations period does not run until the plaintiff actually suffers legal injury and some cases cite this holding with approval. The Court has not issued a majority opinion resolving the conflict and providing definitive guidance.[12]

Contributory Negligence. The common law doctrine of contributory negligence is still followed in Alabama and has been allowed as a defense to a legal malpractice claim where the client failed to follow the attorney's advice and instructions.[13]

Assumption of the Risk. The Alabama Supreme Court has not decided whether assumption of the risk is a viable defense to a legal malpractice action, but the Court has held that it was not error for a trial court to instruct the jury on assumption of the risk as a defense to a medical malpractice claim.[14] The construct of the ALSLA is very similar to Alabama's statute governing malpractice claims against healthcare providers (the Alabama Medical Liability Act) and because of the analogy, consideration should be given to asserting the defense of assumption of the risk in a case where the facts would support it.

Alabama

Local Considerations

Admissibility of Disciplinary Violations. The violation of a rule of professional conduct does not give rise to an independent cause of action under the ALSLA.[15] A plaintiff in an ALSLA action may not offer evidence of an attorney's violating a rule of conduct to support their malpractice claim.[16] Evidence of any action taken in response to a charged violation of the professional rules is not admissible.[17] An attorney charged with malpractice may offer evidence of action taken in an effort to comply with any rule or official opinion or interpretation of the rules of professional conduct to support his defense.[18]

Expert Testimony Requirement. The ALSLA places the burden on plaintiffs to prove the legal service provider breached the applicable standard of care. The Alabama Supreme Court has consistently held that expert testimony is required to establish that an attorney has deviated from the applicable standard of care.[19]

There is an exception to the expert testimony requirement for instances where the want of skill or lack of care is so obvious that it is within the understanding of a layman. The Supreme Court recognized this exception in a case in which a client's lawyer failed to file her registration forms in a class action. In the same case the Court also held that expert testimony was not needed to support her claim that her lawyer breached the applicable standard of care in misrepresenting the lawyer's qualifications for the case, since "a trier of fact with common knowledge and experience could determine that an attorney's representation that he . . . has experience . . . when that representation is not true, violates the standard of care."[20]

Bifurcation. The ALSLA allows a lawyer defendant in a legal malpractice action to move for the underlying action upon which the malpractice claim is premised to be severed from the malpractice case itself. The statutory language is mandatory, providing that when malpractice liability is dependent on the resolution of an underlying action, "the court shall upon the motion of the legal services provider order the severance of the underlying action for separate trial."[21]

1 *Shows v. NCNB Nat'l Bank*, 585 So. 2d 880, 882 (Ala. 1991).

2 *Ind. Stave Co. v. Bell*, 678 So. 2d 770, 772 (Ala. 1996).

3 *Springer v. Jefferson County*, 595 So. 2d 1381, 1383-84 (Ala. 1992); Ind. Stave Co. v. Bell, 678 So. 2d 770, 772 (Ala. 1996).

4 *Mardis v. Shackleford*, 4 Ala. 493, 8 (Ala. 1842).

5 *Boros v. Baxley*, 621 So. 2d 240, 244 (Ala. 1993).

6 *Boros v. Baxley*, 621 So. 2d 240, 244 (Ala. 1993).

7 *Oliver v. Towns*, 770 So. 2d 1059, 1061 (Ala. 2000).

8 Ala. Code § 6-5-574 (1975).

9 Ala. Code § 6-5-574 (1975).

10 W. Michael Atchison & Robert P. MacKenzie, The Professional Liability of Attorneys in Alabama, 30 Cumb. L. Rev. 453, 475 (2000)

11 *Ex parte Panell*, 756 So. 2d 862, 865 (Ala. 1999)

12 The opinion in issued in *Ex Parte Panell* was a plurality opinion and only three justices agreed. The case seemed to overrule the line of cases following *Michael v. Beasley*, 583 So. 2d 245 (Ala. 1991), and *Cofield v. Smith*, 495 So. 2d 61 (Ala. 1986), that held that the limitations period does not run until the plaintiff actually suffers legal injury. See *Floyd v. Massey & Stotser, P.C.*, 807 So. 2d. 508, 511-12 (Ala. 2001). Some cases cite the Panell rule with approval, such as *Dennis v. Northcutt*, 887 So. 2d 219, 221 (Ala. 2004) and *Ex parte Seabol*, 782 So. 2d 212, 214 (Ala. 2000). In *Denbo v. DeBray*, 968 So. 2d 983 (Ala. 2006) the Court recognized but did not resolve the disparity and in *Price v. Ragland*, 966 So. 2d 246 (Ala. 2007) referred to Panell as a nonbinding opinion that applied only to actions brought after the decision was released.

13 *Ott v. Smith*, 413 So. 2d 1129 (Ala. 1982)

14 *Lyons v. Walker Reg'l Med. Ctr.*, 868 So. 2d 1071, 1085 (Ala. 2003)

15 Ala. Code § 6-5-578(b) (1975)

16 Ala. Code § 6-5-578(b) (1975)

17 Ala. Code § 6-5-578(b) (1975)

18 § 6-5-578(a)

19 *Valentine v. Watters*, 896 So. 2d 385, 392 (Ala. 2004)

20 *Valentine v. Watters*, 896 So. 2d 385, 394-395 (Ala. 2004)

21 Ala. Code § 6-5-579 (1975). While the statutory language appears to give the court no choice there does not appear to be Alabama case law clarifying whether the trial court has any discretion in ordering bifurcation, nor is there precedent on the question whether upon bifurcation the plaintiff must try the underlying case in the same forum and under the same standard of review that would originally have applied. See Atchison & MacKenzie, The Professional Liability of Attorneys in Alabama, 30 Cumb. L. Rev. 453, 485-86 (2000).

Alaska

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Legal malpractice actions in Alaska are based on the principles of contract and tort law.[1] A plaintiff must prove a deviation from the standard of care, proximate causation, and damages.[2] The plaintiff must do so by a preponderance of the evidence.[3] In order to prevail on a legal malpractice theory, a plaintiff must prove four elements: (1) the duty of the attorney to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the [attorney's] negligence.[4]

Generally, a lawyer who undertakes representation of a client is required to "have and use the knowledge, skill, and care ordinarily possessed and employed by members of the [legal] profession in good standing."[5] In most cases, the testimony of an expert is necessary to establish that the conduct of an attorney fell below the standard of care required of the profession. Expert testimony is not required in non-technical situations where negligence is evident to lay people or where the fault is so clear as to constitute negligence as a matter of law.[6]

Duty

Generally, a legal malpractice claim requires the existence of an attorney-client relationship,[7] and an attorney is liable only for actions within the scope of the attorney-client relationship.[8] In the context of legal malpractice, an attorney's obligations involve the duty to advise the client of action the client should take in a given set of circumstances.[9] Where the law is unsettled, there is at least a viable claim that the standard of care requires the attorney to advise a client to follow the reasonably prudent course of action in light of the uncertainty, such that Alaska. R. Civ. P. 12(b)(6)[10] dismissal is inappropriate.[11]

Breach

A lawyer who fails to use such skill, prudence and diligence as other lawyers commonly possess and who would exercise under similar circumstances breaches the standard of care.[12] Professional ethics rules "are evidence of the scope of the duties owed by an attorney to a client or former client," eve3n though "actions which constitute a violation of professional ethics rules may not constitute actionable legal malpractice.[13]

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Duty includes the obligation to "advise the client of action the client should take in a given set of circumstances."[14] Failure to advise a client of a course of action that would protect the client from a clearly foreseeable risk will constitute a breach of the lawyer's duty as a matter of law.[15] Moreover, the attorney's concern regarding the client's willingness to pay the additional costs of the course of conduct does not excuse or justify the lawyer's failure to advise the client to take the additional steps.[16]

Causation

In Alaska, "to make out a prima facie case for [legal] malpractice, the plaintiff must show that the defendants were the cause of her injury."[17] Foreseeability of the harm is the critical inquiry.[18] The plaintiff must show that "but for the negligence of [her] attorney, [she] would have received a more favorable result."[19] This standard applies in both the litigation and transactional contexts.[20]

Damages

In legal malpractice cases, Alaska follows the general tort rule that "all damages, whether special or general, which are proximately caused by a party's tortious actions are recoverable."[21] A legal malpractice plaintiff may recover actual damages, including attorney's fees and costs.[22] Attorney's fees incurred as a result of the defendant attorney's negligence may be recovered by a plaintiff in a legal malpractice action.[23] In Alaska, emotional distress damages are generally not awarded in legal malpractice cases, absent a showing of severe emotional distress or a preexisting special duty.

In Alaska, prejudgment interest is an item of compensatory damages.[24] Interest is awarded at a rate three percentage points above that of the 12th Federal Reserve District discount rate, in effect on January 2 of the year in which the judgment is entered.[25] Prejudgment interest may not be awarded for future economic damages, future non-economic damages, or punitive damages.[26]

A significant peculiarity of Alaska law is its provision for the prevailing party's attorney fees.[27] The prevailing party is entitled to recover partial reasonable attorney fees as a matter of course in Alaska litigation. Where the prevailing party recovers a money judgment, the attorney's fee award is typically calculated as a percentage pf the verdict amount plus prejudgment interest.[28]

Punitive damages may be awarded in legal malpractice cases.[29] Under AS 09.17.020, the statute that addresses awards of punitive damages, the plaintiff must prove by clear and convincing evidence that the defendant's conduct "was outrageous, including acts done with malice or bad motives"[30] or "evidenced reckless indifference to the interest of another person."[31] The plaintiff need not prove that the defendant acted with actual malice.[32]

An award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to the plaintiff in the action[33] or the sum of $500,000.[34] If the defendant's conduct was motivated by financial gain and the adverse consequences of the conduct were actually known by the defendant or the person responsible for making policy decisions on behalf of the defendant, the jury may award an amount of punitive damages not to exceed the greatest of four times the amount of compensatory damages awarded to the plaintiff in the action,[35] four times the aggregate amount of financial gain that the defendant received as a result of the defendant's misconduct,[36] or the sum of $ 7,000,000.[37]

Litigation Cases – The Case Within A Case

The Alaska Supreme Court has approvingly mentioned the "trial-within-a-trial" or "case within a case" approach to legal malpractice cases.[38] Although it has not yet expressly adopted the approach, the Court has indicated that trial courts may be free to use it when appropriate.[39] In *Power Constructors Inc. v. Taylor and Hintze*,[40] a case addressing legal malpractice where the underlying case was a civil case, the Court initially described how plaintiff in a civil action for legal malpractice must prevail when the

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underlying case is a **criminal** case. The Court stated that the plaintiff "is required to prove that the jury would have found [the plaintiff] innocent if [her] attorney has acted competently."[41] The Court went on to state:

> [The elements of legal malpractice] are traditionally handled by having a trial-within-a-trial, the goal of which is to determine what the result of the underlying proceeding or matter should have been [. . .]. The trial judge must determine issues of law which were not previously urged or adequately decided.[42]

The Court further noted that two judgments are at issue in a legal malpractice case – the judgment in the underlying case affected by the malpractice, and the judgment sought against the attorney for malpractice.[43] The value of each of the judgments must be separately considered when the trial court determines whether a jury award for malpractice exceeds the value of a pretrial offer of judgment.[44] Since the malpractice award compensates for the loss of a favorable judgment or the entry of an unfavorable one, the total value of the lost or unfavorable judgment must first be established.[45]

Because the Court had not formally adopted the trial-within-a-trial-approach, it held that the trial court in the case was not constrained to use it. The Court acknowledged that there may be cases in which it is improper to use it. For example, if the trial-within-a trial approach would not enable the jury to obtain an accurate evidential reflection or semblance of the original action, an alternative approach may be more appropriate.[46] Still, an earlier case suggests that the trial-within-a-trial approach, at least in the criminal context is the preferred approach.[47]

Defenses

Statute of Limitations

Failure to file the action within the applicable statute of limitations will result in dismissal of the action. Under Alaska law, malpractice actions have long been considered a hybrid for limitation purposes. The statute of limitation for a professional malpractice claim depends on the nature of the injury.[48] If the nature of the injury alleged is economic loss, the statute of limitation applicable to contract actions (3 years) applies.[49] However, if the nature of the injury is to a person's personal or reputational interest, the two-year tort statute of limitation applies.[50] Special rules apply in the context of claims against criminal defense attorneys.[51]

The limitation period begins to run when the claim accrues, which is governed by the "discovery rule." This means the statute of limitations for legal malpractice does not begin to run until the plaintiff discovers, or reasonably should discover, existence of all elements of his cause of action.[52] Thus, if client discovers his attorney's negligence before he suffers consequential damages, the statute of limitations will not begin to run until client suffers actual damages.[53] It is not necessary that the client suffer all of the damages caused by the attorney's malpractice before the statute of limitations begins to run, nor is it necessary that the client know the full extent of his damages.[54]

Comparative Negligence

Alaska follows a system of pure comparative fault. Under AS 09.17.080, apportionment of fault may be made in "all actions involving the fault of more than one person." The finder of fact may allocate fault to "each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages."[55] Fault may be apportioned to legal malpractice plaintiffs.[56]

Collectibility

When a legal claim is lost through professional negligence, actual damage occurs only if the claim is meritorious and has value.[57] Consequently, an attorney also has a defense to a malpractice claim if a judgment is not collectable. In some cases, the Plaintiff/Client claims a judgment (or settlement) the plaintiff received in the prior case would have been higher if not for the lawyer's negligence.[58] The lawyer may defend by arguing that some or all of the higher award would not have been collectible.[59] Stated differently, the plaintiff is not harmed by the loss of a claim. The defendant attorney has the burden of proving uncollectibility."[60]

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1 *Breck v. Moore*, 910 P. 2d 599, 604 (Alaska 1996).
2 *Id.* at 603 (Alaska 1996).
3 *Cavanah v. Martin*, 590 P.2d 41, 42 (Alaska 1979).
4 *Zok v. Collins*, 18 P.3d 39, 42 n.8 (Alaska 2001) (alteration in original) (quoting *Shaw v. State, Dep't of Admin., Pub. Defender Agency*, 816 P.2d 1358, 1361 n.5 (Alaska 1991)).
5 *Doe v, Hughes, Thorsness, Gantz, Powell, & Brundin*, 838 P.2d 804 P.2d 804, 806 (Alaska 1992); *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin*, 828 P.2d 745, 765 (Alaska 1992).
6 *Bohna*, 828 P.2d at 761 (Alaska 1992).
7 *Miller v. Sears*, 636 P.2d 1183, 1190 (Alaska 1981).
8 *Cummings v. Sea Lion Corp.*, 924 P.2d 1011, 1019 (Alaska 1996).
9 *Doe*, 838 P.2d at 807 (Alaska 1992).
10 Alaska R. Civ. P. 12(b)(6) addresses motions to dismiss for failure to state a claim upon which relief can be granted.
11 *Doe*, 838 P.2d at 807 (Alaska (1992).
12 *Bohna v Hughes, Thorseness, Gantz, Powell & Brundin*, 828 P.2d 745, 765 (Alaska 1992).
13 *Griffith v Taylor*, 937 P.2d 297, 301 n.7 (Alaska 1997).
14 *Doe*, 838 P.2d at 807.
15 *Id.*
16 *Id.*
17 *Tush v. Pharr*, 68 P.3d 1239, 1247 (Alaska 2003).
18 *Dinsmore-Poff v. Alvord*, 972 P.2d 978, 987 (Alaska 1999).
19 *Shaw*, 816 P.2d at 1360.
20 *Belland v. O.K. Lumber Co.*, 797 P.2d 638, 640 (Alaska 1990).
21 *ERA Helicopters, Inc. v. Digicon Alaska, Inc.*, 518 P.2d 1057, 1060 (Alaska 1974).
22 *Cummings*, 924 P.2d at 1022.
23 *Id.* at 1017.
24 *Guin v. Ha*, 591 P.2d 1281 (Alaska 1979).
25 AS 09.30.020.
26 AS 09.30.070(c).
27 Alaska R. Civ. P. 82.
28 *Id.*
29 *Cummings*, 924 P.2d at 1017.
30 AS 09.17.020(b)(1).
31 AS 09.17.020(b)(2).
32 *Dura Corp. v. Harned*, 703 P.2d 396, 405 n.5 (Alaska 1985).
33 AS 09.17.020(f)(1).
34 AS 09.17.020(f)(2).
35 AS 09.17.020(g)(1)
36 AS 09.17.020(g)(2)
37 AS 09.17.020(g)(3)
38 *See Shaw v. State, Department of Administration*, 861 P.2d 566, 573 (Alaska 1993); *Diamond v. Wagstaff*, 873 P.2d 1286, 1290 n.2 (Alaska 1994).
39 *Power Constructors, Inc. v. Taylor and Hintze*, 960 P.2d 20, 30 (Alaska 1998).
40 *Id.*
41 Power Constructors, Inc. 960 p.2d at 30.
42 *Id.* quoting *Shaw* 861 P.2d 566 at 573 n12 and 2 Mallen & Smith, Legal Malpractice § 27.1, at 624 (3d ed. 1989) (Emphasis and ellipses in original).
43 *Power Constructors, Inc.* 960 p.2d at 35.
44 *Power Constructors, Inc.* 960 P.2d at 39, citing *Bohna*, 828 P.2d 745 at 759.
45 *Id.* This entails calculation of prejudgment interest and attorney's fees on the judgment.
46 *Power Constructors, Inc.*, 960 P.2d at 30 (quoting *Lieberman v. Employers Insurance of Wausau*, 419 A.2d 417, 427 (N.J. 1980).
47 *Shaw v State*, 861 P.2d 566, 573 (Alaska 1993).
48 *Breck vs. Moore*, 910 P.2d 599, 603 (Alaska 1996); *Lee Houston & Associates, Ltd. v. Racine*, 806 P. 2d 848, 855 (Alaska 1991).
49 *Breck*, 910 P2d at 603; See also *Christianson vs. Conrad-Houston Insurance*, 318 P.3d 390, 398 (Alaska 2014).
50 AS 09.10.070.
51 A convicted criminal defendant must obtain post-conviction relief as a pre-requisite to maintaining a legal malpractice claim against his defense attorney. *Shaw v State*, 816 P.2d 1358, 1360 (1991). As a result, the statute of limitations is tolled so long as the plaintiff is pursuing post-conviction relief. *Id.*
52 *Greater Area, Inc. v. Bookman*, 657 P.2d 828 (Alaska 1982).
53 *Id.*
54 *Wettanen v. Cowper*, 749 P.2d 362 (Alaska 1988).
55 AS 09.17.080(a)(2).
56 *Pederson v. Barnes*, 139 P.3d 552, 560 (Alaska 2006).
57 *Power Constructors, Inc.*, 960 P.2d at 31. The plaintiff bears the burden of proving these elements of damage.
58 *Power Constructors, Inc.*, 960 P.2d at 32.
59 *Id.*
60 *Power Constructors, Inc.*, 960 P.2d at 31.

Arizona

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Arizona legal malpractice actions have been founded upon theories of breach of contract,[1] breach of fiduciary duty,[2] aiding and abetting a client in tortious conduct,[3] wrongful institution of civil proceedings,[4] and negligence. This compendium focuses primarily on legal malpractice based upon theories of negligence. In a negligence action against a lawyer, the plaintiff must show the basic elements of duty, breach of duty, causation and damages.[5] Specifically, the plaintiff must prove (1) the existence of an attorney-client relationship which imposes a duty on the attorney "to exercise that degree of skill, care, and knowledge commonly exercised by members of the profession," (2) breach of that duty, (3) that such negligence was the proximate cause of the resulting injury, and (4) the fact and extent of the injury.[6]

Arizona follows the Restatement of Law when there is no case or statute to the contrary. Hence, the Restatement (Third) of The Law Governing Lawyers provides guidance to the practitioner in a professional negligence case whether representing the lawyer or the client.[7]

Duty: Creation of the Attorney-Client Relationship and Obligations to Nonclients

When a person holds an objectively reasonable belief that the lawyer is acting as his attorney, relies on that belief and relationship, and the lawyer does not refute that belief, the court will conclude that an attorney-client relationship exists.[8] The Supreme Court of Arizona has held that "[I] n attorney-client business ventures, an attorney is deemed to be dealing with a client when 'it may fairly be said that because of other transactions an ordinary person would look to the lawyer as a protector rather than as an adversary.'"[9] For example, even though a client "must have known" that the attorney was not acting as his attorney in a particular transaction, because the two had a ten-year professional history, the client was still deemed a "client" for the purposes of professional rules of conduct.[10]

Arizona holds under certain circumstances that a lawyer may be liable to a nonclient to the extent that a foreseeable and specific third-party is injured by the lawyer's actions.[11]

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For example, a lawyer for a wrongful death plaintiff has been held to have duties to the wrongful death beneficiaries. An attorney hired by an insurer to represent an insured also owes a duty of care to the insurer when the interests of the insurer and the insured coincide.[12] Note, however, that if an actual conflict of interest exists, not simply a potential conflict, the lawyer's duty is exclusively owed to the insured and not the insurer.[13] One Arizona case also held that a lawyer for a guardian owes a duty to the ward,[14] however, this holding has been called into question by a subsequent amendment to the probate code.[15]

Proving Causation

In a legal malpractice action, the plaintiff must prove that but for the attorney's negligence, he would have been successful in the prosecution or defense of the original suit.[16] This is often referred to as proving the "case within a case."[17] In Arizona, the case within a case is judged on an objective standard, which means that the trier in the malpractice suit views the first suit from the standpoint of what a reasonable judge or jury would have decided, but for the attorney's negligence.[18] Of course, this requirement does not exist if the negligence involves a non-litigation matter.

Expert testimony is generally required to establish the standard of care in a professional malpractice action.[19] But it is not necessary where the negligence is so grossly apparent that a lay person would have no difficulty recognizing it.[20]

Arizona has adopted the ABA Model Rules of Professional Conduct (referred to as Ethical Rules or ERs). It is a matter of some debate whether a violation of the ERs is a violation of the standard of care. At least one Arizona case has held that a violation of the ethical rules is evidence of a violation of the standard of care.[21]

Damages Recoverable

A plaintiff may recover compensatory damages in a legal malpractice action by proving that but for the attorney's negligence, the prosecution or defense of the original action would have been successful.[22] Arizona courts recognize that in legal malpractice actions, the value of the lost claim consists of the entire verdict, including compensatory and punitive damages.[23] Thus, in Arizona, if an attorney's negligence is the cause of dismissal of the underlying claim, the proper measure of damages is all compensatory and punitive damages awarded by the jury in the trial of the case within a case.[24]

In addition, punitive damages have historically been awarded against attorneys for the legal malpractice itself if it rises to the level of aggravated or outrageous conduct.[25] The plaintiff must also show by clear and convincing evidence that the attorney intentionally caused the plaintiff to be damaged or pursued a course of action by which he knowingly and consciously disregarded a substantial risk of significant harm.[26] Furthermore, Arizona permits punitive damages to be awarded vicariously against a law partnership for the acts one of its attorneys performed in the ordinary course of the partnership's business.[27] Arizona has not adopted the Restatement (Second) of Torts view requiring some employer participation or acquiescence in the employee's acts or that the employee was a manager of the employer.[28]

Damages for emotional distress are not permitted with two exceptions: (1) if the attorney intentionally harmed the plaintiff or acted in bad faith, or (2) if the malpractice results in direct damages to a personal interest – such as the loss of liberty or damage to a family relationship – as opposed to an economic interest.[29]

Attorney's fees are precluded in legal malpractice cases arising in tort in Arizona, even where there is an implied-in-law contract between attorney and client.[30] However, where there is an actual special contractual agreement or undertaking, such as an express promise to perform services under an oral contract, then attorney's fees may be awarded for those claims arising out of contract.[31]

Defenses

Common defenses in legal malpractice actions in Arizona are comparative fault and statute of limitations.

Arizona is a pure comparative fault jurisdiction, such that if the plaintiff is found to be at fault, her full damages shall be reduced in proportion to the relative degree of her

fault which is a proximate cause of the injury.[32] The question of whether a plaintiff is partially at fault is a question of fact for the jury.[33]

In Arizona, legal malpractice actions are subject to the two-year statute of limitations for tort claims.[34] The claim for legal malpractice accrues when (1) the plaintiff knows or reasonably should know of the attorney's negligent conduct *and* (2) the plaintiff's damages are ascertainable, and not speculative or contingent.[35] For example, in one case, defendant attorneys failed to properly secure a note owed to the plaintiff client by her ex-husband in their divorce case. The defendant attorneys argued that plaintiff knew or should have known by September 1987 that the alleged negligence had occurred because by that time the ex-husband had defaulted on the note, plaintiff had converted the obligation into a judgment for the full amount of the note, and she had retained a collections attorney to assist her in her collection efforts. However, it was not until October 27, 1987 that plaintiff received a letter from her collections attorney which was her first evidence that the note was truly uncollectible. Because plaintiff filed her malpractice action against the defendant attorneys on October 25, 1989, within two years of the accrual date, the court found that her action was not time-barred.[36]

Procedure

Plaintiffs are required to file and serve with a legal malpractice claim a written statement, certified by the plaintiff or her attorney, whether or not expert opinion testimony is necessary to prove the licensed professional's standard of care or liability for the claim.[37]

If the plaintiff or her attorney certifies that expert opinion testimony is necessary, the plaintiff must then serve a preliminary expert opinion affidavit along with the initial disclosures that are required by Rule 26.1, Ariz. R. Civ. P. Plaintiff may provide affidavits from as many experts as she deems necessary. The preliminary expert opinion affidavit shall contain at least the following information: (1) The expert's qualifications to express an opinion on the licensed professional's standard of care or liability for the claim; (2) The factual basis for each claim against a licensed professional; (3) The licensed professional's acts, errors or omissions that the expert considers to be a violation of the applicable standard of care resulting in liability; (4) The manner in which the licensed professional's acts, errors or omissions caused or contributed to the damages or other relief sought by the claimant.[38]

If the plaintiff or her attorney certifies that expert opinion testimony is not necessary and the defendant attorney disputes that certification in good faith, then the defendant attorney may apply by motion to the court for an order requiring the plaintiff to obtain and serve a preliminary expert opinion affidavit.[39]

The court, on its own motion or the motion of the defendant attorney, shall dismiss the claim against the defendant attorney without prejudice if the plaintiff fails to file and serve a preliminary expert opinion affidavit after the plaintiff or her attorney has certified that an affidavit is necessary.[40]

1 *Asphalt Engineers, Inc. v. Galusha*, 160 Ariz. 134, 138, 770 P.2d 1180, 1184 (Ct. App. 1989).
2 *See Ross v. Bartz*, 158 Ariz. 305, 306-07, 762 P.2d 592, 593-94 (Ct. App. 1988); Ariz. R. Prof'l Conduct (ER) 1.15, Ariz. R. Sup. Ct. 42, Comment 1; *see also Webb v. Gittlen*, 217 Ariz. 363, 367, 174 P.3d 275, 279 (2008) ("Attorneys are fiduciaries with duties of loyalty, care, and obedience, whose relationship with the client must be one of 'utmost trust'") (citing *In re Piatt*, 191 Ariz. 24, 26, 951 P.2d 889, 891 (1997).
3 *Chalpin v. Snyder*, 220 Ariz. 413, 418-19, 207 P.3d 666, 671-72 (Ct. App. 2008).
4 *Id.*, 220 Ariz. at 424, 207 P.3d at 677.
5 *Phillips v. Clancy*, 152 Ariz. 415, 418, 733 P.2d 300, 303 (Ct. App. 1986).
6 *Id.*
7 *Kremser v. Quarles & Brady, L.L.P.*, 201 Ariz. 413, 417, 36 P.3d 761, 765 (Ct. App. 2001).
8 *In the Matter of Pappas*, 159 Ariz. 516, 522-23, 768 P.2d 1161, 1167-68 (Ariz. 1988) (quoting *In the Matter of Neville*, 147 Ariz. 106, 112, 708 P.2d 1297, 1302 (Ariz. 1985)).
9 *Pappas*, 159 Ariz. at 522.
10 *Id.*
11 *Kremser*, 201 Ariz. at 416, 36 P.3d at 764 (citing *Paradigm Ins. Co. v. Langerman Law Offices*, 200 Ariz. 146, 153-54, ¶¶ 24-27, 24 P.3d 593, 600-01 (2001); *Napier v. Bertram*, 191 Ariz. 238, 242, ¶ 15, 954 P.2d 1389, 1393 (1998)).

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12 *Paradigm Ins.*, 200 Ariz. at 154, ¶ 29, 24 P.3d at 601.
13 *Id.*, 200 Ariz. at 150, 24 P.3d at 597 (citing Ariz. R. Prof'l Conduct (ER) 1.8(f)(2)-(3), Ariz. R. Sup. Ct. 42; Restatement (Third) of The Law Governing Lawyers § 134(2)(a)).
14 *Fickett v. Superior Court of Pima County*, 27 Ariz. App. 793, 795, 558 P.2d 988, 990 (1976) ("We are of the opinion that when an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward.").
15 ARIZ. REV. STAT. § 14-5652(A) ("the performance by an attorney of legal services for a fiduciary, settlor or testator does not by itself establish a duty in contract or tort or otherwise to any third party.").
16 *Clancy*, 152 Ariz. at 418, 733 P.2d at 303.
17 *Id.*
18 *Id.* (contrasting with a subjective standard, in which the arbiter from the first suit would be asked to testify concerning the effect, if any, of the attorney's actions on the outcome of the underlying case.)
19 *Galusha*, 160 Ariz. at 135, 770 P.2d at 1181.
20 *Id.*, 160 Ariz. at 135-36, 770 P.2d at 1181-82.
21 *Elliott v. Videan*, 164 Ariz. 113, 116, 791 P.2d 639, 642 (Ct. App. 1989) ("These rules are rules of professional conduct only, and a violation of these rules does not establish an act of malpractice. They are merely evidence that you may consider in your determination of whether [the lawyer] committed malpractice.").
22 *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 131, 907 P.2d 506, 517 (Ct. App. 1995) (citing *Galusha*, 160 Ariz. at 136-37, 770 P.2d at 1182-83).
23 *Videan*, 164 Ariz. at 119, 791 P.2d at 645.
24 *Id.*, 164 Ariz. at 119-20, 791 P.2d at 645-46.
25 *Id.*, 164 Ariz. at 118, 791 P.2d at 644.
26 *Galusha*, 160 Ariz. at 137, 770 P.2d at 1183 (citing *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986)).
27 *Winston & Strawn*, 184 Ariz. at 128, 907 P.2d at 514.
28 *Id.*, 184 Ariz. at 130, 907 P.2d at 516.
29 *Reed v. Mitchell & Timbanard, P.C.*, 183 Ariz. 313, 318-19, 903 P.2d 621, 626-27 (Ct. App. 1995)
30 *Galusha*, 160 Ariz. 134, 138, 770 P.2d 1180, 1184 (Ct. App. 1989) (citing *Barmat v. John and Jane Doe Partners A-D*, 155 Ariz. 519, 523, 747 P.2d 1218, 1222 (1987); ARIZ. REV. STAT. § 12-341.01).
31 *Galusha*, 160 Ariz. at 138, 770 P.2d at 1184.
32 ARIZ. REV. STAT. § 12-2505(A).
33 *See Reed*, 183 Ariz. at 318, 903 P.2d at 626 (citing ARIZ. CONST. Art. 18, § 5; ARIZ. REV. STAT. § 12-2505(A)).
34 ARIZ. REV. STAT. § 12-542; *Reed*, 183 Ariz. at 317, 903 P.2d at 625.
35 *Reed*, 183 Ariz. at 317, 903 P.2d at 625.
36 *Id.*
37 ARIZ. REV. STAT. §§ 12-2601 et. seq.
38 *Id.*
39 *Id.*
40 *Id.*

Arkansas

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Elements of the Cause of Action

Legal malpractice claims in Arkansas are governed by common law negligence principles. Plaintiff has the burden of proving that the lawyer's act or omission: (1) fell below a generally accepted standard of care; (2) proximately causing plaintiff's damages.[1] The standard of care requires that the attorney "exercise reasonable diligence and skill on behalf of a client."[2]

A lawyer does not have liability for "mere errors of judgment." The lawyer is not liable for a mistake in opinion on a point of law that has yet to be settled by the Arkansas Supreme Court, or issues on which reasonable attorneys may differ.[3]

Requirement of Privity

Arkansas law requires the existence of an attorney-client relationship for a legal malpractice claim. Absent fraud, or knowledge that the primary intent of the client was to provide the professional services to benefit a particular person, a lawyer has no liability for alleged acts of legal malpractice to persons not his client. This requirement of privity is established by statute in Arkansas.[4] Lawyers are immune from liability to non-clients, and conclusory allegations of intentional misrepresentation, without factual basis, will not support a malpractice claim by a non-client.[5] Thus, bond counsel for a municipal bond public improvement project had no liability to a bank loaning money on the project, because the bank was not the bond counsel's client. However, allegations of intentional misrepresentation by bond counsel came within the fraud exception to the privity requirement of the statute, precluding summary judgment.[6]

Statute of Limitations

Claims for legal malpractice are governed by a three-year statute of limitations.[7] The statute begins to run on the date of the negligent act, not the date of discovery or resulting damage.[8]

Causation

In order to prove proximate cause, plaintiff has the burden of showing that "but for the alleged negligence of the

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attorney, the result in the underlying action would have been different."[9] Thus, where the allegation of negligence concerns the lawyer's conduct in representation of the client in litigation, the plaintiff has the burden of proving that he would have ultimately prevailed in that underlying litigation. Plaintiff thus has the burden of proving the "case within the case." Plaintiff "must prove the merits of the underlying case as part of the proof of the malpractice case."[10]

Expert Testimony

Generally, expert testimony is required to establish that the lawyer's conduct fell below the standard of care.[11] An exception exists where "the conduct claimed to be negligent is so clear it can be recognized or inferred by a person who is not an attorney."[12]

Arkansas Client Security Fund

The Arkansas Supreme Court created a client security fund as a potential source for reimbursement based on "dishonest conduct of the lawyer (arising out of) a lawyer-client relationship or a fiduciary relationship between the lawyer and the claimant."[13] Claims are made to the Arkansas Supreme Court Client Security Fund Committee which has broad discretion. Claims are honored as "a matter of grace and not a matter of right."[14] The rules do not provide for a right of appeal from a decision of the committee, although the Arkansas Supreme Court has recognized the right of claimants' denied relief by the committee to appeal to the Arkansas Supreme Court.[15]

1 *Southern Farm Bureau Cas. Ins. Co. v. Daggett*, 354 Ark. 112, 118 S.W.3d 525 (2003); *Anthony v. Kaplan*, 324 Ark. 52, 918 S.W.3d 174 (1996)
2 *Nash v. Hendrix*, 369 Ark. 60, 250 S.W.3d 541 (2007)
3 *Evans v. Hamby*, 2011 Ark. 69, 378 S.W.3d 723 (2011)
4 Ark. Code Ann. § 16-22-310
5 *Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996)
6 *First Ark. Bank & Trust v. Gill Elrod Ragon Owen & Sherman, P.A.*, 2013 Ark. 159, 427 S.W.3d 47 (2013)
7 Ark. Code Ann. § 16-56-105; *Pounders v. Reif*, 2009 Ark. 581, 2009 Ark. LEXIS 756 (2009)
8 *Moix-McNutt v. Brown*, 348 Ark. 518, 74 S.W.3d 612 (2002)
9 *Davis v. Bland*, 367 Ark. 210, 238 S.W.3d 924 (2006)
10 *Nash v. Hendrix*, 369 Ark. 60, 250 S.W.3d 541 (2007); *Evans v. Hamby*, 2011 Ark. 69, 378 S.W.3d 723 (2011)
11 *Grassi v. Hyden*, 2010 Ark. App. 203, 374 S.W.3d 183 (2010)
12 *Grassi, supra*, quoting *Benton v. Nelsen*, 502 N.W.2d 288, 290 (Iowa 1993)
13 *In Re Client Sec. Fund*, 254 Ark. 1075, 493 S.W.2d 422 (1973)
14 *Healthcare Recoveries, Inc. v. Ark. Client Sec. Fund*, 363 Ark. 102, 211 S.W.3d 512 (2005)
15 *Nosal v. Neal*, 318 Ark. 727, 888 S.W.2d 634 (1994)

California

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In California, an action for legal malpractice based on negligence requires a showing of the following four factors: (1) the duty of the attorney to exercise the knowledge, skill, and ability ordinarily possessed and exercised by other similarly situated attorneys; (2) breach of that duty; (3) a proximate causal connection between the negligent conduct and the subsequent injury; and (4) actual loss or damage resulting from the negligence.[1]

While the existence of a duty is a question of law, a breach of that duty is a question of fact.[2] In general, the standard of care is considered to be that of members of the profession in the same or similar locality under similar circumstances. Nevertheless, case law has held a "lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field."[3] Proof of the applicable standard of care usually requires expert testimony, but when the failure of attorney performance is readily apparent from the facts, expert testimony is not necessary.[4] Similarly, a breach of the attorney's duty must be proved by expert evidence, except where the evidence clearly establishes the attorney's "numerous, blatant and egregious violations" of professional standards.[5]

Proving Causation and Damages

As in other jurisdictions, California follows the "trial-within-a-trial" doctrine, where "the goal is to decide what the result of the underlying proceeding or matter should have been, an objective standard."[6] In other words, a malpractice plaintiff must prove she would have obtained a better result if the defendant had acted as a reasonably careful attorney.[7] This means the plaintiff must show careful management of her claim would have resulted in a favorable judgment and collection of it.[8] Moreover, without actual loss or damage, there is no tort.[9] To prove damages, therefore, the plaintiff must show the probable value of the lawsuit she has lost.

It must be noted a showing of collectibility does not apply to every malpractice case. It instead applies only when the alleged malpractice consists of mishandling the client's claim.[10] For example, in *DiPalma v. Seldman*,

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the appellate court reversed the trial court's decision to grant the defendant attorney's motion for nonsuit which was based on the uncollectable nature of the underlying judgment. The alleged negligence consisted of advising the plaintiff to quitclaim the property, and the court found had the defendant not advised the plaintiff to convey the property to the debtors, the plaintiff might not have collected any money, but he would not have lost his interest in the property.[11]

Damages Recoverable

In general, a successful malpractice plaintiff in California is entitled to be made whole. As such, she is entitled to receive the value of her claim which was lost. The measure of damages in a legal malpractice case is "the difference between what was recovered and what would have been recovered but for the attorney's wrongful act or omission."[12]

Punitive damages, which seek to punish the tortfeasor for his intentional or malicious wrongful behavior, may be recoverable upon a showing of actual damages and the requisite intentional wrongful acts.[13] Conversely, a malpractice plaintiff may not recover punitive damages lost in the underlying action as compensatory damages in the subsequent malpractice action.[14]

As for damages for emotional distress, it was originally held such damages could be recovered in a legal malpractice action only upon a showing of physical impact or injury and affirmative misconduct or bad faith.[15] Although subsequent case law did away with this requirement, a showing of foreseeability is still required. Thus, because emotional distress is typically not a foreseeable result of legal malpractice, such damages are not usually awarded.[16]

Defenses

There are numerous defenses to legal malpractice claims in California. First and foremost, the statute of limitations is an affirmative defense. The applicable statute of limitations for a legal malpractice claim is "**one year** after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or **four years** from the date of the wrongful act or omission, **whichever occurs first.**"[17] The limitations period will be tolled if any of the following four conditions exist: (1) the plaintiff has not sustained actual injury; (2) the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; (3) the attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney; and (4) the plaintiff is under a legal or physical disability which restricts her ability to commence legal action.[18] The third condition regarding willful concealment will only toll the four-year statute of limitations period.[19]

Negligence of the client can also be asserted as a defense, although California uses a pure form of comparative negligence. Therefore, because liability is proportionally assigned, any contributory negligence on the part of the client will not serve as a complete defense and it will not bar recovery.[20]

An attorney also cannot be held legally responsible for an honest and reasonable mistake of law or an unfortunate selection of remedy or other procedural step. This is because of "the complexity of the law and the circumstances that call for a difficult choice among possible courses of action."[21] Accordingly, an attorney cannot be found liable for a reasonable exercise of judgment. Such a defense, however, will not survive a showing of a violation of the client's instructions.

A conflicting public obligation may serve as a defense as well. Per the California Supreme Court,

> To hold the attorney responsible in damages whenever in retrospect it appears he mistakenly sacrificed his client's interests in favor of his public obligations would place an impossible burden on the practice of law. Moreover, awarding damages against the attorney would violate sound public policy, because an attorney frequently faced with the question whether vigorous advocacy in favor of a client must be curtailed in light of public obligation would tilt in favor of the client at the expense of our system of justice.[22]

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The court went on to explain the "attorney's choice to honor the public obligation must be shown to have been so manifestly erroneous that no prudent attorney would have done so."[23]

A final potential defense is that of unclean hands.[24] For example, in *Blain v. Doctor's Company*, the plaintiff physician who had been a former defendant in a medical malpractice action, followed the directions of his insurance defense counsel to lie during a deposition. Subsequently, the physician filed an action against that attorney for legal malpractice. The trial court determined the equitable doctrine of unclean hands worked as a complete bar to any theory of recovery, and the appellate court affirmed. More specifically, the appellate court explained "[a] doctor who lies under oath about the incident for which he is being sued must know that if the lie is discovered it will adversely affect his defense."[25]

1 *Jackson v. Johnson* (1992) 5 Cal. App. 4th 1350, 1355 (quoting *Budd v. Nixen* (1971) 6 Cal. 3d 195, 200); *Lucas v. Hamm* (1961) 56 Cal. 2d 583, 592.
2 *Ishmael v. Millington* (1966) 241 Cal. App. 2d 520, 525.
3 *Wright v. Williams* (1975) 47 Cal. App. 3d 802, 810; 1 WITKIN, CAL. PROCEDURE *Attorneys* § 288 (5th ed. 2008).
4 *Wilkinson v. Rives* (1981) 116 Cal. App. 3d 641, 647-48; *Wright*, 47 Cal. App. 3d at 810.
5 *Day v. Rosenthal* (1985) 170 Cal. App. 3d 1125, 1146-47.
6 *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 Cal. App. 4th 579, 585-86 (quoting 4 MALLEN & SMITH, LEGAL MALPRACTICE § 33.1 (2006 ed.).
7 CACI 601.
8 *DiPalma v. Seldman* (1994) 27 Cal. App. 4th 1499, 1506-07; *Campbell v. Magana* (1960) 184 Cal. App. 2d 751, 754.
9 *Jackson*, 5 Cal. App. 4th at 1355.
10 *DiPalma*, 27 Cal. App. 4th at 1506-07.
11 *Id.* at 1508.
12 *Norton v. Superior Court* (1994) 24 Cal. App. 4th 1750, 1758.
13 *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal. 4th 1037, 1046; *Kluge v. O'Gara* (1964) 227 Cal. App. 2d 207, 210.
14 *Ferguson*, 30 Cal. 4th at 1048-49.
15 *See Quezada v. Hart* (1977) 67 Cal. App. 3d 754, 761-62.
16 *See Pleasant v. Celli* (1993) 18 Cal. App. 4th 841, 853, *overruled by Adams v. Paul* (1995) 11 Cal. 4th 583, 591.
17 CAL. CODE CIV. PRO. § 340.6.
18 *Id.*
19 *Id.*
20 *See Li v. Yellow Cab* (1975) 13 Cal. 3d 804, 828-29.
21 WITKIN, *supra* note 3, § 326.
22 *Kirsch v. Duryea* (1978) 21 Cal. 3d 303, 309.
23 *Id.*
24 *See Blain v. Doctor's Co.* (1990) 222 Cal. App. 3d 1048, 1063-64.
25 *Id.* at 1063.

Colorado

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In Colorado, a legal malpractice claim can be an action in negligence, contract, or breach of fiduciary duties.[1] To prove a legal malpractice claim in negligence, a plaintiff must prove four different elements: (1) a duty of care owed from the attorney to the plaintiff, (2) the attorney breached that duty, and (3) the attorney proximately caused damage to the plaintiff.[2] The duty an attorney owes to their client is "to employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession in carrying out the services for his client."[3] Essentially, the goal is to determine "what ordinary members of the profession would have done at the time the action was taken."[4] Whether or not an attorney owes a plaintiff a duty and the scope of that duty is a question of law.[5]

In Colorado, attorneys do not owe non-clients a duty except in very limited circumstances.[6] Third parties may only being a claim against an attorney when the attorney's conduct is fraudulent or malicious.[7] Potential claims of negligence against an attorney are not assignable from a client to a non-client.[8]

A fiduciary is an attorney who has a duty to act primarily for the benefit of a third party with respect to their handling of an underlying matter.[9] A fiduciary's obligations include "a duty of loyalty, a duty to exercise reasonable care and skill, and a duty to deal impartially with beneficiaries."[10] To show a breach of a fiduciary duty, plaintiffs must be able to prove the following elements: "1) that the defendant was acting as a fiduciary of the plaintiff; 2) that he breached a fiduciary duty to the plaintiff; 3) that the plaintiff incurred damages; and 4) that the defendant's breach of fiduciary duty was a cause of the plaintiff's damages."[11]

Malpractice claims based on an alleged breach of contract claim must be based on a specific provision contained in a contact between an attorney and client.[12] If the cause of action is based on a mere recitation of the general duty owed to clients, that would be an action based in negligence, not contact.[13]

Additionally, a plaintiff is almost always required to produce expert testimony to identify negligent action or inaction of an attorney that breached the standard of care.[14] Specifically, a "certificate of review" must be filed within 60 days of the complaint and contain statements from an expert supporting the plaintiff's claim for alleged negligence.[15] Expert testimony must identify the appropriate standards

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of professional conduct to prove allegations of negligent conduct.[16] Only claims where the negligence is "clear and palpable" do not require a certificate of review and subsequent expert testimony.[17] In addition, expert testimony may be required to prove a breach of a contract or fiduciary duty depending on the specific allegation.[18]

Proximate Cause

To establish the element of proximate cause in Colorado, the plaintiff must show two elements. First, the plaintiff must establish "but for" causation; but for the attorney's actions, the injury would not have occurred.[19] Typically, courts look to foreseeability to determine if there is proximate cause.[20] Secondly, the plaintiff must prove that their underlying case would have been successful if the attorney acted as an ordinary attorney would have under the circumstances, the "case within a case" requirement.[21] There can be more than one proximate cause.[22] When the underlying case was a criminal matter, the plaintiff need not first obtain postconviction relief in order to sustain a malpractice action.[23]

Damages

The client must be able to prove that damages were sustained.[24] An award of damages cannot be based on speculation or conjecture.[25] Specifically, the plaintiff must be able to show "by a preponderance of the evidence that he has in fact suffered damage or that his rights have been infringed and that his evidence in this regard provides a reasonable basis for a computation of the damage so sustained."[26] However, the specific amount of damages need not be proven.[27] For example, profits lost by a breach of contract would satisfy the damage requirement.[28] Any profits gained under the contract at issue would be subtracted from the anticipated profits under the contract.[29] Generally, non-economic damages are barred from recovery.[30]

Defenses

The statute of limitations for legal malpractice claims is two years.[31] The statute accrues "when a plaintiff learns facts that would put a reasonable person on notice of the general nature of the damage and that the damage was caused by the wrongful conduct of an attorney."[32] However, Courts will toll the statute of limitations when "flexibility is required to accomplish the goals of justice."[33] Colorado Courts have determined that the goals of justice may require the statute to be tolled in extraordinary circumstances or when the attorney's wrongful conduct prevented a client from filing suit.[34] However, not knowing the extent of the injury sustained will not toll the statute.[35] In criminal matters, Colorado adopted the "two track" approach.[36] Specifically, a criminal defendant must file a malpractice claim within the period defined in the statute of limitations regardless of the finality of the underlying criminal matter.[37]

Comparative negligence can act as a defense to a legal malpractice claim if the client's alleged negligence relates to the injury caused by the attorney's conduct.[38] Colorado Court's have held that comparative negligence was a valid defense when the plaintiff did the following "1) failed to supervise, review, or inquire as to the representation; 2) refused to follow advice or instructions; 3) failed to provide the attorney with essential information; 4) failed to mitigate damages caused by the lawyer's negligence; or 5) interfered with the attorney's representation."[39]

Additionally, Colorado Courts recognize a collateral estoppel defense.[40] "Collateral estoppel is a form of issue preclusion attaching to a subsequent adjudicatory proceeding."[41] To plead this defense, there must be "an identity of issue, an identity or privity between those parties against whom the doctrine is asserted, a judgment on the merits, and a full and fair opportunity to litigate the issue in the prior proceeding."[42]

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1 *Smith v. Mehaffy*, 30 P.3d 727, 733 (Colo. Ct. App. 2000).
2 *Bebo Constr. Co. v. Mattox*, 990 P.2d 78, 83 (Colo.1999).
3 *Id.* citing *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver*, N.A., 892 P.2d 230, 240 (Colo.1995)
4 *Stone v. Satriana*, 41 P.3d 705, 712 (Colo. 2002).
5 *Metro. Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313, 317 (Colo. 1980)
6 *Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A.*, 892 P.2d 230, 240 (Colo. 1995).
7 *Weigel v. Hardesty*, 549 P.2d 1335, 1337 (Colo. Ct. App. 1976).
8 *Roberts v. Holland & Hart*, 857 P.2d 492, 495 (Colo. Ct. App. 1993).
9 *Winkler v. Rocky Mountain Conference of United Methodist Church*, 923 P.2d 152, 157 (Colo. Ct. App. 1995).
10 *Id.*
11 *Graphic Directions, Inc. v. Bush*, 862 P.2d 1020, 1022 (Colo. Ct. App. 1993).
12 *McLister v. Epstein & Lawrence, P.C.*, 934 P.2d 844, 847 (Colo. Ct. App. 1996).
13 *Id.*
14 CRSA 13–20–601(3).
15 *Martinez v. Badis*, 842 P.2d 245, 249-50 (Colo. 1992);
16 *Boigegrain v. Gilbert*, 784 P.2d 849, 850 (Colo. Ct. App. 1989).
17 *Id.*
18 *Martinez*, 842 P.2d at 252-53.
19 *Brown v. Silvern*, 45 P.3d 749, 751 (Colo. Ct. App. 2001)
20 *Ekberg v. Greene*, 588 P.2d 375, 377 (Colo. 1978).
21 *Miller v. Byrne*, 916 P.2d 566, 579 (Colo. Ct. App. 1995)
22 *Brown*, 45 P.3d at 751.
23 *Rantz v. Kaufman*, 109 P.3d 132, 136 (Colo. 2005).
24 *Tull v. Gundersons, Inc.*, 709 P.2d 940, 943-44 (Colo. 1985).
25 *Id.* at 943.
26 *Riggs v. McMurty*, 400 P.2d 916, 919 (Colo. 1965)
27 *Id.*
28 *Tull*, 709 P.2d at 943-44 (Colo. 1985).
29 *Id.*
30 *Aller v. Law Office of Carole C. Schriefer, P.C.*, 140 P.3d 23, 26-27 (Colo. Ct. App. 2005).
31 C.R.S. § 13–80–102(1) (2004).
32 *Torrez v. Edwards*, 107 P.3d 1110, 1113 (Colo. Ct. App. 2004).
33 *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1096 (Colo. 1996)
34 *Morrison v. Goff*, 91 P.3d 1050, 1053 (Colo. 2004).
35 *Palisades Nat. Bank v. Williams*, 816 P.2d 961, 963-64 (Colo. Ct. App. 1991).
36 *Morrison*, 91 P.3d at 1057.
37 *Id.* at 1055.
38 *McLister v. Epstein & Lawrence, P.C.*, 934 P.2d 844, 846 (Colo. Ct. App. 1996).
39 *Id.*
40 *Metro. Gas Repair Serv., Inc.*, 621 P.2d at 319.
41 *Id.*
42 *Id.*

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District of Columbia

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An action for legal malpractice is a negligence action. "[T]he elements of an action for professional negligence are the same as those of an ordinary negligence action."[1] The plaintiff must establish that there is an attorney-client relationship, the applicable standard of care, a breach of that standard, and a causal relationship between the breach and the damages claimed.[2]

It is the existence of an attorney-client relationship that gives rise to a duty of care. Whether and attorney-client relationship exists is based on the circumstances of the particular case.[3] A third-party cannot bring a legal malpractice claim against attorney, even where the third-party has suffered from the attorney's malpractice. The District of Columbia recognizes one exception for cases in which the third party can establish that it was the direct and intended beneficiary of contract.[4]

Proving Causation

Once the plaintiff has shown a breach of the applicable standard of care, there still must be proof of a causal connection between the attorney's breach and the harm alleged.[5] This causal relationship requires proof of a "case within the case." "The plaintiff therefore must effectively 'present two cases, one showing that [the] attorney performed negligently, and a second or predicate 'case within a case' showing that [the plaintiff] had a meritorious claim that [he] lost due to [the] attorney's negligence." Only by making out both cases can a plaintiff demonstrate a 'causal relationship, or proximate cause, between the violation and the harm complained of ."[6]

Damages

The measure of damages recoverable in a legal malpractice action is the value of the plaintiff's lost claim –the amount the client would have recovered but for the attorney's negligence.[7]

It is not clear whether damages for mental anguish might be recoverable. A claim for mental anguish would probably be assessed as one for intentional infliction of emotional distress. In the District of Columbia in order sustain a claim of intentional infliction of emotional distress, "a plaintiff

District of Columbia

must prove that the [defendant] engaged in (1) extreme and outrageous conduct that (2) intentionally or recklessly caused (3) severe emotional distress.[8]

Lawyers are to be treated as anyone else and punitive damages may be available if the lawyer commits an act accompanied with "fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard of the plaintiff's rights, or other circumstances tending to aggravate the injury."[9]

Defenses

An action for legal malpractice must be filed within three years from the time the right to maintain the action accrues.[10] A claim for legal malpractice accrues when the plaintiff has sustained some injury, even if the injury occurs before the exact amount of damages can be determined.[11] The District of Columbia applies the discovery rule and has held that the right of action in a legal malpractice case does not accrue until the plaintiff has knowledge of, or by the exercise of reasonable diligence should have knowledge of the existence of the injury; its cause in fact; and some evidence of wrongdoing.[12]

Whether there is a statute of limitations defense must be assessed under the continuous representation rule which has been adopted that any action is tolled while the attorney continues to represent the client.[13] The statute may also be tolled if the attorney has fraudulently concealed matters which would have put the client on notice of the claim.[14]

The District of Columbia Court of Appeals recognizes the attorney judgment rule as a defense to a legal malpractice claim.[15] A claim for legal malpractice is not actionable for an attorney's reasoned exercise of informed judgment on an unsettled proposition of law. It is a two part test: the error must have been one of professional judgment and the attorney must have exercised reasonable care in making the judgment.[16]

In the District of Columbia the plaintiff's contributory negligence can be a complete defense to the defendant's liability for negligence and the defense has been allowed in action for legal malpractice.[17]

Local Considerations

The District of Columbia does not follow the locality rule. Under that rule the standard of care would be measured in only in the context of attorneys practicing within the District of Columbia.[18]

The District of Columbia Bar does not certify lawyer specialists. All attorneys are generally held to the same standard of care which is, "that degree of reasonable care and skill expected of lawyers acting under similar circumstances."[19]

Expert testimony by the Plaintiff is required to establish the standard of acre unless the attorney's lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge.[20]

The Rules of Professional Conduct do not in and of themselves provide a basis for a civil action, but may be considered in defining the minimum level of professional conduct required of an attorney.[21] A legal expert may use the Rules of Professional Conduct in discussing the standard of care required in a legal malpractice case.[22]

1 *O'Neil v. Bergan*, 452 A.2d 337, 341 (D.C. 1982)
2 *Mills v. Cooter*, 647 A.2d 1118, 1123 (D.C. 1994) and *Herbin v. Hoeffel*, 806 A.2d 186, 194-95 (D.C. 2002)
3 *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998)
4 *Hopkins v. Akins*, 637 A.2d 424, 429 (D.C. 1993) and *Williams v. Mordkofsky*, 901 F.2d 158, 163 (D.C. Cir. 1990)
5 *Dalo v. Kivitz*, 596 A.2d 35, 41 (D.C. 1991)
6 *Jacobsen v. Oliver*, 451 F. Supp. 2d 181, 187 (D.D.C. 2006)
7 *Lockhart v. Cade*, 728 A.2d 65, 69 (D.C. 1999)
8 *Herbin v. Hoeffel*, 806 A.2d 186 (D.C. 2002) and *Williams v. Callaghan*, 938 F. Supp. 46, 51 (D.D.C. 1996)
9 *Dalo v. Kivitz*, 596 A.2d 35, 40 (D.C. 1991) and *Boynton v. Lopez*, 473 A.2d 375, 378 (D.C. 1984)
10 D.C. CODE ANN. § 12-301 (2008); *Bleck v. Power*, 955 A.2d 712 (D.C. 2008)
11 *Burtoff v. Faris*, 935 A.2d 1086, 1089 (D.C. 2007)
12 *Bleck v. Power*, 955 A.2d at 715
13 *R.D.H. Communications, Ltd. v. Winston*, 700 A.2d 766, 768 (D.C. 1997)
14 *Weisberg v. Williams, Connolly and Califano*, 390 A.2d 992, 995 (D.C. 1978)
15 *Bioment, Inc. v. Finnegan Henderson* LLP, 967 A.2d 662 (D.C. 2009)
16 *Bioment, Inc. v. Finnegan Henderson*, LLP, 967 A.2d 662, 666 (D.C. 2009)
17 *Breezevale Ltd. v. Dickinson*, 759 A.2d 627, 634 (D.C. 2000), reh'g en banc granted, opinion vacated, 769 A.2d 133 (D.C. 2001) and opinion adopted on reh'g en banc, 783 A.2d 573 (D.C. 2001)
18 *Morrison v. MacNamara*, 407 A.2d 555 (D.C. 1979)
19 *Battle v. Thornton*, 646 A.2d 315 (D.C. 1994)
20 *Television Capital Corp. of Mobile v. Paxson Communications Corp.*, 894 A.2d 461, 469-70 (D.C. 2006)
21 *Griva v. Davison*, 637 A.2d 830 (D.C. 1994)
22 *Waldman v. Levine*, 544 A.2d 683 (D.C. 1988)

Florida

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A legal malpractice action in Florida is a claim based on alleged negligence. Three elements must be pled and proven: (1) the attorney's employment; (although a third party beneficiary may bring a claim under certain circumstances) (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence as the proximate cause of loss to the client.[1]

Proving Causation

A Plaintiff cannot recover damages for legal malpractice unless it is shown that there was a neglect of a reasonable duty which was the proximate cause of tangible loss.[2] So the Plaintiff must prove that, but for the Defendant's malpractice, no loss would have occurred.[3] The Plaintiff must prove that both a favorable result would have been achieved in the underlying litigation but for the attorney's negligence and that any judgment would have been collectible.[4]

Generally, liability is limited to clients with whom the attorney shares privity of contract.[5] Both the law firm and the attorney directly responsible for the matter may be liable to the client for malpractice.[6] The law firm's duty to supervise the actions of a subordinate or partner level attorney may form the basis for liability.[7] However, attorneys associated with a professional association cannot be held personally liable for alleged malpractice of other attorneys on the basis of vicarious liability or negligent failure to train or supervise.[8]

Actionable harm cannot be established based on negligent conduct of litigation until a Final Judgment is rendered against the client.[9] Further, the adverse judgment must be final in the sense that a pending appeal must be complete on the possibility of further redress must be precluded.[10]

Expert testimony may be utilized to establish the appropriate standard of care and alleged breach.[11] However, under certain circumstances a jury may be competent to determine standard of care as well as the existence and extent of damages without expert testimony.[12]

Statute of Limitations

An action based on professional malpractice must be commenced within two years, whether based on tort or contract. The limitations period begins to run from the

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time the cause of action is or reasonably should have been discovered.[13] However, no cause of action is deemed to have accrued until the existence of redressable harm has been established,[14] but a cause of action does not accrue until the underlying adverse judgment becomes final, including the exhaustion of appellate rights.[15] The two year statute of limitations period is limited to persons in privity with the Defendant.[16] Therefore, one maintaining an action as a third party beneficiary may not be bound by the two year limitations period.[17]

Defense

The defense of the comparative negligence is available in a legal malpractice case.[18] An attorney may also assert that he or she followed the explicit instructions of the client or that the client consented to the disposition of the case.[19] Of course, a client will not be found comparatively negligent for relying on an attorney's erroneous advice.[20] Likewise, good faith tactical decisions or decisions made on a fairly debatable point of law are generally actionable under the Rule of Judgmental Immunity.[21]

Damages

The measure of damages in a malpractice case is the amount of loss suffered by the client as the result of the attorney's negligence.[22] Punitive damages are permitted if it is established that an attorney was guilty of oppressive conduct showing a great indifference to the person or property of the client.[23]

1 *Law Office of David J. Stern, P.A. v. Security Nat. Servicing Corp.*, 969 So.2d 962 (Fla. 2007).
2 *Jones v. Law Firm of Hill & Ponton*, 223 F.Supp. 2d 1284 (M.D. Fla. 2002).
3 *Steffen v. Gray, Harris & Robinson, P.A.*, 283 F.Supp. 2d 1272 (M.D. Fla. 2003).
4 *Fernandez v. Barrs*, 641 So.2d 1371 (Fla. 1st DCA 1994).
5 *Horowitz v. Laske*, 855 So.2d 169 (Fla. 5th DCA 2003).
6 *Bill Branch Chevrolet, Inc. v. Philip L. Burnett, P.A.*, 555 So.2d 455 (Fla. 2nd DCA 1990).
7 *Dollman v. Shutts & Bowe*n, 575 So.2d 320 (Fla. 3rd DCA 1991).
8 *O'Keefe v. Darnell*, 192 F.Supp. 2d 1351 (M.D. Fla. 2002).
9 *Jones v. Law Firm of Hill & Ponton*, 223 F.Supp. 2d 1284 (M.D. Fla. 2002).
10 *Eldred v. Reeber*, 639 So.2d 1086 (Fla. 5th DCA 1994).
11 *Manner v. Goldstein Professional Association*, 436 So.2d 431 (Fla. 3rd DCA 1983).
12 *Tarleton v. Arnstein & Lehr*, 719 So.2d 325 (Fla. 4th DCA 1998).
13 Florida Statute §95.11(4)(a).
14 *Clemente v. Freshman*, 760 So.2d 1059 (Fla. 3rd DCA 2000)
15 *Law Office of David J. Stern, P.A. v. Security National Servicing Corporation*, 969 So.2d 962 (Fla. 2007).
16 Florida Statute §95.11(4)(a).
17 *Baskerville-Donavan Engineers, Inc. v. Pensacola Executive House Condominium Association, Inc.*, 581 So.2d 1301 (Fla. 1991).
18 *Michael Kovach, P.A. v. Pearce*, 427 So.2d 1128, (Fla. 5th DCA 1983).
19 *Boyd v. Brett-Major*, 449, So.2d 952 (Fla. 3rd DCA 1984); *George v. Cigna Insurance Company*, 691 So.2d 1209 (Fla. 3rd DCA 1997).
20 *Greene v. Leasing Associates, Inc.*, 935 So.2d 21 (Fla. 4th DCA 2006).
21 *Crosby v. Jones*, 705 So.2d 1356 (Fla. 1998).
22 *Kay v. Bricker*, 485 So.2d 486 (Fla. 3rd DCA 1986).
23 *Singleton v. Foreman*, 435 F.2d 962.

Georgia

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A legal malpractice action in Georgia can be based in contract[1] or tort.[2] A legal malpractice claim based on the tort of negligence requires proof of the following: 1) a duty exists by virtue of employment of the defendant attorney; 2) breach of the duty via failure of the attorney to exercise ordinary care, skill, and diligence; and 3) proximate causation of the damages claimed by the plaintiff.[3]

There are no required formalities for the formation of an attorney-client relationship.[4] A showing that "the advice or assistance of an attorney is sought and received in matters pertinent to his profession" is enough to establish employment.[5] An attorney-client relationship can be implied from the conduct of the parties.[6] Courts will look to the nature of the contacts with the attorney; whether the supposed client informed the attorney that the attorney's advice was being relied on; whether the attorney in fact offered any legal advice or assistance; and whether the attorney's representations or conduct reasonably induced the supposed client to believe the relationship existed.[7]

The test of whether a duty is owed is one of foreseeability. If an attorney volunteers to act[8] or otherwise gives the plaintiff justifiable grounds for reliance, he may be liable for malpractice.[9] The standard of care required by an attorney in the representation of his client is to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise.[10] An attorney must exercise reasonable skill and diligence with regard to the business he performs.[11]

Proving Causation

Causation is the most complicated element of a legal malpractice case. The client bears the burden of proving that the attorney's negligence proximately resulted in damages to the client.[12] To establish proximate cause, the client must show that "but for" the attorney's failure to perform ordinarily skillful services, the outcome would have been different.[13] An actual showing of this is required, and mere speculation is insufficient.[14] Thus, causation is the element that creates actionable legal malpractice, as opposed to a simple mistake. It also, in essence, requires a plaintiff in a legal malpractice action to prove two cases: the legal malpractice case at hand and the underlying action involving the alleged malpractice (also known as the "case

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within a case"). Of note, the range of evidence in a legal malpractice case is not limited solely to evidence developed in the underlying case.[15] For example, a document created by an attorney belongs to the client who retained him and is, therefore, presumptively discoverable by the client in a dispute with the lawyer.[16]

In 2012, the Georgia Supreme Court decided a very significant case addressing causation in a legal malpractice claim. In *Leibel v. Johnson*, the Supreme Court decided that a plaintiff could not use expert testimony to prove that the outcome of a representation would have been different, but for the attorney's conduct.[17] The Court reasoned that a jury, not an expert, is tasked in a legal malpractice case with evaluating the evidence and deciding the case on the merits.[18]

In 2013, the Georgia Supreme Court addressed the issue of whether the legal profession is different from other commercial enterprises and, therefore, whether legal malpractice claims are assignable like contract claims.[19] In *Villanueva v. First Am. Title Ins. Co.*, the Supreme Court held that legal malpractice claims were not per se unassignable.[20]

Also in 2013, the Georgia Supreme Court granted certiorari for a case addressing whether an attorney's communications with a firm's in-house counsel were privileged.[21] The Supreme Court determined that the attorney-client privilege applies to communications between a law firm's attorneys and its in-house counsel regarding a client's potential claims against the firm where (1) there is a genuine attorney-client relationship between the firm's lawyers and in-house counsel; (2) the communications in question were intended to advance the firm's interests in limiting exposure to liability rather than the client's interests in obtaining sound legal representation; (3) the communications were conducted and maintained in confidence, and (4) no exception to the privilege applies. On remand, the burden will be on the law firm, the proponent of the privilege, to establish that the privilege exists with evidence that these four elements have been satisfied.[22]

Damages Recoverable

In a legal malpractice case, the recoverable damages are limited to the value of the underlying claim.[23] The costs of defending a suit that results from an attorney's negligent advice are also recoverable.[24] However, the client has a duty to mitigate the damages.[25]

Because the attorney-client relationship is fiduciary in nature,[26] an attorney can also be sued for damages for breach of fiduciary duty.[27] For example, an attorney who assumes conflicting interests may be held liable for damages resulting therefrom, even if the attorney was successful in the underlying representation.[28] Likewise, an attorney who represents multiple parties despite a potential conflict of interest may be held liable for punitive damages if the attorney continues to represent both parties to the detriment to one of the parties.[29] An attorney's attempt to conceal or misrepresent matters affecting a client's case may also give rise to a claim for fraud and punitive damages.[30] Moreover, a lawyer who intentionally refuses to communicate with a client about his case may be subjected to actual and punitive damages.[31]

Defenses

Defenses to legal malpractice claims in Georgia include many of the standard professional malpractice defenses. This includes, but is not limited to, failure to bring a claim within the statute of limitations; failure to establish any of the required elements of a legal malpractice claim; or failure to attach an expert's affidavit with the complaint.

In Georgia, the statute of limitations for a legal malpractice claim based in contract is four (4) years.[32] A legal malpractice claim based in torts must be filed within two (2) years.[33] The limitation period begins as soon as there is a breach of an attorney's duty and some degree of harm, even if the degree of harm is minimal and much or most of the harm occurs later.[34] Thus, the statute of limitations runs from the date of the breach of the duty – not from the time when the extent of the resulting injury is ascertained, nor

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from the date of the client's discovery of the error.[35] In fact, the Georgia Supreme Court has specifically addressed the issue in a legal malpractice case and held that the statute of limitations is not tolled by the confidential relationship between the parties when the client knows of all the facts necessary to file a malpractice action before the running of the statute.[36]

In an action for legal malpractice, the plaintiff must file with the complaint an expert's affidavit setting forth at least one negligent act constituting the alleged breach of duty and the factual basis for each claim of negligence.[37] If no expert evidence is offered to support the allegations of malpractice, there is no dispute as to any material fact pertaining to the reasonableness of the defendant attorney's legal representation of the plaintiff.[38] An expert's competency is not determined by whether he resides in Georgia or if he is a licensed member of the bar at the time of the alleged negligence. Rather, the correct standard is whether at the time of testifying the expert has knowledge of the applicable standard of care on at least one matter on which the claim is based.[39]

Failure to file an expert's affidavit will result is dismissal of the case.[40] Courts will generally allow an insufficient or incomplete affidavit to be amended to comply with challenges to its sufficiency.[41] Interestingly, an attorney may make an affidavit as an expert on his own behalf.[42]

1 *O.C.G.A. § 9-3-25; Jones v. Am. Envirecycle*, 217 Ga. App. 80, 81, 456 S.E.2d 264, 266 (1995).
2 *O.C.G.A. § 9-3-33; Gingold v. Allen*, 272 Ga. App. 653, 655, 613 S.E.2d 173, 175 (2005).
3 *Tante v. Herring*, 264 Ga. 694, 453 S.E.2d 686 (1994) (citing Adams, Ga. Law of Torts, § 5-3 (2009-2010); *Rogers v. Norvell*, 174 Ga. App. 453, 457, 330 S.E.2d 392 (1985); *Graves v. Jones*, 184 Ga. App. 128, 130, 361 S.E.2d 19 (1987).
4 *McMann v. Mockler*, 233 Ga. App. 279, 282, 503 S.E.2d 894 (1998).
5 *Guillebeau v. Jenkins*, 182 Ga. App. 225, 229, 355 S.E.2d 453 (1987).
6 *In re Dowdy*, 247 Ga. 488, 277 S.E.2d 36 (1981); *Guillebeau v. Jenkins*, 182 Ga. App. 225, 229, 355 S.E.2d 453 (1987).
7 *Guillebeau v. Jenkins*, 182 Ga. App. 225, 229, 355 S.E.2d 453 (1987); *Horn v. Smith & Meroney, P.C.*, 194 Ga. App. 298, 390 S.E.2d 272 (1990); *Calhoun v. Tapley*, 196 Ga. App. 318, 395 S.E.2d 848 (1990).
8 *Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead*, 203 Ga. App. 412, 417 S.E.2d 29 (1992).
9 *Driebe v. Cox*, 203 Ga. App. 8, 416 S.E.2d 314 (1992).
10 *Cox v. Sullivan*, 7 Ga. 144, 148, 1849 WL 1649; *Kellos v. Sawilowsky*, 254 Ga. 4, 5, 325 S.E.2d 757 (1985).
11 *Id.*
12 *Rogers v. Norvell*, 174 Ga. App. 453, 457, 330 S.E.2d 392 (1985).
13 *Szurovy v. Olderman*, 243 Ga. App. 449, 452, 530 S.E.2d 783 (2000); *Amstead v. McFarland*, 287 Ga. App. 135, 138, 650 S.E.2d 737 (2007); *McMann v. Mockler*, 233 Ga. App. 279, 280, 503 S.E.2d 894 (1998).
14 *Dedon v. Orr*, 235 Ga. App. 64, 508 S.E.2d 445 (1998).
15 *Blackwell v. Potts*, 266 Ga. App. 702, 598 S.E.2d 1 (2004).
16 *Swift, Currie, McGhee & Hiers v. Henry*, 276 Ga. 571, 581 S.E.2d 37 (2003).
17 291 Ga. 180, 728 S.E.2d 554 (2012).
18 *Id.*
19 *Villanueva v. First Am. Title Ins. Co.*, 292 Ga. 630, 740 S.E.2d 108 (2013).
20 *Id.*
21 *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 746 S.E.2d 98 (2013).
22 *Id.* 293 Ga. at 429, 746 S.E.2d at 108.
23 *Lewis v. Uselton*, 224 Ga. App. 428, 480 S.E.2d 856 (1997).
24 *Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead*, 203 Ga. App. 412, 417 S.E.2d 29 (1992).
25 *Crowley v. Trust Co. Bank of Middle Georgia, N.A.*, 219 Ga. App. 531, 466 S.E.2d 24 (1995).
26 *Watkins & Watkins, P.C. v. Colbert*, 237 Ga. App. 775, 778, 516 S.E.2d 347 (1999).
27 See *Tante v. Herring*, 264 Ga. 694, 453 S.E.2d 686 (1994).
28 *Tante v. Herring*, 264 Ga. 694, 453 S.E.2d 686 (1994).
29 *Read v. Benedict*, 200 Ga. App. 4, 406 S.E.2d 488 (1991).
30 *Thomas v. White*, 211 Ga. App. 140, 438 S.E.2d 366 (1993).
31 *Id.*
32 *O.C.G.A. § 9-3-25.*
33 *O.C.G.A. § 9-3-33*; see *Hamilton v. Powell, Goldstein, Frazer & Murphy*, 167 Ga. App. 411, 306 S.E.2d 340 (1983), aff'd, 252 Ga. 149, 311 S.E.2d 818 (1984); *Kilby v. Shepherd*, 177 Ga. App. 462, 339 S.E.2d 742 (1986).
34 *Stocks v. Glover*, 220 Ga. App. 557, 469 S.E.2d 677 (1996).
35 *Id.*
36 *Frame v. Hunter, Maclean, Exley & Dunn, P.C.*, 269 Ga. 844, 507 S.E.2d 411 (1998).
37 *O.C.G.A. § 9-11-9.1(a); see Lutz v. Foran*, 262 Ga. 819, 427 S.E.2d 248 (1993); *Housing Auth. of Savannah v. Greene*, 259 Ga. 435, 436, 383 S.E.2d 867 (1989).
38 *Rose v. Rollins*, 167 Ga. App. 469, 306 S.E.2d 724 (1983).
39 *Morris v. Atlanta Legal Aid Soc'y, Inc.*, 222 Ga. App. 62, 473 S.E.2d 501 (1996).
40 *O.C.G.A. § 9-11-9.1(a); see Lutz v. Foran*, 262 Ga. 819, 427 S.E.2d 248 (1993); *Housing Auth. of Savannah v. Greene*, 259 Ga. 435, 436, 383 S.E.2d 867 (1989).
41 *Washington v. Georgia Baptist Medical Ctr.*, 223 Ga. App. 762, 478 S.E.2d 892 (1996).
42 *Findley v. Davis*, 202 Ga. App. 332, 414 S.E.2d 317 (1991).

Hawaii

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In Hawai'i, legal malpractice actions are "hybrids of tort and contract[.]" ***Higa v. Mirikitani***, 55 Haw. 167, 173, 517 P.2d 1, 5 (1973) (holding that the six year statute of limitations applicable to contract claims, HRS § 657-1(1), governs legal malpractice claims).

Liability

The elements of a legal malpractice action are: (1) the parties had an attorney-client relationship; (2) the defendant committed a negligent act or omission constituting a breach of that duty; (3) there is a causal connection between the breach and the plaintiff's injury; and (4) the plaintiff suffered actual loss or damages. ***Thomas v. Kidani***, 126 Hawai'i 125, 129, 267 P.3d 1230, 1234 (2011).

Duty

An attorney owes a client a duty "to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." ***Thomas v. Kidani***, 126 Hawai'i 125, 129, 267 P.3d 1230, 1234 (2011) (*quoting* ***Blair v. Ing***, 95 Hawai'i 247, 259, 21 P.3d 452, 464 (2001)).

A non-client may maintain a legal malpractice action against a lawyer under certain circumstances. ***Blair v. Ing***, 95 Hawai'i 247, 21 P.3d 452 (2001) ("*Blair I*") (in estate planning context, client's beneficiary can maintain legal malpractice action against testator's attorney).

Causation

The causation element of legal malpractice is often thought of as requiring a plaintiff to litigate a "trial within a trial." That is, the plaintiff must show "both the attorney's negligence and also what the outcome of the mishandled litigation would have been if it had been properly tried." ***Collins v. Greenstein***, 61 Haw. 26, 38, 595 P.2d 275, 282 (1979).

Defenses

For statute of limitation purposes, the discovery rule applies to legal malpractice actions. **Blair v. Ing**, 95 Hawai'i 247, 267, 21 P.3d 452, 472 (2001). Under Hawai'i's discovery

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rule, the statute of limitations begins to run when the plaintiff "discovers or should have discovered the negligent act, the damage, and the causal connection between the former and the latter." ***Yamaguchi v. Queen's Medical Center***, 65 Haw. 84, 90, 648 P.2d 689, 693-94 (1982).

Prevailing Party Attorney Fees

A professional malpractice action alleging claims of breach of implied contract and negligence was in the nature of *assumpsit* for purposes of awarding fees pursuant to HRS § 607-14. ***Blair v. Ing***, 96 Hawai'i 327, 333, 31 P.3d 184, 190 (2001) ("Blair II") (certified public accountant). *See also*, ***Helfand v. Gerson***, 105 F.3d 530 (9th Cir. 1997) (predicting Hawai'i law).

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Although legal malpractice in Idaho is recognized as an amalgam of both tort and contract theories, the cause of action is considered one of tort.[1] Comprised of four elements, legal malpractice claims require: (1) the existence of an attorney-client relationship; (2) the existence of a duty on the party of the lawyer; (3) breach of the duty or standard of care by the lawyer; and (4) damages suffered by the client that were proximately caused by the lawyer's breach.[2] When the alleged malpractice arises from representation in a criminal matter, the client is also required to establish the element of "actual innocence of the underlying charges."[3] The burden of proof for each element of a legal malpractice claim rests with the plaintiff.[4]

Except in very limited circumstances, only an attorney's client can bring an action for legal malpractice.[5] Idaho has narrowly extended an attorney's duty, and the right to bring a legal malpractice action, where an attorney voluntarily assumes a duty to a non-client.[6] In the context of testamentary instruments, Idaho's Supreme Court has also held that the preparing attorney "owes a duty to the beneficiaries named or identified therein to prepare such instruments, and if requested by the testator to have them properly executed, so as to effectuate the testator's intent as expressed in the testamentary instruments."[7] Legal malpractice claims are assignable, but only when transferred to an assignee in a commercial transaction along with other business assets and liabilities.[8]

In Idaho, the standard of care for an attorney is the "degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer" practicing law within the local community.[9] Expert evidence of both negligence and causation of damages is typically required when establishing a prima facie case of legal malpractice."[10] "Expert testimony is unnecessary, however, 'where the attorney's alleged breach of duty of care is so obvious that it is within the ordinary knowledge and experience of laymen.'"[11] When expert testimony is required, the plaintiff's failure to produce such testimony is grounds for summary judgment.[12]

Proximate Cause

To succeed on a legal malpractice claim, damages must be proximate caused by the lawyer's breach of the standard of care.[13] Proximate cause is defined as "a cause which, in

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natural and probable sequence, produced the complained injury, loss or damage, and but for that cause the damage would not have occurred."[14] It is not necessary that the identified proximate cause be the only cause of the plaintiff's alleged damages.[15] "It is sufficient if it is a substantial factor in bringing about the injury, loss or damage."[16] It is not a proximate cause "if the injury, loss or damage likely would have occurred anyway."[17] When an attorney's breach of the standard of care prohibits the client from pursuing a particular claim, the plaintiff must show, for purposes of establishing proximate cause, that they had some chance of success in the underlying, unpursued claim.[18] When the underlying suit was pursued, but the client alleges that the attorney's breach of the standard of care resulted in the claim being unsuccessful, the proximate cause standard becomes whether the attorney's breach negatively altered the client's chance of success.[19]

Damages

Proof that damages were sustained by the client is essential to a legal malpractice claim.[20] While damages cannot be based on speculation, damages need only be proved with a reasonable certainty.[21] Mathematical exactitude is not required.[22] "In a legal malpractice case based upon negligence in handling litigation for a claimant, the measure of direct damages is the difference between the client's actual recovery and the recovery which should have been obtained but for the attorney's malpractice."[23]

Defenses

Idaho has a two year statute of limitations for legal malpractice.[24] The cause of action does not accrue until some damage occurs.[25] "Potential harm or an increase in the risk of damage is not sufficient to constitute some damage."[26] Instead, objective proof must support the existence of some actual damage.[27] What constitutes "damage" and what constitutes "objective proof" depend on each case's individual facts.[28]

A statute of limitations defense, however, may be barred by the doctrine of equitable estoppel.[29] In the context of a legal malpractice case, application of the doctrine of equitable estoppel "requires a showing of: (1) a false representation or concealment of a material fact with knowledge of the truth; (2) the intent that the false representation be relied upon; (3) detrimental reliance upon the false representation causing a delay filing a claim; and (4) the lack of knowledge of the truth, or inability to discover the truth by the person asserting estoppel."[30]

Idaho courts have also recognized failure to mitigate as a viable affirmative defense in a legal malpractice suit.[31] When asserting failure to mitigate, the "defendant must prove both that a means of mitigation existed and that the proposed course of mitigation would, in fact, have resulted in a reduction of the plaintiff's damages."[32]

1 *Bishop v. Owens*, 272 P.3d 1247, 1251 (Idaho 2012).
2 *Id.*
3 *Lamb v. Manweiler*, 923 P.2d 976, 979 (Idaho 1996).
4 *Harrigfeld v. Hancock*, 90 P.3d 884, 886 (Idaho 2004).
5 *See Taylor v. Riley*, 336 P.3d 256, 272 (Idaho 2014), *reh'g denied* (Nov. 5, 2014); *Harrigfeld*, 90 P.3d at 889.
6 *Taylor*, 336 P.3d at 272.
7 *Harrigfeld*, 90 P.3d at 888.
8 *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 293 P.3d 661, 668 (Idaho 2013).
9 *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 981 P.2d 236, 239 (Idaho 1999); *see also Bishop*, 272 P.3d at 1252 (stating that the standard of care in a legal malpractice claim is the local standard of care by an attorney).
10 *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 996 P.2d 303, 308 (Idaho 2000) (citing *Jarman v. Hale*, 731 P.2d 813, 816 (Idaho Ct. App.1986)).
11 *Id.*
12 *Id.*
13 *E.g., Bishop*, 272 P.3d at 1251 (citing *Johnson v. Jones*, 652 P.2d 650, 654 (Idaho 1982)).
14 *Marias v. Marano*, 813 P.2d 350, 352 (Idaho 1991).
15 *Id.*
16 *Id.*
17 *Id.*
18 *Jordan v. Beeks*, 21 P.3d 908, 913 (Idaho 2001) (citing *Murray v. Farmers Ins. Co.*, 796 P.2d 101, 104 (Idaho 1990)).
19 *Id.*
20 *See, e.g., Bishop*, 272 P.3d at 1251 (citing Johnson, 652 P.2d at 654).
21 *See Hake v. DeLane*, 793 P.2d 1230, 1235 (Idaho 1990) (citing *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 595 P.2d 709, 716–17 (Idaho 1979)).
22 *Powell v. Sellers*, 937 P.2d 434, 439 (Idaho Ct. App. 1997) (citing *Bumgarner v. Bumgarner*, 862 P.2d 321, 332 (Idaho Ct. App.1993)).
23 *Sohn v. Foley*, 868 P.2d 496, 500 (Idaho Ct. App. 1994).
24 *Parsons Packing, Inc. v. Masingill*, 95 P.3d 631, 633 (Idaho 2004) (quoting *Lapham v. Stewart*, 51 P.3d 396, 399–400 (Idaho 2002)); IDAHO CODE § 5-219(4).
25 *City of McCall v. Buxton*, 201 P.3d 629, 632 (Idaho 2009) (citing Stephens v. Stearns, 678 P.2d 41, 46 (Idaho 1984)).
26 *Id.*
27 *Chicoine v. Bignall*, 835 P.2d 1293, 1298 (Idaho 1992).
28 *City of McCall*, 201 P.3d at 635 (quoting Bonz v. Sudweeks, 808 P.2d 876, 880 (Idaho 1991)).
29 *Fairway Dev. Co. v. Petersen, Moss, Olsen, Meacham & Carr*, 865 P.2d 957, 960 (Idaho 1993) (citing *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 644 P.2d 341, 344 (Idaho 1982); *Zumwalt v. Stephan, Balleisen & Slavin*, 748 P.2d 406, 409 (Idaho Ct. App.1988)).
30 *Id.*
31 *McCormick Int'l USA, Inc. v. Shore*, 277 P.3d 367, 371 (Idaho 2012).
32 *Id.*

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In a legal malpractice action, ordinary negligence principles apply.[1] To prevail in an action for legal malpractice, the plaintiff client must plead and prove the following elements: (1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that but for the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) actual damages.[2] The plaintiff must generally present expert testimony to establish the standard of care against which the defendant attorney's conduct must be measured.[3]

Proving Causation

When an attorney's negligence is alleged to have occurred during the representation of a client in the underlying action, the plaintiff must prove that counsel's negligence resulted in the loss of the underlying action.[1] That is, to establish legal malpractice, the plaintiff must prove a "case within a case," meaning that the plaintiff must prove the underlying action and what his or her recovery would have been in that prior action absent the alleged malpractice.[5] The plaintiff must prove that but for the attorney's negligence, the plaintiff would have been successful in the underlying suit.[6] Thus, in cases involving litigation, no legal malpractice exists unless the attorney's negligence resulted in the loss of an underlying cause of action.[7] Illinois case law requires a plaintiff, as part of his prima facie case, to prove that any judgment against the underlying defendant in his lost lawsuit would have been collectible against a solvent underlying defendant.[8]

Illinois courts, except in those rare cases where an attorney's conduct falls within the common knowledge of a lay person, require that the standard of care be established through expert testimony.[9] Under the "error in professional judgment" rule, an attorney is not liable for errors in judgment, only for failing to exercise a reasonable degree of care and skill, even if it led to an unfavorable result for the client.[10] Illinois courts have followed the majority of jurisdictions which recognize that an ethical code violation does not constitute an implied cause of action for legal malpractice; however, evidence of an ethical code violation is admissible as relevant evidence in establishing the standard of care.[11]

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Damages

The existence of actual damages is essential to a viable cause of action for legal malpractice.[12] The injury in a legal malpractice action is neither a personal injury, nor is it the attorney's negligent act itself; rather, it is a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission.[13] A settlement by successor counsel does not necessarily bar a malpractice action against prior counsel, and an attorney malpractice action should be allowed where the plaintiff can show that he or she settled for a lesser amount than he or she could have reasonably expected absent the malpractice.[14]

Illinois courts follow the rule that damages are measured by the amount that the client would have recovered but for the attorney's negligence.[15] Illinois has a statute that specifically prohibits the recovery of punitive damages in legal malpractice cases.[16] It should be noted that one appellate court has construed the statutory language to be limited to allegations of legal malpractice and allowed the pleading of punitive damages against an attorney for an action alleging common law fraud.[17]

Illinois courts have held that in actions sounding in tort for legal malpractice, there is no recovery for pre-judgment interest on the grounds that Illinois case law does not allow recovery of pre-judgment interest in negligence actions.[18]

A plaintiff is prohibited from recovering as part of her malpractice damages attorneys' fees incurred in the prosecution of the legal malpractice action.[19] A malpractice plaintiff is allowed to recover attorneys' fees that were incurred by the plaintiff to rectify his former attorney's malpractice.[20]

Defenses

In Illinois, defenses to legal malpractice actions include: failure to demonstrate that the plaintiff client would have prevailed in the underlying action; failure to prove actual damages; failure to establish an attorney-client relationship; failure to proffer expert testimony establishing the standard of care; and failure to file the action within the applicable statute of limitations.

Under Illinois law, the statute of limitations for malpractice is two years from the date of discovery or a maximum of six years from the date the alleged malpractice occurred.[21] The statute of limitations for legal malpractice incorporates the "discovery rule," which serves to toll the limitations period to the time when the plaintiff knows or reasonably should know of his or her injury.[22] In legal malpractice actions, the term "injury," for purposes of the discovery rule, is something caused by the attorney's negligent act or omission for which the plaintiff may seek damages; it is not the negligent act itself.[23] It is the realized injury to a client, and not the attorney's misapplication of expertise, which marks the point in time for measuring compliance with the statute of limitations period for a legal malpractice action.[24] Illinois courts have rejected the "continuous representation rule," which tolls the running of the statute of limitations until the attorney ceases to represent the client.[25]

Unlike other states, failure to file an Affidavit of Merit will not result in dismissal of a legal malpractice action in Illinois. The statute requiring an attorney for a medical malpractice plaintiff to submit an Affidavit of Merit does not apply to legal malpractice actions.[26]

Illinois courts recognize the application of the doctrine of in pari delicto to legal malpractice actions. This defense bars a plaintiff from recovering from a defendant for a wrong in which the plaintiff was also seriously culpable.[27] Under this doctrine, some courts have held that an attorney will not be liable for legal malpractice, even when the lawyer provided negligent advice, if the client uses the advice to commit fraud.[28]

The affirmative defense of contributory negligence is available in legal malpractice cases filed in Illinois.[29]

Local Considerations

The Attorney Registration and Disciplinary Commission has established a Client Protection Program for the purpose of reimbursing claimants for losses caused by dishonest conduct committed by Illinois lawyers.[30] The Commission may consider a claim if certain conditions exist, including: the claimant experienced a loss of money or property, consequential damages, interest, and the costs of recovery; the loss arose out of or during the course of a lawyer-client relationship between the lawyer and the claimant related to a matter in the state, or fiduciary relationship between the lawyer and the client that is related to the practice of

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law in the state; the loss was caused by the intentional dishonesty of the lawyer, and the claim was not based on negligence; there is no reasonably available collateral source for reimbursement such as insurance, surety, bond, or some other fund; reasonable efforts have been made by the claimant to exhaust administrative and civil remedies; the claim was filed within three years after the date the claimant knew or should have known of the dishonest conduct or within one year after the date the lawyer was disciplined or died, whichever is later; and the claimant has cooperated fully with disciplinary and law enforcement officials.[31]

Reimbursement of losses by the program is within the sole discretion of the Commission, and is not a matter of right.[32] Claims are paid out of the Client Protection Program Trust Fund by order of the Commission, and the maximum payment to any one claimant arising from a claim is $25,000.[33] Aggregate payments arising from the conduct of any one attorney may not exceed $250,000.[34] A lawyer whose dishonest conduct results in reimbursement to a claimant is liable to the Client Protection Program for restitution.[35]

1 *Lopez v. Clifford Law Offices*, P.C., 362 Ill. App. 3d 969, 299 Ill. Dec. 53, 841 N.E.2d 465 (1st Dist. 2005), *appeal denied*, 218 Ill. 2d 541, 303 Ill. Dec. 3, 850 N.E.2d 808 (2006).
2 *First Nat. Bank of LaGrange v. Lowrey*, 872 N.E.2d 447 (1st Dist. 2007); *Universal Underwriters Ins. Co. v. Judge & James, Ltd.*, 865 N.E.2d 531 (1st Dist. 2007).
3 *First Nat. Bank of LaGrange v. Lowrey*, 872 N.E.2d 447 (1st Dist. 2007).
4 *Webb v. Damisch*, 362 Ill. App. 3d 1032, 299 Ill. Dec. 401, 842 N.E.2d 140 (1st Dist. 2005).
5 *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 302 Ill. Dec. 746, 850 N.E.2d 183 (2006); *Merritt v. Goldenberg*, 362 Ill. App. 3d 902, 299 Ill. Dec. 271, 841 N.E.2d 1003 (5th Dist. 2005).
6 *Universal Underwriters Ins. Co. v. Judge & James, Ltd.*, 372 Ill. App. 3d 372, 310 Ill. Dec. 207, 865 N.E.2d 531 (1st Dist. 2007).
7 *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 302 Ill. Dec. 746, 850 N.E.2d 183 (2006).
8 *Sheppard v. Krol*, 218 Ill.App.3d 254, 578 N.E.2d 212 (1ST Dist. 1991).
9 *Barth v. Reagan*, 139 Ill.2d 399, 564 N.E.2d 1196 (1990).
10 *Goldstein v. Lustig*, 154 Ill.App.3d 595, 507 N.E.2d 164 (1st Dist. 1987).
11 *Rogers v. Robson*, 74 Ill.App.3d 467, 392 N.E.2d 1365 (3rd Dist. 1979).
12 *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 297 Ill. Dec. 319, 837 N.E.2d 99 (2005).
13 *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 305 Ill. Dec. 584, 856 N.E.2d 389 (2006).
14 *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 305 Ill. Dec. 584, 856 N.E.2d 389 (2006).
15 *Nettleton v. Stogsdill*, 387 Ill.App.3f 743, 749 (2d Dist. 2008).
16 735 ILCS 5/2-1115.
17 *Cripe v. Leiter*, 291 Ill.App.3d 155, 683 N.E.2d 516 (3rd Dist. 1997).
18 *Wilson v. Cherry*, 244 Ill.App.3d 632, 612 N.E.2d 953 (4th Dist. 1993).
19 *Sorenson v. Fiorito*, 90 Ill.App.3d 368, 413 N.E.2d 47 (1st Dist. 1980).
20 *National Wrecking Co. v. Coleman*, 139 Ill.App.3d 979, 487 N.E.2d 1164 (1st Dist. 1985).
21 *In re Keck, Mahin & Cate*, 274 B.R. 740, 743 (Bankr. N.D. Ill. 2002) (citing 735 ILCS 5/13-214.3).
22 735 ILCS 5/13–214.3(b–d); *Snyder v. Heidelberger*, 2011 IL 111052, 352 Ill. Dec. 176, 953 N.E.2d 415 (Ill. 2011).
23 *Profit Management Development, Inc. v. Jacobson, Brandvik and Anderson, Ltd.*, 309 Ill. App. 3d 289, 242 Ill. Dec. 547, 721 N.E.2d 826 (2d Dist. 1999), *appeal denied*, 188 Ill. 2d 582, 246 Ill. Dec. 131, 729 N.E.2d 504 (2000).
24 Goodman v. Harbor Market, Ltd., 278 Ill. App. 3d 684, 215 Ill. Dec. 263, 663 N.E.2d 13 (1st Dist. 1995), reh'g denied, (Apr. 19, 1996).
25 *Serafin v. Seith*, 284 Ill.App.3d 597, 672 N.E.2d 302 (1st Dist. 1996).
26 *Ayon ex rel. Ayon v. Balanoff*, 308 Ill. App. 3d 900, 721 N.E.2d 719 (1999) (citing 735 ILCS 5/2–622).
27 *Mettes v. Quinn*, 89 Ill.App.3d 77, 411 N.E.2d 549 (3rd Dist. 1980).
28 *Makela v. Roach*, 142 Ill.App.3d 827, 492 N.E.2d 191 (2nd Dist. 1986).
29 *Nika v. Danz*, 199 Ill.App.3d 296, 556 N.E.2d 873 (4th Dist. 1990).
30 Illinois Rules of Professional Conduct, Rule 780(a).
31 ILCS Attorney Registration Dis. Com. Rule 501.
32 Illinois Rules of Professional Conduct, Rule 780(c); 4 Ill. Law and Prac. Attorneys and Counselors § 85.
33 ILCS Attorney Registration Dis. Com. Rule 510.
34 ILCS Attorney Registration Dis. Com. Rule 510.
35 4 Ill. Law and Prac. Attorneys and Counselors § 85.

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Elements of Cause of Action

The elements of attorney malpractice in Indiana are: (i) employment of an attorney which creates the duty; (ii) the failure of the attorney to exercise ordinary skill and knowledge (the breach of the duty); and (iii) that such negligence was the proximate cause (iv) of damage to the plaintiff.[1] Plaintiffs in legal malpractice cases also sometimes add a count for constructive fraud. The elements of constructive fraud are: (i) a duty owing by the party to be charged to the complaining party due to their relationship; (ii) violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists; (iii) reliance thereon by the complaining party; (iv) injury to the complaining party as a proximate result thereof; and (v) the gaining of an advantage by the party to be charged at the expense of the complaining party.[2]

As such, plaintiffs' claims for both attorney malpractice and constructive fraud depend upon the existence of a duty running from defendants to plaintiffs. In the absence of such a duty, plaintiffs cannot recover under either theory.[3] A duty is dependent upon the existence of an attorney-client relationship between the plaintiff and defendant.[4]

Proving Causation

When analyzing the merits of an attorney malpractice claim, the plaintiff must establish that she had a valid claim in the underlying action that was allegedly mishandled by the defendant attorney.[5] In other words, the client must show that the attorney's negligence proximately caused the injury.[6] In Hill, an attorney failed to perfect an appeal of a property distribution entered in a divorce case. The Court of Appeals analyzed the trial court's distribution order and found that the trial court's distribution was proper.[7] As a result, even if the plaintiff had been able to appeal the trial court's distribution order, the result would have been the same because the Court of Appeals would not have reversed the order.[8] Under these circumstances, the Court of Appeals found that the attorney's negligence did not cause the plaintiff any damage.[9]

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Damages

Legal malpractice plaintiffs are entitled to all damages proximately caused by the attorney's negligence.[10] In fact, if the plaintiff can prove by clear and convincing evidence that the attorney acted with malice, oppression, bad faith, fraud, and a heedless disregard of the consequences, the plaintiff is also entitled to punitive damages.[11]

Also, if a plaintiff can prove deceit or collusion, the plaintiff has a statutory right to treble damages. Under Ind. Code § 33-43-1-8: "(a) An attorney who is guilty of deceit or collusion, or consents to deceit or collusion, with intent to deceive a court, judge, or party to an action or judicial proceeding commits a Class B misdemeanor. (b) A person who is injured by a violation of subsection (a) may bring a civil action for treble damages."

Defenses

The principal defense in legal malpractice cases is the statute of limitations bar. The statute of limitations for a claim of legal malpractice in Indiana is two years.[12] Generally, a cause of action accrues when a wrongfully inflicted injury causes damage.[13] Legal malpractice actions are "subject to the 'discovery rule,' which provides that the statute of limitations does not begin to run until such time as the plaintiff knows, or in the exercise of ordinary diligence could have discovered, that he had sustained an injury as the result of the tortious act of another."[14] "For a cause of action to accrue, it is not necessary that the full extent of damage be known or even ascertainable, but only that some ascertainable damage has occurred."[15]

1 *Fiddler v. Hobbs*, 475 N.E.2d 1172, 1173 (Ind. Ct. App. 1985).
2 *Pugh's IGA, Inc. v. Super Food Services, Inc.*, 531 N.E.2d 1194 (Ind. Ct. App. 1988), trans. denied.
3 *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991).
4 *Rice v. Strunk*, 670 N.E.2d 1280, 1283-84 (Ind. 1996).
5 *Hill v. Bolinger*, 881 N.E.2d 92, 94-95 (Ind. Ct. App. 2008).
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Bell v. Clark*, 653 N.E.2d 483, 491 (Ind. Ct. App. 1995).
11 *Id.*
12 Ind. Code § 34-11-2-4; *Spry v. Batey* (Estate of Spry), 804 N.E.2d 250, 252-53 (Ind. Ct. App. 2004); *Silvers v. Brodeur*, 682 N.E.2d 811, 813 (Ind. Ct. App. 1997), trans. denied.
13 *Keep v. Noble County Dept. of Public Welfare*, 696 N.E.2d 422, 425 (Ind. Ct. App. 1998), trans. denied.
14 *Id.*
15 *Id.* at 813-14.

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Negligence

Legal malpractice actions in Iowa area based on the tort of negligence. *Dessel v. Dessel*, 431 N.W.2d 359, 361 (Iowa 1988). To establish a prima facie claim of legal malpractice, the plaintiff must produce substantial evidence to show: (1) the existence of an attorney-client relationship giving rise to a duty, (2) the attorney, either by an act or failure to act, violated or breached that duty, (3) the attorney's breach of duty proximately caused injury to the client, and (4) the client sustained actual injury, loss or damage. *Dowell v. Nelissen*, No 09-1634, 2010 WL 2384617, at *4 (Iowa Ct. App. June 16, 2010). A failure to prove any element by substantial evidence is fatal to the claim. *Ruden v. Jenk*, 543 N.W.2d 605, 610 (Iowa 1996). Proof must be by a preponderance of the evidence. Whiteaker v. State, 382 N.W.2d 112, 116 (Iowa 1986). An attorney is generally liable for malpractice only to a client. *Ruden*, 543 N.W.2d at 610. However, there is some relaxation of the privity requirement when a third-party claimant is a direct and intended beneficiary of a lawyer's services. *Brody v. Ruby*, 267 N.W.2d 902, 906 (Iowa 1978).

An attorney is obligated to use the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances. *Schmitz v. Crotty*, 528 N.W.2d 112, 115 (Iowa 1995). A lawyer must engage in adequate preparation and perform the legal tasks with a reasonable degree of care, skill and diligence. *Ruden*, 543 N.W.2d at 610-11.

Normally, expert testimony is required to establish that an attorney's conduct is negligent, but when the negligence is so obvious that a layperson can recognize or infer it, expert testimony is unnecessary. *DePape v. Trinity Health Systems, Inc.*, 242 F. Supp. 2d 585, 609 (N.D. Iowa 2003). See also *Benton v. Nelsen*, 502 N.W.2d 288, 290 (Iowa Ct. App. 1993).

Ordinarily, the issue of whether an attorney has exercised reasonable care is a question of fact. *Dessel*, 431 N.W.2d at 361. If the facts are so compelling that no conflicting inferences can be drawn from them and rational people cannot differ in response, however, then the court may decide the question as a matter of law. Expert testimony that an attorney's conduct is negligent is necessary unless

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proof is so clear a trial court can rule as a matter of law that the professional failed to meet an applicable standard or the conduct claimed to be negligent is so clear it can be recognized or inferred by a person who is not an attorney. *Benton v. Neleon*, 502 N.W.2d 288, 288-290 (Iowa Ct. App. 1993)

The statute of limitations for bringing a legal malpractice case is normally five years, based upon actions for unwritten contracts or brought for injuries to property. *Venard v. Winter*, 524 N.W.2d 163, 165-66 (Iowa 1994).[1] *See also Norton v. Adair County*, 441 N.W.2d 347, 355 (Iowa 1989) ("Our statute of limitations applicable to attorney malpractice is in section 614.1(4), which provides a five-year limitation period.")

Causation

In a legal malpractice case, the plaintiff must prove that, but for the lawyer's negligence, the loss would not have occurred and the underlying suit would have been successful. *Huber v. Watson*, 568 N.W.2d 787, 790 (Iowa 1997); *Ruden*, 543 N.W.2d at 611. Even though negligence has been established, proximate cause must be determined separately. *Blackhawk Building Systems, Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg*, 428 N.W.2d 288, 290 (Iowa 1988). The proximate cause requirements are the same as in other tort actions. *Dessel*, 431 N.W.2d at 361. Proximate cause is ordinarily a question of fact for the jury. *Crookham v. Riley*, 584 N.W.2d 258, 265 (Iowa 1998).

Causation is composed of two components. The first is a "but-for" or "cause in fact" component. The defendant's conduct is not a cause in fact if the plaintiff would have suffered the same harm had the defendant not acted negligently.

Under the "but-for" test,

> the defendant's conduct is a cause in fact of the plaintiff's harm if, but-for the defendant's conduct, the harm would not have occurred. The but-for test also implies a negative. If the plaintiff would have suffered the same harm had the defendant not acted negligently, the defendant's conduct is not a cause in fact of the harm.

Berte v. Bode, 692 N.W.2d 368, 372 (Iowa 2005) quoting Dam B. Dobbs, *The Law of Torts*, §168 at 409 (2000).

The second component is a "legal cause" or "proximate cause" component. The defendant's conduct is not a legal cause if the harm that resulted from the defendant's negligence is so clearly outside the risks he assumed that it would be unjust or impractical to impose liability. Legal cause or proximate cause is about the scope of responsibility. *Id.* at 372. Actual causation as well as legal causation must exist between the negligence and the damages. *Faber v. Herman*, 731 N.W.2d 1,7 (Iowa 2007).

In order to sustain his/her burden of proof in a legal malpractice case, the plaintiff must present evidence of the underlying claim that establishes that the lawsuit would have been successful if it had been properly litigated. *Baker*, 225 N.W.2d at 112; *see also Huber*, 568 N.W.2d at 790. Presenting such evidence involves litigating the "suit within a suit," which will determine the liability of the defendant lawyer, rather than the third party against whom the underlying claim was directed. Sisk, Gregory C., Lawyer Malpractice and Liability, Iowa Practice, Vol. 16, 2015.

> To establish causation and damages in an action arising out of negligent representation in a legal proceeding, the plaintiff is essentially required to try the underlying proceeding within the malpractice action to establish that he or she would have prevailed in the underlying proceeding.

Nordine v. Woodburn, No. 13-0410, 2013 WL 6116884, at *1 (Iowa Ct. App. Nov. 20, 2013).

Proximate cause requires proof that a plaintiff not only would have prevailed at trial on the underlying claim, but that a judgment would have been collectible. *Burke v. Roberson*, 417 N.W.2d 209, 211 (Iowa 1987). *See also Beeke v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149, 160 (Iowa 1984) ("Moreover, in proving the value of the underlying claim, the client has the burden to show not just that a judgment in an ascertainable amount would have been entered, but the amount that would have been collected on that judgment"). As the Supreme Court explained in *Whiteaker:*

> At the trial of the malpractice action, can the lawyer successfully contend that, regardless of the substantial amount of the probable verdict in the underlying suit,

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> the measure of the client's damages is limited to the amount he would have actually recovered by way of a satisfied judgment? The question should be answered affirmatively, since otherwise the client would be placed in a better position as a result of the lawyer's malpractice than he would have been in had the attorney not been negligent.

Whiteaker, 382 N.W.2d at 115.

Damages

The goal of legal malpractice suits is to put the clients in the position they would have occupied had the attorney not been negligent. *Sladek v. Kmart Corporation*, 493 N.W.2d 838, 840 (Iowa 1992). The measure of damages in prosecuting a case is the difference between what the client should have recovered but for the negligence, and what the client actually recovered. Burke, 417 N.W.2d 417 at 212. Moreover, the measure of the client's damages is limited to the amount he or she would have actually recovered but for the negligence. Id. The damage award should be limited so as not to permit the client to profit from the lawyer's negligence. *Hook v. Trevino*, 839 N.W.2d 434, 446 (Iowa 2013); *see also Sladek*, 493 N.W.2d at 840.

That is, the amount of damages recoverable is limited to the amount of loss actually sustained as a proximate result of the negligence. *Dessel*, 431 N.W.2d at 362. There must be substantial evidence showing a reasonable basis from which an amount of damages may be inferred or approximated. *Shannon v. Hearity*, 487 N.W.2d 690, 693 (Iowa Ct. App. 1992).

When the loss arises from negligently defending a case, the loss actually sustained from the adverse judgment is the amount of that judgment including costs. *Pickens, Baines & Abernathy v. Heasley*, 328 N.W.2d 524, 526 (Iowa 1983).

Defenses

The statute of limitations in Iowa is five years for a legal malpractice case. *Norton*, 441 N.W.2d at 355. See above.

A lawyer who exercises the litigation skills of an ordinary lawyer and who advocates zealously and loyally on behalf of the client is not vulnerable to malpractice liability merely because of defeat at trial. The law does not impose an implied guarantee of results. *Martinson Mfg. Co. v. Serry*, 351 N.W.2d 772, 775 (Iowa 1984). Where the lawyer acts in good faith and exercises a reasonable degree of care, skill and diligence, then mere errors in judgment are not grounds to recover for malpractice. *Baker*, 225 N.W.2d at 112; *Koeler v. Reynolds*, 344 N.W.2d 556, 560 (Iowa 1983)(Everyone is presumed to have discharged his duty, whether legal or moral, until the contrary is made to appear).

1 Although an action based directly upon the contract itself, such as for breach of contract, has a ten-year statute of limitations. §614.1(5), Code of Iowa.

Kansas

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An action for legal malpractice in Kansas may sound in either tort or contract.[1] "Where the gravamen of the action is a breach of a duty imposed by law upon the relationship of attorney/client and not of the contract itself, the action is in tort."[2] By contrast, "[w]here the act complained of is a breach of specific terms of the contract without any reference to the legal duties imposed by law upon the relationship created thereby, the action is contractual."[3] For tort-based legal malpractice, a form of professional negligence, "a plaintiff is required to show (1) the duty of the attorney to exercise ordinary skill and knowledge, (2) a breach of that duty, (3) a causal connection between the breach of duty and the resulting injury, and (4) actual loss or damage."[4]

Duty of the Attorney-Client Relationship

As in any negligence action, a plaintiff claiming legal malpractice must first demonstrate that the defendant attorney owed a duty to the plaintiff. In short, "an attorney has a duty to do that which he or she is hired to do by a… client."[5] "An attorney is obligated to his client to use reasonable and ordinary care and diligence in the handling of cases he undertakes, to use his best judgment, and to exercise that reasonable degree of learning, skill and experience which is ordinarily possessed by other attorneys in his community."[6] Generally speaking, an attorney owes that duty only to his or her client, with whom there is privity of contract.[7] One implication of this is that "an attorney cannot be held liable for the consequence of his professional negligence to his client's adversary."[8] However, "where an attorney has rendered services which he should recognize as involving a foreseeable injury to some third-party beneficiary of the contract[,]" such as "in will drafting and in the examination of real estate titles[,]" the attorney may also owe a professional duty to that third-party.[9]

Breach of Professional Duty

Whether a duty has been breached "is a question normally decided by the trier of fact."[10] To demonstrate a breach of professional duty by an attorney, "a plaintiff must show that his attorney failed to use that degree of learning, skill, and care that a reasonably competent lawyer would use in similar circumstances."[11] "The duty of an attorney to exercise reasonable and ordinary care and discretion remains the same for all attorneys, but what constitutes negligence in a

particular situation is judged by the professional standards of the particular area of the law in which the practitioner is involved."[12]

"Expert testimony is generally required and may be used to prove the standard of care by which the professional actions of the attorney are measured and whether the attorney deviated from the appropriate standard."[13] "Expert testimony is not necessary where the breach of duty on the part of the attorney, or his failure to use due care, is so clear or obvious that the trier of fact may find a deviation from the appropriate standard of the legal profession from its common knowledge."[14]

An error in judgment by an attorney does not always constitute a breach of professional duty.[15] Where an attorney has made an error with respect to an issue "on which reasonable lawyers could disagree or which involves a choice of strategy, an error of informed judgment should not be gauged by hindsight or second-guessed by an expert witness."[16] However, if an attorney makes an error on an issue "that is settled and can be identified through ordinary research and investigation techniques, an attorney should not be able to avoid liability by claiming the error was one of judgment."[17]

Proximate Causation of Actual Damage

To show proximate causation, "a plaintiff in a legal malpractice case must show that but for the negligence of the attorney, the outcome of the underlying lawsuit would have been successful."[18] In the litigation context, the "plaintiff must establish the validity of the underlying claim by showing that it would have resulted in a favorable judgment in the underlying lawsuit had it not been for the attorney's error."[19] This means that the plaintiff must "successfully retry the underlying lawsuit" in the legal malpractice action.[20] Alternately, where the plaintiff claims lost settlement opportunity, the plaintiff must establish that, but for the attorney's negligence, "the client and the party against whom a claim has been asserted would have reached agreement upon a settlement in an ascertainable amount."[21]

The plaintiff's actions after entry of an adverse judgment in an underlying lawsuit have significant implications on proximate causation. For example, if appellate review is possible and not futile, "under the abandonment doctrine, a plaintiff may abandon a legal malpractice action by settling the underlying case before or during the pendency of an appeal or by failing to take or prosecute an appeal to completion"; because, doing so "hinders the… determination of whether it was the attorney's breach of duty or judicial error that caused the plaintiff's injuries."[22] Furthermore, where the outcome of the underlying lawsuit was a criminal conviction, the plaintiff cannot establish proximate causation without first obtaining postconviction relief; because, "until a plaintiff has been exonerated, his or her criminal conduct and not his or her attorney's negligence is the proximate cause of his or her incarceration."[23]

Statute of Limitations

Negligence-based legal malpractice claims must be brought within two years of accrual of the cause of action.[24] Accrual of the action is usually governed by one of four theories:

> (1) The occurrence rule—the statute begins to run at the occurrence of the lawyer's negligent act or omission.
>
> (2) The damage rule—the client does not accrue a cause of action for malpractice until he suffers appreciable harm or actual damage as a consequence of his lawyer's conduct.
>
> (3) The discovery rule—the statute does not begin to run until the client discovers, or reasonably should have discovered, the material facts essential to his cause of action against the attorney.
>
> (4) The continuous representation rule—the client's cause of action does not accrue until the attorney-client relationship is terminated.[25]

Determining which of these accrual theories should apply in a specific case can be confusing, especially where a legal malpractice claim concerns an unresolved underlying lawsuit:

> In a legal malpractice action in which there is underlying litigation which may be determinative of the alleged negligence of the attorney, the better rule, and the one which generally will be applicable under K.S.A. 60–513(b), is that the statute of limitations does not begin to run until the underlying litigation is finally

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> determined…. However, the rule that the underlying litigation must be finally determined before the statute of limitations begins to run cannot be arbitrarily applied in every case. If it is clear that the plaintiff in a potential legal malpractice action has incurred injury and if it is reasonably ascertainable that such injury was the result of the defendant attorney's negligence, then under K.S.A. 60–513(b) the statute begins to run at the time that it is reasonably ascertainable that the injury was caused by the attorney's malpractice even though the underlying action may not have been finally resolved.[26]

However, even if a legal malpractice action has accrued, appellate review of the underlying lawsuit can sometimes toll the statute of limitations.[27]

Contract-based legal malpractice claims must be brought within five years, if the contract is in writing[28]; or, if the contract is unwritten, within three years.[29] "A cause of action for breach of contract accrues when a contract is breached by the failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury it causes."[30]

1 *Bowman v. Doherty*, 235 Kan. 870, 879, 686 P.2d 112, 120 (1984).
2 *Id.*
3 *Id.*
4 *Bergstrom v. Noah*, 266 Kan. 847, 874, 974 P.2d 531, 553 (1999); *see also Phillips v. Carson*, 240 Kan. 462, 476, 731 P.2d 820, 832 (1987) ("The elements of legal malpractice are: the existence of an attorney-client relationship giving rise to a duty; that the attorney breached that duty by act or omission; that the attorney's breach of duty proximately caused injury to the client; and that the client sustained actual damages.").
5 *Kansas Pub. Employees Ret. Sys. v. Kutak Rock*, 273 Kan. 481, 493, 44 P.3d 407, 415 (2002).
6 *Bowman*, 235 Kan. at 878, 686 P.2d at 120.
7 *Nelson v. Miller*, 227 Kan. 271, 286-87, 607 P.2d 438, 450 (1980); *see also Bank IV Wichita, Nat. Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson*, 250 Kan. 490, 499, 827 P.2d 758, 765 (1992) (noting that legal malpractice claims cannot be assigned because they are personal to the client).
8 *Nelson*, 227 Kan. at 289, 607 P.2d at 451.
9 *Id.* at 286-87, 450; *see also Pizel v. Zuspann*, 247 Kan. 54, 67, 795 P.2d 42, 51 *opinion modified on denial of reh'g*, 247 Kan. 699, 803 P.2d 205 (1990) (adopting "the balancing test developed by the California courts" for determining whether "an attorney may be liable to parties not in privity").
10 *Bergstrom*, 266 Kan. at 875, 974 P.2d at 553. However, "[w]hen, under the totality of circumstances as demonstrated by the uncontroverted facts, a conclusion may be reached as a matter of law that negligence has not been established, judgment may be entered as a matter of law." Id.
11 *Canaan v. Bartee*, 276 Kan. 116, 129, 72 P.3d 911, 919 (2003).
12 *Bowman*, 235 Kan. at 878, 686 P.2d at 120.
13 *Id.* at 879, 120.
14 *Id.*
15 *Bergstrom*, 266 Kan. at 884, 974 P.2d at 559-60 (applying the "error of judgment" defense).
16 *Id.* at 878, 555-56 (quoting *Hunt v. Dresie*, 241 Kan. 647, 658, 740 P.2d 1046, 1055 (1987) (quoting Mallen and Levit, Legal Malpractice § 215, p. 311)).
17 *Id.*
18 *Canaan*, 276 Kan. at 130, 72 P.3d at 920.
19 *Canaan*, 276 Kan. at 120, 72 P.3d at 914-15.
20 *Webb v. Pomeroy*, 8 Kan. App. 2d 246, 249, 655 P.2d 465, 467 (1982).
21 *McConwell v. FMG of Kansas City, Inc.*, 18 Kan. App. 2d 839, Syl. ¶ 6, 861 P.2d 830, 833 (1993).
22 *Brammer v. Denning*, 270 P.3d 1231, 2012 WL 718947, at *5 (Kan. Ct. App. 2012) (unpublished disposition) ("The abandonment doctrine is based on the rationale that apparent injury to the plaintiff may be corrected with the successful prosecution of an appeal and ultimate vindication of the attorney's conduct by an appellate court."); *see also Zimmerman v. Panec*, 277 P.3d 447, 2012 WL 1970242 (Kan. Ct. App. 2012) (unpublished disposition); *Guinn v. Raymond*, 88 P.3d 807, 2004 WL 944256 (Kan. Ct. App. 2004) (unpublished disposition).
23 *Canaan*, 276 Kan. at 131-32, 72 P.3d at 920-21 (adopting the "exoneration rule").
24 K.S.A. § 60-513.
25 *Pancake House, Inc. v. Redmond By & Through Redmond*, 239 Kan. 83, 87, 716 P.2d 575, 579 (1986).
26 *Dearborn Animal Clinic, P.A. v. Wilson*, 248 Kan. 257, 270, 806 P.2d 997, 1006 (1991).
27 *Pizel*, 247 Kan. at 77, 795 P.2d at 56-57 (discussing *Pancake House* and holding, under the damage theory, that a legal malpractice claim accrued when a trial court declared a trust invalid, but also that the statute of limitations was tolled until the Kansas Supreme Court denied the petition for review).
28 K.S.A. § 60-511.
29 K.S.A. § 60-512.
30 *Pizel*, 247 Kan. at 74, 795 P.2d at 54.

Kentucky

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In Kentucky, a plaintiff may bring a legal malpractice claim based on the tort claim of negligence. In order to bring a successful negligence claim, the following elements must be proven: "(1) that there was an employment relationship with the defendant/attorney; (2) that the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and (3) that the attorney's negligence was the proximate cause of damage to the client." Thus, in other words, the plaintiff must show an attorney/client relationship existed, which obligates the attorney to provide his or her services under an ordinary standard of care. Finally, with regard to the final element of causation, in order to "prove that the negligence of the attorney caused the plaintiff harm, the plaintiff must show that he/she would have fared better in the underlying claim; that is, but for the attorney's negligence, the plaintiff would have been more likely successful." This approach is referred to as a "suit-within-a-suit," or a "trial within a trial."

Expert testimony is generally required in legal malpractice cases in Kentucky. The purpose of expert testimony is to guide the jury regarding the relevant standard of care in the professions, and the expert explains what the attorney's duties were to his client and what might constitute a breach of that duty. The expert does not testify as to whether or not an attorney-client relationship was formed, as it is not a proper subject for expert opinion.

Proving Duty

An attorney-client relationship is contractually formed through express or implied conduct. As officers of the court, attorneys have a heighted duty of care that consists of "scrupulous honor, good faith and fidelity to his client's interests." In order to recover in a legal malpractice action, a plaintiff must prove that an attorney-client relationship existed and that the defendant- attorney's services deviated from the acceptable standard of care a "reasonably competent attorney" would have exercised under the same or similar circumstances.

In a given case, "whether that degree of care and skill exercised by the attorney…meets the requirements of the standard of care aforementioned, the attorney's act, or failure to act, is judged by the degree of its departure from the quality of professional conduct customarily provided by

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members of the legal profession." This is a divergence from the commonly used "reasonable person" standard, as, in a legal malpractice action, the trier of fact must examine the attorney's conduct from the point of view of a reasonably competent attorney in the legal profession under the same or similar circumstances.

An attorney can also be a liable to a third party, provided that the attorney's negligence interfered with the benefits a third party intended to attain from the attorney-client relationship. Courts have extended this duty owed to third parties "irrespective of privity."

Proving Causation

To prove a claim of lawyer malpractice, a plaintiff must show that the lawyer's negligence caused or produced, or contributed to causing or producing, a less favorable result in the underlying case than would have been achieved if the lawyer had performed non-negligently or without a breach of duty. A plaintiff proves such claim by a "suit within a suit." A recent Kentucky Supreme Court case, *Osborne v. Keeney*, clearly outlines the concept behind proving proximate cause utilizing the "suit within a suit" method in the legal malpractice context:

> The manner in which the plaintiff can establish what should have happened in the underlying action, but for the attorney's conduct, will depend on the nature of the attorney's error. When dealing with a situation such as the instant case where a claim is lost, including, but not limited to, because it is barred by an applicable statute of limitations, a plaintiff must recreate an action that was never tried. The plaintiff must bear the burden the plaintiff would have borne in the original trial. And the lawyer is entitled to any defense that the defendant would have been able to assert in the original trial. This is what is commonly known in Kentucky law as the suit-within-a-suit approach. While this approach has been repeatedly affirmed, the actual procedure for trying such a case remains elusive.

Osbourne further explicates an attorney may be found liable in a legal malpractice action if the plaintiff can demonstrate that the attorney fell below the standard of care and that such a violation was the proximate cause of damage or injury to the client. The attorney's negligence is the proximate cause of injury to the client if the plaintiff can prove, but for the attorney's mishap, he or she would have succeeded in the underlying claim. In practical terms, a "suit within a suit" is achieved by litigating the underlying claim in full and appropriately instructing the jury. In other words, the "jury should be instructed as if it were the jury in the underlying case, and success on the underlying claim instruction is necessary to a legal malpractice recovery."

Even if the plaintiff settles with the defendant in the underlying litigation, the plaintiff is not thereafter barred from initiating a legal malpractice action against his or her attorney for negligence in the prior suit. In *Goff v. Justice*, the court held the trier of fact must "look beyond the fact that the underlying claim was settled and consider the position in which" the plaintiff was left in because of the attorney's negligence. If the plaintiff was restricted in the presenting its case against the defendant in the underlying litigation as a result of the attorney's negligence, then a subsequent legal malpractice action should survive preclusion.

Damages Recoverable

In order to recover damages in a legal malpractice action, the plaintiff must demonstrate that because of the attorney's negligence or wrongful conduct, the plaintiff (former client) was "deprived… of something to which he would otherwise have been entitled." Therefore, if the plaintiff cannot prove a different result would have occurred in the underlying claim absent the attorney's negligence, then the plaintiff cannot prove damages in the subsequent legal malpractice claim. For example, in *Mitchell v. Transamerica*, it was undisputed the Mitchells attorney committed malpractice by failing to file a claim in Kentucky state court within the statute of limitations. In their subsequent legal malpractice action, the Mitchells argued they could have likely received additional damages if their case had been properly filed in Kentucky, but the Court of Appeals held that contention was "a matter of conjecture and speculation."

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Notably, Kentucky courts have held that a plaintiff in a legal malpractice action may not recover punitive damages, which are lost in the underlying claim, but rather, the plaintiff may only recover compensatory damages. In *Osborne*, the Kentucky Supreme Court rejected the lower court's reasoning that "recovery of lost punitive damages would be compensatory because the loss 'is a result of the lawyer's negligence.'" The court found this approach would frustrate the public policy behind an award of punitive damages, which are supposed to act as a deterrent against the defendant for future wrongdoing. The "nexus between the attorney accused of malpractice and the actual wrongdoer" is too weak to punish the negligent attorney for the defendant's initial wrongdoing in the underlying case.

That being said, if a plaintiff can establish acts of fraud, oppression or malice or can demonstrate gross negligence by the attorney, a claim for punitive damages can be stated. In such cases, the attorney is the wrongdoer sought to be punished.

Defenses

Kentucky law provides several defenses to lawyers sued for legal malpractice. One of those defenses is that the plaintiff failed to file within the applicable one-year statute of limitations, which is governed by KRS 413.245. This statute provides that an action arising out of failure or omission of professional services must be brought one year after the occurrence. Additionally, the statute codified the common-law discovery rule and states that an action must be brought one year after the cause of act was discovered or should have been discovered by the injured party. In reference to the discovery rule, Kentucky courts hold that such cause of actions do not accrue if the underlying circumstances are unfixed and speculative, as a cause of action does not accrue until damage occurs. Moreover, "[t]he mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm – not yet realized – does not suffice to create a cause of action for negligence… . [U]ntil the client suffers *appreciable* harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice."

Another common defense in Kentucky malpractice cases is the lack of an attorney-client relationship. Failure to prove that such a relationship existed negates the duty requirement; thus, the plaintiff's malpractice claim will not prevail. A finding that no such attorney-client relationship existed is highly fact specific.

Louisiana

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To establish a claim for legal malpractice in Louisiana, a plaintiff must prove: 1) the existence of an attorney-client relationship; 2) negligent representation by the attorney; and 3) loss caused by the negligence.[1] In analyzing these elements, Louisiana law recognizes that an attorney does not need to exercise perfect judgment in every instance but also that his/her license and contract for employment hold out to clients that he/she possesses certain minimal skills, knowledge, and abilities.[2] Thus, the standard of care an attorney must exercise is the degree of care, skill and diligence exercised by prudent attorneys practicing in the same locality.[3] This standard, then, may vary depending on the particular circumstances and relationship at issue.[4]

Expert testimony is typically necessary to establish the standard of care and that the attorney failed to meet it.[5] The violation of an ethical rule, by itself, does not constitute actionable legal malpractice or proof of causation, although it is still a relevant consideration.[6] Expert testimony is not an absolute requirement, however, and is not required where the alleged malpractice is "obvious" or constitutes "gross error".[7] Once a prima facie case of malpractice has been established – whether through expert testimony or not – the burden of proof shifts to the defendant-attorney to prove the underlying litigation would have been unsuccessful.[8]

With particular respect to the first prong of the three-part test described above, "[e]stablishment of an attorney-client relationship is adequately proven when it is shown that the advice and assistance are sought and received in matters pertinent to his profession or when the agreement or representation has been made under conditions acceptable to both parties."[9] Not only is it "critical" that the plaintiff sought legal advice from an attorney acting in that capacity, but the inquiry also "turns" on the purported client's subjective belief that the attorney-client relationship existed.[10]

Causation

Use of a negligence standard as part of the three-prong malpractice test necessarily invokes Louisiana's duty-risk analysis, which requires a plaintiff to establish both cause-in-fact and legal cause.[11] In other words, an aggrieved party must establish some "causal connection" between the alleged negligence of the defendant-attorney and the unfavorable outcome of the underlying litigation.[12]

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Cause-in-fact involves a factual analysis.[13] Louisiana courts usually use a "but for" test to determine whether this element has been met, essentially asking whether the plaintiff's claimed injuries would have occurred "but for" the defendant's allegedly-tortious conduct.[14] "The proper method of determining whether an attorney's malpractice is a cause in fact of damage to his client is whether the performance of that act would have prevented the damage."[15]

There is no set "rule" for determining the scope of a defendant's duty under the "legal cause" or "proximate cause" element,[16] but its purpose in the duty/risk analysis is to prevent a defendant from being transformed into an insurer of all persons against all harms.[17] This element involves a policy question designed to ask whether the scope of protection created by the duty allegedly breached was intended to protect *this* specific plaintiff from *these* particular damages arising in *this* alleged manner.[18] Accordingly, this element involves a purely legal question whose answer depends on factual determinations of foreseeability and ease of association between the plaintiff's claimed damages and the defendant's allegedly-tortious conduct.[19]

Damages Recoverable

Again, a plaintiff must establish the existence of damages caused by the attorney's alleged negligence in order to recover them.[20] Further, the mere breach of a professional duty causing only nominal damages, speculative harm, or the threat of future harm not yet realized does not suffice to create a legal malpractice action.[21] Logically, then, where a client is in the same legal position before and after the attorney is removed from the representation, a claim for legal malpractice should not persist.

Earlier Louisiana cases found that when an attorney's performance falls below the requisite standard of competence and skill, "…the attorney is liable for any damage to the client caused by his substandard performance."[22] This stand is consistent with viewing legal malpractice as a tort[23] and implies that any damages suffered as a result of the malpractice should be recoverable. On this basis, there are cases as recent as the 1990's finding that a successful plaintiff could recover damages for mental anguish caused by the malpractice in addition to any damages due based on the loss of the underlying litigation.[24]

This may no longer be the case, however. More current decisions have taken the position that, "[a] plaintiff can have no greater rights against attorneys for the negligent handling of a claim than are available in the underlying claim."[25] If this viewpoint holds firm over the long term, it likely means a malpractice-plaintiff would be limited to recovering only damages suffered in the underlying litigation.

With respect to the issue of attorney's fees, Louisiana law holds that attorney's fees are only recoverable when provided for via either statute or contract.[26] In the context of a legal malpractice claim, though, there is a distinction between attorney's fees incurred in prosecuting a malpractice action and additional fees incurred by having to hire a new attorney in the underlying litigation to "mop up" or "correct" the negligence of the attorney-defendant. At least one Louisiana case has held that, while attorney's fees incurred in prosecuting a legal malpractice claim are not recoverable, the costs of "additional" action by a new attorney in the underlying action necessitated by the alleged malpractice may be awarded.[27]

As an additional matter, La. R.S. 37:222 may provide a further limitation on the recovery of certain types of damages, depending on the nature of the malpractice claim. This statute states:

> A. An attorney who acts in good faith shall not be liable for any loss or damages as a result of any act or omission in negotiating or recommending a structured settlement of a claim or the particular mechanism or entity for the funding thereof or in depositing or investing settlement funds in a particular entity, unless the loss or damage was caused by his willful or wanton misconduct.
>
> B. As used in this Section:
>
> (1) "Attorney" means a natural person, duly and regularly licensed and admitted to practice law in this state, a professional law corporation organized pursuant to R.S. 12:801 et seq., or a partnership formed for the practice of law and composed of such natural persons or corporations, all of whom are duly and regularly licensed and admitted to the practice of law.

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(2) "Good faith" is presumed to exist when the attorney recommends or negotiates, invests, or deposits funds with an entity which is funded, guaranteed, or bonded by an insurance company which, at the time of such act, had a minimum rating of "A+9" or "Double A", or an equivalent thereof, according to standard rating practices in the insurance industry.

Defenses

Obviously, an attorney's primary defenses to a legal malpractice claim will initially revolve around one or more of the three prongs described above because failure to prove one of these three elements is fatal to the claim.[28] In addition to defenses based on the three-prong analysis, however, there are other defenses that should be considered. Two such defenses are prescription and/or preemption, which are Louisiana's versions of statutes of limitations and/or repose. As stated by La. R.S. 9:5605(A), in pertinent part:

> No action for damages against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional corporation, company, organization, association, enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide legal services shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.
>
> * * * * *

Notably, subparagraph (B) of the statute adds that, "[t]he one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods … and … may not be renounced, interrupted, or suspended." As such, the "continuing representation" rule (a suspension principle based on the doctrine of contra non valentum whereby the statute of limitations is considered suspended during the attorney's representation of the client) does not create an exception to these time periods.[29]

Conversely, and consistent with the majority of Louisiana's other professional liability statutes, the time limitations for filing suit provided in subparagraph (A) do not apply in cases of fraud, as that term is defined in La. C.C. art. 1953.[30] Though fraud may result from silence or inaction, La. C.C.P. Art. 856 mandates that circumstances constituting alleged fraud be pled with particularity. Accordingly, general allegations of fraud without any specificity or corroborating evidence are insufficient to invoke the fraud exception.[31]

Mitigation of damages is another potential defense to consider. However, the failure to mitigate is an affirmative defense, which means it must be specifically pled in answering the petition and that the burden of proof is on the party asserting it.[32]

Under Louisiana law, malpractice plaintiffs do have a duty to mitigate their damages, but that duty encompasses only what a reasonably prudent person would have done to lessen the damages suffered, taking into account the facts known at the time and avoiding the temptation to view the case through hindsight.[33] Therefore, "[t]he scope of a party's duty to mitigate depends on the particular facts of the individual case, and a party is not required to take actions which would likely prove unduly costly or futile."[34] A plaintiff is not required to pursue mitigation measures that would have been unreasonable, impractical, or disproportionately expensive considering all attendant circumstances, or if the measures would not have made a difference.[35]

By way of example, if an aggrieved party fails to pursue an appeal of an adverse judgment or settles a claim unfavorably without bringing the matter to trial, a question may arise as to whether the party has failed to mitigate. Using the foregoing mitigation standards, a party does not waive its right to file a legal malpractice suit by not filing an appeal or by settling a claim unless it is determined that a reasonably prudent party would have appealed or taken the case to trial rather than settling.[36]

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1 *MB Industries, LLC v. CNA Ins. Co.*, 2011-0303 (La. 10/25/11), 74 So.3d 1173, 1184 (citing cases); *Moses v. Hingle*, 2007-1384 (La.App. 4 Cir. 03/19/08), 978 So.2d 1263, *12.
2 *Ramp v. St. Paul Fire & Marine Ins. Co.*, 269 So.2d 239, 244 (La. 1972).
3 *Id.*
4 *Leonard v. Reeves*, 2011-1009 (La.App. 1 Cir. 01/12/12), 82 So.3d 1250, 1257 (citing cases).
5 *MB*, 74 So.3d at 1184 (citing cases); and *Brassette v. Exnicios*, 2011-1439 (La.App. 1st Cir. 05/14/12), 92 So.3d 1077, 1082.
6 *Id.*
7 *MB*, 74 So.3d at 1185 (citing cases); and *Brassette*, 92 So.3d at 1082 (citing cases).
8 *Ault v. Bradley*, 564 So.2d 374, 376-377 (La.App. 1st Cir. 1990)(citing cases); *Henderson v. Domingue*, 626 So.2d 555, 558 (La.App. 3rd Cir. 1993); and *Johnson v. Tschirn*, 99-0625 (La.App. 4 Cir. 09/29/99), 746 So.2d 629, 632.
9 *La Nasa v. Fortier*, 553 So.2d 1022, 1023-1024 (La.App. 4th Cir. 1989) (citing cases).
10 *Id* at 1024 (citing cases).
11 *See, Leonard*, 82 So.3d at 1262-1263.
12 *MB*, 74 So.3d at 1187.
13 *Rando v. Anco Insulations, Inc.*, 2008-C-1163, 2008-C-1169 (La. 5/22/09), 16 So.3d 1065, *29 (citing cases).
14 *Roberts v. Benoit*, 605 So. 2d 1032, 1042 (La. 1991)(citing cases); *See also, Scott v. Pyles*, 99-CA-1775 (La.App. 1 Cir. 10/25/00), 770 So. 2d 492, 499 (citing *Hutzler v. Cole*, 633 So. 2d 1319, 1325 (La.App. 1st Cir. 1994).
15 *Ault*, 564 So.2d at 379 (citing cases); and *Leonard*, 82 So.3d at 1262 (citing cases).
16 *Roberts*, 605 So.2d at 1044.
17 *Rando*, 16 So. 3d 1065, at *39 (citing *Todd v. State Through Social Services*, 96-3090 (La. 9/9/97), 699 So. 2d 35, 39); *See also, Roberts*, 605 So.2d at 1044 (quoting Malone, *Ruminations on Cause-In-Fact*, 9 Stan.L.Rev. 60, 73 (1956)) and 1055, on *reh'g* (La. 1991).
18 *Rando*, 16 So. 3d 1065, *30-*31 (citing cases); *See also, Scott*, 770 So. 2d at 500 (citing cases); and *Roberts*, 605 So. 2d at 1044-1045 (citing authorities)
19 *Rando*, 16 So. 3d 1065, *31 (citing cases).
20 *Moses*, 978 So.2d 1263, at *12.
21 *Id.*
22 *Ault*, 564 So.2d at 379 (citing *Gill v. DiFatta*, 364 So.2d 1352 (La.App. 4th Cir. 1978)).
23 *Henderson*, 626 So.2d at 559.
24 *Henderson*, 626 So.2d at 559.
25 *Costello v. Hardy*, 03-1146 (La. 01/21/04), 864 So.2d 129, 138 (citing cases); and *Whittington v. Kelly*, 40,386 (La.App. 2 Cir. 12/14/05), 917 So.2d 688, 692-694.
26 *Ault*, 564 So.2d at 379-380 (citing cases).
27 *Henderson*, 626 So.2d at 559-560 (citing cases).
28 *Whittington*, 917 So.2d at 692 (citing *Costello*, 864 So.2d 129).
29 *Jenkins v. Starns*, 2011-1170 (La. 01/24/12), 85 So.3d 612, 627-628; *Lambert v. Toups*, 99-72 (La.App. 3 Cir. 10/13/99), 745 So.2d 730, 732; and *Reeder v. North*, 97-0239 (La. 10/21/97), 701 So.2d 1291, 1297-1298.
30 La. R.S. 9:5605(E).
31 *Brumfield v. McElwee*, 2007-0548 (La.App. 4 Cir. 01/16/08), 976 So.2d 234, 240.
32 *MB*, 74 So.3d at 1181 (citing cases).
33 *Brassette*, 92 So.3d at 1084-1085 (citing cases).
34 *MB*, 74 So.3d at 1181 (citing cases); and *Brassette*, 92 So.3d at 1084.
35 *Brassette*, 92 So.3d at 1085 (citing cases).
36 *MB*, 74 So.3d at 1182-1183 (citing cases); and *Brassette*, 92 So.3d at 1084.

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In Maine, legal malpractice actions are governed by the principles of tort law (specifically negligence), rather than contract law, where liability is predicated on a "deviation from the standard of care."[1] In order for a plaintiff to be successful in a legal malpractice action, the plaintiff must prove by a preponderance of the evidence that: (1) defendant owed the plaintiff a duty to conform to a certain standard; (2) the defendant deviated from that standard; and (3) that the deviation proximately caused the plaintiff's damages.[2]

Duty/ Standard of Care

A plaintiff must first establish that the defendant owed the plaintiff a duty. In order to satisfy this requirement, a plaintiff must show that an attorney-client relationship existed. Maine case law is well settled that third parties may not bring an action for professional malpractice against an attorney if they do not have privity of contract with the attorney.[3] However, whether the required relationship existed is not based on whether a fee or formal retainer was exchanged, but rather, may be implied by the conduct of the parties.[4] The determinative factor is whether the plaintiff "reasonably believed: that an attorney-client relationship was present.[5]

Once the plaintiff has established that an attorney-client relationship existed, the plaintiff must then prove that the defendant deviated from the standard of care. The appropriate standard of care in a legal malpractice action is the "skill, prudence, and diligence that would be used by attorneys of ordinary skill and capacity.[6] Maine requires expert evidence to establish the breach of a defendant in a legal malpractice action except where the breach is so obvious that it may be determined by the Court as a matter of law or is within the ordinary knowledge of a layman.[7]

Causation

In order to establish proximate cause in a legal malpractice claim, the plaintiff must provide sufficient evidence/ inferences from that evidence that indicate that the negligence of the defendant played a substantial part in causing the damage and that the damage was either a direct result or a reasonably foreseeable consequence of the negligence.[8] Therefore, the possibility of causation is not enough and even if the probabilities were evenly balanced, the defendant would be entitled to judgment.[9]

To successfully prove causation in a matter regarding a defendant's advice or tactics which preceded a final result

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on the merits of an underlying action, a plaintiff must demonstrate that he or she would have received a more favorable result but for the defendant's alleged negligence.[10] However, if the alleged negligence involves failing to plead or to timely plead so that the plaintiff's opportunity before a factfinder is precluded, a plaintiff must demonstrate not only the loss of opportunity, but also that the facts generated by the plaintiff's statements would support a claim which the law allows.[11]

Damages

When it has been determined that a defendant has committed legal malpractice he or she is then liable to the plaintiff for any "reasonably foreseeable loss" caused by his or her negligence.[12] In other words, the plaintiff is entitled to recover the amount it would have recovered but for the defendant's negligence.[13] While the traditional measure of damages is based on economic loss, in extreme cases where particularly egregious actions on the part of the defendant attorney have resulted in extreme harm to the plaintiff personally, (harm to the plaintiff's reputation or deterioration of the plaintiff's marriage) recovery of damages for severe emotional distress have been deemed as a "reasonably foreseeable loss" for which the defendant may be found liable.[14] Emotional distress damages are also available if the plaintiff can show that the defendant intentionally caused the injury to the plaintiff, the defendant was untruthful with his client or the defendant wantonly desegregated the consequences of his actions.[15] Punitive damages may also be awarded when the plaintiff can show that the defendant acted with malice.[16]

Assignment

While many jurisdictions have expressly prohibited assignment of legal malpractice claims, Maine has determined that assignment of these claims is allowed. Because legal malpractice claims are not for personal injury, but for economic harm, a plaintiff may assign its claim to third party that has a "clear interest" in the claim.[17] This reasoning behind allowing assignments is to facilitate resolution of these claims as efficiently as possible by allowing a third party with a clear interest who has more time, energy and resources to pursue the claim.[18]

Affirmative Defenses

a. Statute of Limitations

The applicable statute of limitations runs for six years after the "cause of action accrues."[19] A cause of action is generally deemed to accrue when the plaintiff sustains a legally cognizable injury.[20] An exception to this general rule exists when the legal malpractice claim involves a title examination. In this instance, the legal malpractice claim accrues when the plaintiff discovers or reasonably should have discovered the malpractice.[21]

b. Collectability

Unollectability of a judgment is considered an affirmative defense to a legal malpractice claim and must be both pled and proved by the defendant.[22]

1 *Graves v. S.E. Downey Registered Land Surveyor, P.A.*, 885 A.2d 779, 782 (Me. 2005).
2 *Id.* (*quoting Forbes v. Osteopathic Hosp. of Me., Inc.*, 552 A.2d 16, 17 (Me.1988)); *Garland v. Roy*, 2009 ME 86, 976 A.2d 940, 946.
3 *Homeowners' Assistance Corp. v. Merrimack Mortgage Co. Inc.*, CV-99-132, 2000 WL 33679263 (Me. Super. Jan. 24, 2000)
4 *Larochelle v. Hodson*, 690 A.2d 986, 989 (Me. 1997).
5 *Board of Overseers of the Bar v. Dineen*, 500 A.2d 262, 264 (Me. 1985).
6 *Id.* (*quoting Schneider v. Richardson*, 411 A.2d 656, 657 (Me. 1979)).
7 *Pitt v. Frawley*, 722 A.2d 358, 361.
8 *Niehoff v. Shankman & Associates Legal Ctr., P.A.*, 2000 ME 214, 763 A.2d 121, 124-25
9 *Id.* (*quoting Merriam v. Wanger*, 2000 ME 757 A.2d 778, 781.
10 *Id.*
11 *Niehoff v. Shankman & Associates Legal Ctr., P.A.*, 2000 ME 214, 763 A.2d 121, 124-25
12 *Moores v. Greenberg*, 834 F.2d 1105, 1110 (1st Cir. 1987).
13 *Hoitt v. Hall*, 661 A.2d 669, 673 (Me. 1995)
14 *Garland v. Roy*, 2009 ME 86, 976 A.2d 940, 947-48.
15 *Id.*
16 *McAlister v. Slosberg*, 658 A.2d 658, 660.
17 *Thurston v. Cont'l Cas. Co.*, 567 A.2d 922, 923 (Me. 1989).
18 *Id.*
19 *Matson v. Babcock*, 565 A.2d 312 (Me. 1989).
20 *Id.*
21 *Id.* (citing *Anderson v. Neal*, 428 A.2d 1189, 1190-91 (Me, 1981).
22 *Jourdain v. Dineen*, 527 A.2d 1304, 1306 (Me. 1987).

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Elements and Nature of a Legal Malpractice Action

While Maryland courts have never been completely clear or consistent in determining whether a legal malpractice cause of action sounds in negligence or contract, there is no doubt as to the requisite elements of such an action. Maryland's Court of Appeals has stated that "in a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client."[1]

A party who was *not a client* of the attorney may bring a legal malpractice action if that party is able to establish: (a) an employment relationship between an attorney and a client; (b) the existence of an intended third party beneficiary of the attorney's services; (c) a duty reasonably arising out of the employment relationship; (d) a breach of that duty; and (e) damages to the intended third party beneficiary directly and proximately flowing from the breach.[2]

While the "relationship" element would seem to indicate the legal malpractice cause of action sounds in contract, Maryland has traditionally applied tort principles and noted the gravamen of the cause of action sounds in tort.[3]

The Employment Relationship

Many of the disputes arising in connection with the issue of whether an attorney has breached a duty owed to the client concern the scope of the representation. Maryland's Court of Appeals has stated that "before an attorney can be held liable, it must appear that the loss for which he is sought to be held arose from his failure to discharge some duty which was fairly within the purview of his employment."[4]

However, payment of a fee is not required to establish an attorney/client relationship and thus impose a duty of care on the attorney.[5] The attorney/client relationship may arise by operation of law.[6]

The duties and obligations inherent in an attorney/client relationship "will not be presumed to flow to a third

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party and will not be presumed to arise by implication when the effect of such a presumption would be tantamount to a prohibited or improbable employment."[7]

Neglect of Reasonable Duty

A lawyer's actions, if challenged, should be examined in light of the traditional standards applicable to professional negligence actions.[8]

The law "implies a promise on the part of attorneys that they will execute the business entrusted to their professional management with a reasonable degree of care, skill and dispatch."[9]

Expert testimony is required to prove legal negligence *unless* the alleged incompetence is within the knowledge or experience of a layperson.[10] Because an expert opinion on the standard of care in an attorney negligence case is often based upon the expert's interpretation of the law, experts in such cases may state their opinion on the law as a foundation for their opinion on the standard of care.[11]

Violation of Maryland's Rules of Professional Conduct is not a *per se* basis for liability, nor do the Rules per se reflect public policy as to an attorney's conduct.[12]

The courts have generally found that where reasonable attorneys might disagree as to the best course of action, the attorney's decision should not be the subject of a legal malpractice action.[13] This rule has often been applied in cases where clients sue their attorneys for negligently recommending a settlement the client is subsequently unsatisfied with.[14]

Damages

In order to prevail in a legal malpractice claim, it is necessary to prove some direct and proximate injury as a result of the breach of duty by the attorney.[15] In other words, even when there has been a breach of duty, there is no legitimate cause of action against an attorney for negligence if the client would not have prevailed in the underlying case.[16] It is part of the plaintiff's burden of proof to demonstrate that the underlying case would have been successful and damages awarded.[17] The trial-within-a-trial doctrine is the "accepted and traditional means" of resolving the issues involved in the underlying proceeding in a legal malpractice action.[18]

Just like a medical bad result does not create a presumption of negligence, a legal bad result likewise does not create a presumption of negligence.[19] A lawyer is not negligent because he did not achieve the desired results; nor is he liable for failure to use a trial strategy which in hindsight might have been successful.[20]

The damages in a legal malpractice action must be foreseeable.[21]

It is generally accepted that a client in Maryland may (in appropriate circumstances) recover emotional distress damages in a legal malpractice action.[22] Additionally, punitive damages may be available to a plaintiff who is able to prove actual malice on the attorney's part.[23]

Defenses to a Legal Malpractice Claim

Statute of Limitations

The Maryland General Assembly has not enacted specific legislation as to the limitations period relevant to a legal malpractice case. In Maryland, legal malpractice claims are generally controlled by Md. Code Ann., Cts. & Jud. Proc. § 5-101 (West), which requires that a civil action "be filed within three years from the date it accrues."[24]

In cases of professional malpractice, Maryland's Court of Appeals has established the "discovery rule" – the rule that the cause of action accrues when the claimant discovers or reasonably should have discovered that he or she has been wronged.[25] The "continuous employment" doctrine (also known as the "continuation of events" theory) may also serve to toll the statute of limitations where a continuous relationship – such as that between attorney and client – exists between the parties.[26]

Collectability

Not only must the plaintiff establish that he or she would have been successful in the underlying case, he or she must also prove the judgment would have been *collectable* (with reasonable effort).[27]

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Contributory Negligence/Assumption of Risk

Despite the fact that legal malpractice cases are viewed as contractual in nature, the ordinary tort defenses of contributory negligence and assumption of risk apply.[28]

Indemnity/Contribution

A lawyer defendant in a legal malpractice action may implead the successor lawyer for indemnity or contribution.[29]

1 *Kendall v. Rogers*, 181 Md. 606, 611-612 (1943), (quoting *Maryland Casualty Company v. Price*, 231 F. 397, 401 (4th Cir. 1916)); see also *Ferguson v. Cramer*, 349 Md. 760, 765-66, 709 A.2d 1264 (1998).
2 *See Flaherty v. Weinberg*, 303 Md. 116, 130, 492 A.2d 618, 625 (1985).
3 *See Flaherty*, 303 Md. at 134.
4 *Home Fed. Sav. & Loan Ass'n v. Spence*, 259 Md. 575, 585, 270 A.2d 820, 825 (1970).
5 *See Central Cab Company v. Clarke*, 259 Md. 542, 549 (1970) (counsel under duty to notify client he was terminating services even though no payments were made to attorney).
6 *See Passmore v. Harrison*, 19 Md. App. 143, 310 A.2d 205 (1973).
7 *Clagett v. Dacy*, 47 Md.App. 23, 30, 420 A.2d 1285, 1290 (1980).
8 *See Thomas v. Bethea*, 351 Md. 513, 529, 718 A.2d 1187, 1195 (1998).
9 *Fishow v. Simpson*, 55 Md. App. 312, 318, 462 A.2d 540, 544 (1983).
10 *Id.* at 318-319 ("A determination of the standard of reasonable care by the trial judge based upon his own private investigation, or upon his own intuitive knowledge of the court, untested by cross examination, or any of the rules of evidence, constitutes a denial of due process in a criminal or civil matter.").
11 *See Franch v. Ankney*, 341 Md. 350, 361-62, 670 A.2d 951, 956 (1996).
12 *See Kersten v. Van Grack, Axelson & Williamowsky, P.C.*, 92 Md. App. 466, 476, 608 A.2d 1270, 1275 (1992).
13 *See, e.g., Fishow*, 55 Md. App. at 317.
14 *See Bethea*, 351 Md. 513.
15 *See, e.g., Glasgow v. Hall*, 24 Md. App. 525, 332 A.2d 722 (1975); *Spence*, 259 Md. 575.
16 *See Taylor v. Feissner*, 103 Md. App. 356, 366, 653 A.2d 947, 952 (1995).
17 *See Bethea*, 351 Md. at 533.
18 *Id.*
19 *Compare Luckey v. Kan*, 115 Md. App. 1, 691 A.2d 748, cert. denied, 346 Md. 240, 695 A.2d 1228 (1997), with *Fishow*, 55 Md. App. 312.
20 *See Fishow*, 55 Md. App. at 317.
21 *See, e.g., Stone v. Chicago Title Ins. Co. of Maryland*, 330 Md. 329, 624 A.2d 496 (1993) (holding all requirements of proximate cause applicable to attorney malpractice).
22 *See Fischer v. Longest*, 99 Md. App. 368, 637 A.2d 517 (1994).
23 *See, e.g., Miller v. Schaefer*, 80 Md. App. 60, 75, 559 A.2d 813, 820 (1989) aff'd, 322 Md. 297, 587 A.2d 491 (1991); *Homa v. Friendly Mobile Manor, Inc.*, 93 Md. App. 337, 342, 612 A.2d 322, 324 (1992).
24 *See Fairfax Sav., F.S.B. v. Weinberg & Green*, 112 Md. App. 587, 612, 685 A.2d 1189, 1201 (1996).
25 *See, e.g., Watson v. Dorsey*, 265 Md. 509, 512, 290 A.2d 530 (1972); *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 95, 756 A.2d 963, 973 (2000).
26 *See Brown & Sturm*, 360 Md. at 97 (a relationship built on trust and confidence generally gives the confiding party the right to relax his or her guard and rely on the good faith of the other party so long as the relationship continues to exist).
27 *See Bethea*, 351 Md. at 535; *Glasgow*, 24 Md. App. at 530.
28 *See Shofer v. Stuart Hack Co.*, 124 Md. App. 516, 723 A.2d 481 (1999); *Catler v. Arent Fox, LLP*, 212 Md. App. 685, 71 A.3d 155 (2013) (corporate client's officers' contributory negligence in allowing corporate president, whom officers believed was in cognitive decline, to sign loan agreements precluded recovery for alleged legal malpractice by law firm representing corporate client and president in allowing president to sign agreements).
29 *See Parler & Wobber v. Miles & Stockbridge, P.C.*, 359 Md. 671, 756 A.2d 526 (2000).

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Legal Malpractice

Massachusetts, like most states, recognizes a cause of action for legal malpractice. A malpractice claim does not sound exclusively in either contract or tort.[1] The standard of care normally applied is whether the lawyer failed to exercise reasonable care and skill in handling the client's matter, a classical tort negligence standard.[2] Unless the attorney has held himself out as a specialist, he owes his client a duty to exercise the degree of care and skill of the average qualified petitioner.[3] Apart from negligence and breach of contract, there are several other theories of legal malpractice, such as misrepresentation, breach of fiduciary duty, breach of client confidences, inappropriate conflicts of interest, abuse of advantages arising out of the client-lawyer relationship and/or violation of the Massachusetts Consumer Protection Act, Mass. General Laws, Chapter 93A.

An attorney may also be liable to non-clients under certain circumstances, although most claims of legal malpractice arise out of the attorney-client relationship. Therefore, the typical threshold issue for most cases is whether there is an attorney-client relationship. The creation of an attorney-client relationship may be express or implied. If the attorney has not explicitly agreed to provide legal advice or assistance on a particular matter, the plaintiff may still prove an implied attorney-client relationship if he can show the following: (a) that he made an expressed request for the advice or assistance of an attorney on a particular matter, (b) the matter is within the attorney's area of competence, and (c) the attorney impliedly assented to give the required advice or assistance. An attorney's assent may also be inferred from the lawyer's conduct or where the plaintiff reasonably relied upon the attorney to provide advice or assistance, the attorney knew of such reliance and either acquiesced or did nothing to repudiate such reliance.[4]

Expert testimony is generally required in legal malpractice cases to establish that the attorney failed to meet the standard of care, except in those rare cases in which a lawyer's negligence is so obvious that a layperson could understand it without the assistance of an expert.[5] As in other tort cases, the plaintiff must prove that the defendant lawyer owed the plaintiff a duty, breached that duty, and that the defendant's lawyer's handling of the matter

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caused the plaintiff a loss. A defendant attorney who violates this duty of care is liable to his client for any reasonably foreseeable loss caused by his malpractice.

Expert testimony is also typically required to show that the lawyer's failure to exercise the required level of care caused the plaintiff a loss. It is not enough to show that the lawyer failed to exercise adequate skill and care; the plaintiff must also show that the plaintiff probably would have obtained a better legal result in the underlying matter had the lawyer exercised adequate skill and care. This is the so-called "case within a case" (or "trial within a trial") method of proof.

Proving Causation

Often the most crucial piece of a legal malpractice claim is the expert testimony needed to establish the required causal connection between a defendant attorney's conduct and the loss alleged by the plaintiff.[6] The absence of a causation expert may be fatal to a plaintiff's malpractice case.[7]

Causation issues are often complex and difficult to prove because the plaintiff has to prove not only why an underlying case, trial or transaction did not go as well as the client expected, but also show how the proceedings might have gone differently if the case, trial or transaction had been handled with the appropriate care. This requires sufficient evidence, beyond mere speculation, that the client could have and would have obtained a better result but for his lawyer's malpractice. For example, in the typical "trial within a trial" scenario, the plaintiff must prove what the outcome of the underlying trial would have been if the lawyer had not been negligent, thus requiring the plaintiff to put on a trial of the underlying case.[8] However, in at least one set of circumstances, the highest state court, the Supreme Judicial Court, has noted that there may be "no need for a trial within a trial."[9] For instance, the plaintiff, whose lawyer settled his underlying case for something less than its real value because of the attorney's negligence, loses a valuable right, namely, the opportunity to settle the case for a reasonable amount with a trial. Such a plaintiff may seek to recover the difference between the lowest amount at which his case probably would have been settled if he had been represented by competent counsel and the amount of the actual settlement. The Court noted that, "in such an approach there would be no need for a trial within a trial and a plaintiff's potential recovery would be more limited than in a traditional approach."[10]

Statute of Limitations

The statute of limitations for a legal malpractice claim is three years. This is so, even if the plaintiff proceeds on a breach of contract theory, which usually has a 6 year limitation period.[11] "The three years statute of limitations begins to run when the client 'knows or reasonably should know that he or she has sustained appreciable harm as a result of a lawyer's conduct.' This is the so-called "discovery" rule."[12] However, the statute of limitations is typically tolled until the end of the defendant attorney's representation of the plaintiff client.[13] The exception is where the client has 'actual knowledge' of the malpractice and harm. In that case, there can be no "innocent reliance" and the statute of limitations begins to run once the client has actual knowledge of the malpractice and harm.[14]

Defenses

A defendant may employ any of the defenses commonly used in a tort case. For example, the defendant may argue that there was no attorney-client relationship and thus no duty of care, that he did not breach the duty of care, that the alleged breach did not cause the plaintiff's damages, or that the plaintiff was not harmed. Comparative fault also applies to legal malpractice claims in Massachusetts, whether sounding in contract or tort.[15] Under the "modified" comparative negligence approach in Massachusetts, a plaintiff's recovery is reduced by the percentage of the plaintiff's negligence, so long as the plaintiff's negligence is less than or equal to 50 percent. However, if a plaintiff-client's negligence exceeds that of the defendant lawyer, the defendant is entitled to judgment in the defendant's favor.[16]

Damages

An attorney who commits malpractice is liable to his client for any reasonably foreseeable loss caused by his malpractice.[17] This may include emotional distress if it is reasonably foreseeable.[18]

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Duties to Non-Clients

A lawyer may owe duty to a non-client under certain circumstances, where the attorney knows that the non-client was relying on his services, or where the non-client is an intended beneficiary of the lawyer's services.[19] For example, a lawyer may owe a duty to an estate after preparing his client's estate plan.[20]

Consumer Protection Act

The practice of law can constitute trade or commerce within the Massachusetts Consumer Protection Law, M.G.L. c. 93A, thus making this statute applicable to the attorney-client relationship.[21] A violation entitles the plaintiff-client to attorney's fees, and possibly multiple damages. However, an unfair or deceptive act requires more than a mere act of negligence, such as intentional or reckless deceit.[22]

1 *Clark v. Rowe*, 428 Mass. 339, 341 (1998).
2 *Id.*
3 *Fishman v. Brooks*, 396 Mass. 643, 646 (1986).
4 *DeVaux v. American Home Assurance Co.*, 387 Mass. 814, 817-18 (1983).
5 *Harris v. Magri*, 39 Mass. App. Ct. 349, 353-54 (1995).
6 *Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C.*, 25 Mass. App. Ct. 107, 115 (1987).
7 *See, e.g., Atlas Tack Corp. v. Donabed*, 47 Mass. App. Ct. 221 (1999).
8 *Fishman v. Brooks*, 396 Mass. 643, 646 (1986).
9 *Id.*
10 *Id.*
11 *Hodas v. Sherburn, Powers & Needham*, 938 F. Supp. 58, 59 (D. Mass. 1996).
12 *Lyons v. Nutt*, 436 Mass. 244, 247 (2002) (*quoting Williams v. Ely*, 423 Mass. 467, 473 (1996)).
13 *Id.* at 249-50.
14 *Id.* at 250-251.
15 *Clark v. Rowe*, 428 Mass. 339, 341 (1998).
16 *Id.*
17 *Fishman v. Brooks*, 396 Mass. 643, 646 (1986).
18 *See Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987); and *Meyer v. Wagner*, 429 Mass. 410 (1999).
19 *See Ryan v. Ryan*, 419 Mass. 86, 89 (1994).
20 For a recent example, see *Masciare v. Fenischel*, Mass. Lawyers Weekly No. 12-190-12 (holding that an estate executor could bring a legal malpractice action against the lawyer who prepared a will that left his brother's interest in a two-family home to the brother's step-son instead of to the executor, as anticipated, so long as he was suing in his capacity as a personal representative of the estate and not as a potential beneficiary).
21 *Frullo v. Landenberger*, 61 Mass. App. Ct. 814, 822 (2004).
22 *Meyer v. Wagner*, 429 Mass. 410, 424 (1999).

Michigan

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Overview

MCL 600.2912(1) recognizes the civil action of malpractice and states that the common law applies. It is a common-law tort action for injuries or damages arising out of a breach of the duties owed by an attorney to a client. Duties may arise out of the common law or from the Michigan Rules of Professional Conduct.

The elements of a claim for legal malpractice are as follows: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation (violation of the standard of care); (3) damages or injuries that were proximately caused by the negligence (Plaintiff must prove that but for the violation of the standard of care, the plaintiff would not have suffered the injury or damage or would have suffered a lesser injury or damage); and (4) extent of the damages or injuries.

A violation of the standard of care (element 2 above), is either (1) failure by the defendant to do what a reasonably prudent attorney (on of ordinary learning, judgment or skill) would have done in the same or similar circumstances; or (2) action by the defendant that a reasonably prudent attorney would not have taken.[1]

Proving Causation

To prove proximate cause, a plaintiff in a legal malpractice action must also establish that the defendant's action was a "cause in fact" of the claimed injury. In other words, a plaintiff must show that but for the attorney's alleged malpractice, he or she would have been successful in the underlying suit. The practical import is that a client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding. Still, to hold otherwise would permit a jury to find a defendant liable on the basis of speculation and conjecture.[2]

The "suit within a suit" concept also applies where the alleged negligent conduct involves the failure of an attorney to properly pursue an appeal. For failure to pursue an appeal, it is essential to the determination of proximate cause in a legal malpractice action is the plaintiff's ability to show that the appellate court even would have addressed the issue. Specifically, the plaintiff must show that an appellate court would have had jurisdiction to hear the appeal, that the appellate court would have granted review when review is discretionary, and that the trial court's judgment would have been modified on review.[3] The issue of proximate cause in an

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appellate attorney malpractice case is reserved to the court because whether an appeal would have been successful intrinsically involves issues of law within the exclusive province of the courts.[4]

Damages Recoverable

Many jurisdictions impose a collectability requirement on legal malpractice claims, at least where an attorney is engaged to prosecute an action and does so negligently. In the majority of those jurisdictions, the burden of showing collectability is on the plaintiff. Michigan declines to follow these authorities. Instead, Michigan follows the minority view that collectability is an affirmative defense to an action for legal malpractice that must be pleaded and proved by the defendant. The burden of showing complete or partial uncollectability is on the defendant.[5] If, for example, a defendant can show that a judgment would have been only partially collectible, then a plaintiff's damages will be limited to the amount collectable.[6]

Defenses

Statute of Limitation. A legal malpractice action must be brought within two years of the date the defendant discontinued representing the plaintiff on the matters out of which the malpractice arose or within six months of the date that the plaintiff discovered or should have discovered the possibility of a claim against the attorney.[7]

Uncollectability of Judgment in Underlying Suit. As noted above, a judgment that the plaintiff would have been received in the underlying suit must be collectable, but this is an affirmative defense that the defendant must plead and prove.[8]

Collateral Estoppel. Collateral estoppel can be used defensively in legal malpractice cases.[9]

Error of Professional Judgment. Mere errors of professional judgment, as distinguished from breaches of reasonable care, are the basis for a defense.[10]

Perjury. The plaintiff's commission of perjury in the underlying case may be a complete defense to a malpractice claim.[11]

Comparative Negligence of Client. Comparative negligence of the client is a defense to a malpractice claim.[12]

Arbitration Agreement. A fee agreement requiring arbitration of disputes arising out of legal representation has been found to preclude a malpractice suit.[13]

1 *Simko v. Blake*, 448 Mich. 648, 532 N.W.2d 842 (Mich. 1995); *Karam v. Law Offices of Ralph J. Kliber*, 253 Mich. App. 410, 655 N.W.2d 614 (Mich. Ct. App. 2002).
2 *Charles Reinhart Co. v. Winiemko*, 444 Mich. 579, 513 N.W.2d 773 (Mich. 1994)
3 *Id.*
4 *Id.*
5 See e.g. *Jourdain v. Dineen*, 527 A.2d 1304 (Me. 1987).
6 *Teodorescu v. Bushnell, Gage, Reizen & Byington (After Remand)*, 201 Mich. App. 260, 267-268; 506 N.W.2d 275 (Mich. Ct. App. 1993)
7 M.C.L. § 600.5838; M.C.L. § 600.5805(5); *Levy v. Martin*, 463 Mich. 478, 620 N.W.2d (Mich. 2001).
8 *Teodorescu, supra*.
9 *Alterman v. Provizer*, 195 Mich. App. 422, 491 N.W.2d 868 (Mich. Ct. App. 1992).
10 *Simko, supra*.
11 *Pantely v. Garris, Garris, & Garris, P.C.*, 180 Mich. App. 768, 447 N.W.2d 864 (Mich. Ct. App. 1989).
12 *Pontiac Sch. Dist. v. Miller, Canfield, Paddock & Stone*, 221 Mich. App. 602, 563 N.W.2d 693 (1997).
13 *Watts v. Polacyzk*, 242 Mich. App. 600, 619 N.W.2d 714 (2000).

Minnesota

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Professional liability claims in Minnesota are grounded on principles of negligence.[1] A legal malpractice plaintiff must show four elements: (1) an attorney-client relationship existed; (2) the lawyer was negligent or otherwise breached the contract; (3) the negligence or breach of duty was the proximate cause of damages; and (4) "but for" the lawyer's conduct, the plaintiff would have been successful in the prosecution or defense of their action.[2] If the plaintiff fails to prove any one of these essential elements, the claim will fail.[3]

Attorney-Client Relationship

Whether an attorney-client relationship existed is typically a question of fact based upon communications between the parties and the surrounding circumstances.[4] Where a written retainer agreement is in place, the existence of an attorney-client relationship is easier to prove. An attorney-client relationship can also be established by evidence of an implied contract, or under a tort or third-party beneficiary analysis.[5] Under a tort theory, an attorney-client relationship is formed when an individual seeks and receives legal advice from an attorney and reasonably relies on such advice.[6] It is a fact question whether the advice could be reasonably relied upon to establish an attorney-client relationship.[7] An intended third-party beneficiary may bring an action for legal malpractice where the client's sole purpose was to benefit the third party directly and the attorney's conduct caused the beneficiary to suffer a loss.[8]

Negligence/Breach

If a plaintiff establishes the existence of an attorney-client relationship, the plaintiff must then prove the attorney breached the appropriate standard of care.[9] Generally, attorneys have a duty to "exercise that degree of care and skill that is reasonable under the circumstances, considering the nature of the undertaking."[10] Expert testimony is typically required to show the specific applicable standard of care and whether the attorney's conduct deviated from that standard.[11]

Attorneys are usually not liable for mere errors in judgment.[12] To be protected under this so-called "*Meagher* rule," the attorney must still act "in good faith and in an honest belief that [the attorney's] advice and acts are well founded and in the best interest of [their] client…"[13]

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This same exception also applies if the attorney makes a "mistake in a point of law which has not been settled by the court of last resort … and on which reasonable doubt may be entertained by well-informed lawyers."[14] However, an attorney must use reasonable care to obtain the information needed to exercise their professional judgment. The failure to use such reasonable care in obtaining information is negligent, even if performed in good faith.[15]

Proximate Cause/But For

In legal malpractice actions, proximate cause is the same as in an ordinary negligence action.[16] It is typically a fact question for the jury and must be a "substantial factor in bringing about the injury."[17] Malpractice claims against lawyers typically fall within two categories: (1) loss of or damage to an existing cause of action; or (2) other claims for damages not related to an existing cause of action.[18]

The proximate cause element in a claim for loss of or damage to an existing cause of action is typically referred to as the "case-within-a-case" element.[19] To prove causation in these claims, the plaintiff must prove that, but for the attorney's negligence, "he had a meritorious cause of action originally."[20] For example, where an attorney fails to timely serve a complaint prior to the running of the statute of limitations, the plaintiff must prove the action would have been successful if the complaint had been timely served.[21] In other words, the plaintiff must prove that, but for the attorney's negligence, the plaintiff would have been successful in the prosecution or defense of the action.[22]

In claims not involving loss of or damage to an existing cause of action, such as transactional matters, a plaintiff establishes proximate cause by showing that, but for the attorney's conduct, the plaintiff would have obtained a more favorable result than the one actually obtained.[23]

Damages

Legal malpractice plaintiffs are entitled to recover damages appropriate in an ordinary negligence action.[24] Additionally, in some instances, a malpractice plaintiff may be awarded legal fees incurred in the underlying litigation.[25] Similarly, if the attorney's negligence causes the client to become involved in further litigation, the amount of fees paid to the new counsel may be awarded as damages.[26] An attorney or firm may also be required to forfeit fees paid by the client upon a showing of a breach of fiduciary duties to the client.[27] If an attorney commits fraud in the context of an action or judicial proceeding underlying the malpractice claim, the attorney may be liable for treble damages.[28] Courts will not allow attorneys or firms to offset hypothetical attorney fees that would have been earned had the matter had been handled properly.[29] In limited circumstances, a plaintiff may also be entitled to damages for emotional distress or punitive damages where the attorney's violation of the plaintiff's rights was by willful, wanton, or malicious conduct - but mere negligence is insufficient.[30]

Defenses and Other Considerations

Attorneys or firms facing a malpractice suit have several available defenses, including the defense that the plaintiff cannot establish all of the necessary elements – existence of an attorney-client relationship, a breach of the applicable standard of care, proximate causation, and damages. Unless the matter in issue is within a lay jury's common knowledge and comprehension, a legal malpractice plaintiff typically needs to establish the applicable standard of care through expert testimony and the plaintiff's failure to do so can be grounds for dismissal.[31]

A legal malpractice claim must be brought within the six-year statute of limitations.[32] The cause of action accrues and the limitations period begins to run when the first damage results from the malpractice.[33] Minnesota does not mechanically apply a "Discovery Rule," but instead employs a case-by-case rule for the accrual of the cause of action; in some instances, the date of accrual may be easy to determine, while in other cases the determination of the date on which a claim accrues can be much more difficult.[34]

Moreover, in accordance with Minn. Stat. § 544.42, a legal malpractice plaintiff usually must submit an affidavit stating: (1) that the facts have been reviewed by the party's attorney with a qualified expert who believes the defendant attorney deviated from the applicable standard of care; or (2) that the affidavit required could not timely be obtained prior to the running of the statute of limitations; or (3) that the

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parties have agreed to a waiver of the affidavit requirement or that the plaintiff has applied for a waiver from the court.[35] Recent case law suggests the affidavit requirement is not necessarily applicable where the subject matter is within the common knowledge of a lay juror and, accordingly, expert testimony will not be required to establish a prima facie case of malpractice.[36] However, if any of the requisite elements must be proven by expert testimony, an affidavit is required.[37] Failure to comply with the affidavit requirement, when it is applicable, may result in dismissal of the claim with prejudice.[38]

Finally, although the Minnesota Supreme Court has established a Client Security Board to reimburse clients for losses caused by a lawyer's dishonest conduct, this fund does not reimburse losses resulting from malpractice.[39]

1 *See Jerry's Enterprises, Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006).
2 *Blue Water Corp., Inc. v. O'Toole*, 336 N.W.2d 279, 281 (Minn. 1983).
3 *Noske v. Friedberg*, 670 N.W.2d 740, 743 (Minn. 2003).
4 *See Ronnigen v. Hertogs*, 199 N.W.2d 420, 421-422 (Minn. 1972).
5 *Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 265 (Minn. 1992).
6 *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 692-93 (Minn. 1980).
7 *Admiral Merchants Motor Freight, Inc.*, 494 N.W.2d at 266.
8 *Id.*
9 *See id.*
10 *Prawer v. Essling*, 282 N.W.2d 493, 495 (Minn. 1979).
11 *Admiral Merchants Motor Freight, Inc.*, 494 N.W.2d at 266.
12 *Meagher v. Kavli*, 97 N.W.2d 370, 375 (Minn. 1959).
13 *Id.* (quoting *Hodges v. Carter*, 80 S.E.2d 144,146 (N.C. 1954)).
14 *Id.*
15 *Togstad*, 291 N.W.2d at 693.
16 *Raske v. Gavin*, 438 N.W.2d 704, 706 (Minn. Ct. App. 1989).
17 *Vanderweyst v. Langford*, 228 N.W.2d 271, 272 (Minn. 1975); *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980).
18 *Compare Noske*, 656 N.W.2d 409 (alleged malpractice at trial that resulted in conviction) with *Jerry's Enterprises, Inc.*, 711 N.W.2d 811 (alleged malpractice in connection with real estate transaction).
19 *Fiedler v. Adams*, 466 N.W.2d 39, 42 (Minn. Ct. App. 1991).
20 *Hill v. Okay Constr. Co., Inc.*, 252 N.W.2d 107, 117 (Minn. 1977).
21 *See, e.g., Christy v. Saliterman*, 179 N.W.2d 288, 293 (Minn. 1970).
22 *Blue Water Corp., Inc.*, 336 N.W.2d at 281.
23 *Jerry's Enterprises, Inc.*, 711 N.W.2d at 819; *see also Blue Water Corp., Inc.*, 336 N.W.2d at 282-84 (holding attorney's failure to file bank charter application was insufficient basis for award where plaintiff failed to show application would have been granted).
24 DAVID F. HERR, 28A MINNESOTA PRACTICE SERIES: ELEMENTS OF AN ACTION § 13:4 (2013).
25 *See Hill*, 252 N.W.2d at 121.
26 *Autrey v. Trkla*, 350 N.W.2d 409, 413-14 (Minn. Ct. App. 1984).
27 *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982).
28 MINN. STAT. § 481.071; *but see Baker v. Ploetz*, 616 N.W.2d 263, 272-73 (firm not liable for treble damages because fraud occurred during real estate closing and not within judicial action or proceeding).
29 *See Togstad*, 291 N.W.2d at 695-96.
30 *See Lickteig v. Anderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 562 (Minn. 1996); Gillespie v. Klun, 406 N.W.2d 547, 558-59 (Minn. Ct. App. 1987); MINN. STAT. § 549.20.
31 *Hill*, 252 N.W.2d at 116.
32 MINN. STAT. § 541.05, subd. 1(5); Hermann v. McMenomy & Severson, 590 N.W.2d 641, 643 (Minn. 1999).
33 *Thiele v. Stich*, 416 N.W.2d 827, 829 (Minn. Ct. App. 1987) (reversed on unrelated grounds in *Thiele v. Stich*, 425 N.W.2d 580, 584 (Minn. 1988)).
34 *Compare Noske*, 656 N.W.2d at 416 (plaintiff did not suffer damage as a result of conviction, but nine years later when conviction was vacated) *with Antone v. Mirviss*, 720 N.W.2d 331, 338 (Minn. 2006) (action for malpractice in drafting of antenuptial agreement accrued at the time of the client's marriage).
35 MINN. STAT. § 544.42, subd. 3(a).
36 *Timothy Guzick v. Kimball*, A14-0429, 2014 WL 4957973 at *3 (Minn. Ct. App. October 6, 2014) (unpublished).
37 *Id.*
38 MINN. STAT. § 544.42. subd. 6; *Fontaine v. Steen*, 759 N.W.2d 672, 676-77 (Minn. Ct. App. 2009).
39 For additional information, *see* http://csb.mncourts.gov/Pages/default.aspx.

Mississippi

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An action for legal malpractice may be brought in either contract or tort.[1] To plead legal malpractice in Mississippi, a plaintiff must provide sufficient facts to establish three elements: (1) an attorney-client relationship; (2) the attorney's negligence in handling the client's affairs; and (3) proximate cause of the injury.[2] As to the first factor, an attorney-client relationship exists when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person, and (2) the lawyer manifests to the person consent to do so, fails to manifest lack of consent to do so, knowing that the person reasonably relies on the lawyer to provide the services, or a tribunal with power to do so appoints the lawyer to provide the services. Fee payment by the client to the attorney is not required to create an attorney-client relationship.[3] As to the second factor, a lawyer owes his client the duty to exercise the knowledge, skill, and ability ordinarily possessed and exercised by the members of the legal profession similarly situated. Failure to do so constitutes negligent conduct on the part of the lawyer.[4] As to the third essential ingredient, the plaintiff must show that, but for his attorney's negligence, he would have been successful in the prosecution or defense of the underlying action.[5]

The generally accepted rule is that expert testimony is ordinarily necessary to support an action for malpractice of a professional in those situations where special skills, knowledge, experience, learning or the like are required. But this rule does not apply when the attorney's conduct is negligent as a matter of law, and the plaintiff is entitled to a directed verdict on liability (e.g., the failure of an attorney to file a suit prior to the expiration of the statute of limitations).[6] In a legal malpractice action, the question of whether expert testimony is required depends on whether the issue of negligence is sufficiently clear so lay persons could understand and determine the outcome , or whether the alleged breach of duty involves complex legal issues which require expert testimony to amplify and explain it for the fact finder.[7]

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Proving Causation

In the usual legal malpractice case, in order to prove proximate cause the plaintiff must show that but for his attorney's negligence he would have been successful in the prosecution or defense of the underlying action.[8] A legal malpractice action in Mississippi requires the plaintiff to prove a "trial within a trial." In other words, the plaintiff/client carries the burden of trying the underlying claim as a part of this legal malpractice case, not by trying to prove or recreate what would or may have happened in some other court at some other time and place. More specifically, the "success" component of plaintiff's burden involves no attempt to show what would have happened if the attorney had timely brought the case. Rather, the issues that would have been tried there are made up and tried in the legal malpractice suit.[9]

Mississippi law recognizes a clear distinction between allegations of legal malpractice based on negligence (sometimes called a breach of the standard of care) and those based on breach of fiduciary duty (sometimes called a breach of the standard of conduct).[10] When a legal malpractice claim is based on an allegation of breach of fiduciary duty, the plaintiff must establish (1) the existence of an attorney-client relationship; (2) the acts constituting a violation of the attorney's fiduciary duty; (3) that the breach proximately caused the injury; and (4) the fact and extent of the injury.[11] An attorney's breach of his fiduciary duties to his client may cause injury to the client entirely separate from the merits of the underlying case. (For example, suppose a lawyer receives a client's settlement check in a doubtful claim, but procrastinates negotiating the check. Meanwhile, the defendant files bankruptcy, the check is no longer good, and the client receives nothing. It is no defense to the client's lawsuit against the procrastinating lawyer that the client cannot prove that he would have won at trial because the underlying claim was doubtful.). When the claim is for breach of the standard of conduct, lack of expert testimony does not preclude the issue from being heard by a jury.[12]

Defenses

Defenses to malpractice claims in Mississippi include many of the standard professional malpractice defenses including: failure to bring a claim within the statute of limitations; failure to demonstrate that the plaintiff would have prevailed in the underlying action; failure to establish an attorney-client relationship or some other basis for a duty; and failure to proffer expert testimony establishing the standard of care. The Mississippi Supreme Court has carved out a limited exception to the defense of no attorney-client relationship for title work attorneys and held that liability may be extended to "foreseeable third parties who detrimentally rely" on the attorney's negligent conduct.[13] Also, a plaintiff who has received payment from the defendant in the underlying suit for his claims has no damages and cannot maintain a legal malpractice claim against his attorney.[14] An attorney who is a member of a domestic or foreign professional limited liability company is liable for a negligent or wrongful act or omission in which he personally participates to the same extent as if he rendered the services as a sole practitioner. However, he is not liable for the conduct of other members or employees of the limited liability company, except a person under his direct supervision and control.[15] A violation of the Rules of Professional Conduct by an attorney does not give rise to a cause of action for legal malpractice nor does it create any presumption that a duty has been breached. The Rules are not designed to be a basis for civil liability.[16]

In Mississippi, the three year "catch-all" of Miss. Code Ann. § 15-1-49 has been found to be the proper statute of limitations for a claim of attorney negligence.[17] Although, as noted supra, legal malpractice claims may be brought under either tort or contract theories, as a practical matter , it makes no difference under which the claim arises since under current Mississippi Code, the three-year limit of §15-1-49 applies to both. The statute of limitations in a legal malpractice case properly begins to run on the date when the alleged wrongful act or omission occurs or the date the client learns of or through the exercise of reasonable diligence should have learned of the negligence of his lawyer (i.e.,

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the discovery rule).[18] The discovery rule is applied when the facts indicate that it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act.[19] Mississippi does not follow the "continuous representation rule" which provides that the statute of limitations in a legal malpractice action begins to run on the date that the attorney's representation of the specific matter or transaction ended.[20]

Damages Recoverable

Mississippi follows the general rule that the proper element of damages which plaintiffs can recover from their former attorneys if a malpractice claim is sustained is the value of the lost claim, that is, the amount that would have been recovered in the former action but for the attorneys' negligence.[21] A jury should decide this amount and may consider the collectability of the original claim (i.e., whether the plaintiff would have been able to collect on any judgment recovered against the defendant) in deciding on a value.[22]

A legal malpractice plaintiff may not recover for emotional distress flowing from his dilemma with the law.[23] In certain circumstances, the Mississippi Supreme Court has allowed a plaintiff to recover the court costs and attorney's fees expended in connection with a malpractice claim.[24] However, in other cases, these costs and fees have been held to be properly disallowed.[25]

1 *Hutchinson v. Smith*, 417 So.2d 926, 927 (Miss. 1982)
2 *Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay*, 42 So.3d 474, 485 (Miss.2010)
3 *Great American E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A.*, 100 So.3d 420, 424 (Miss.2012)
4 *Hickox By and Through Hickox v. Holleman*, 502 So.2d 626, 634 (Miss.1987)
5 *Luvene v. Waldrup*, 903 So.2d 745, 748 (Miss.2005)
6 *Hickox*, 502 So.2d at 635
7 *Pierce v. Cook*, 992 So.2d 612, 618 (Miss.2008) ("Ordinary jurors possess the requisite knowledge and lay expertise to determine if an adulterous affair between an attorney and his client's wife is a breach of a duty owed by an attorney to his client. Expert testimony would not lend guidance under this circumstance.")
8 *Century 21 Deep South Properties, Ltd. v. Corson*, 612 So.2d 359, 372 (Miss.1992)
9 *Hickox*, 502 So.2d at 634
10 *Crist v. Loyacono*, 65 So.3d 837, 842 -843 (Miss.2011)
11 *id.*
12 *Lane v. Oustalet*, 873 So.2d 92, 99 (Miss.2004)
13 *Great American*, 100 So.3d at 424-25; Century 21, 612 So.2d at 374
14 *Edmonds v. Williamson*, 13 So.3d 1283 (Miss. 2009)
15 *Keszenheimer v. Boyd*, 897 So.2d 190, 192 -193 (Miss.Ct.App.2004); Miss. Code Ann. § 79-29(920)(1)
16 *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205, 1215 (Miss.1996)
17 *Hutchinson*, 417 So.2d at 929
18 *Spann v. Diaz*, 987 So.2d 443, 448 (Miss.2008); Smith v. Sneed, 638 So.2d 1252, 1253 (Miss. 1994)
19 *Bennett v. Hill-Boren, P.C.*, 52 So.3d 364, 369 (Miss.2011)
20 *id.*
21 *Hickox*, 502 So.2d at 634; *Byrd v. Bowie*, 992 So.2d 1202, 1210 (Miss.Ct.App.2008)
22 *Thompson v. Erving's Hatcheries, Inc.*, 186 So.2d 756, 760 (Miss. 1966)
23 *Lancaster v. Stevens*, 961 So.2d 768, 773 (Miss.Ct.App.2007)
24 *Century 21 Deep South Properties, Ltd.*, 612 So.2d at 372.
25 *Erving's Hatcheries, Inc. v. Thompson*, 204 So.2d 188, 192 (Miss. 1967) (held that the costs incurred by the plaintiff client, in an appeal by its former attorney from a judgment holding him liable to the client for negligently allowing the statute of limitations to run against a suit on an open account, were not taxable against the attorney where the judgment in question had been affirmed with respect to the attorney's liability but reversed and remanded for a new trial on the question of damages.)

Missouri

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In order for a plaintiff to sustain a malpractice action against an attorney, (1) an attorney-client relationship must exist, (2) there must have been negligence or a breach of the contract by the defendant, (3) the defendant's negligence or breach must be the proximate cause of plaintiff's damages, and (4) the plaintiff must have been damaged.[1] "Failure to prove any one of these elements defeats a claim for legal malpractice."[2] If a person is convicted of a crime, he or she is likely barred from bringing an action for legal malpractice involving the actions in the case for which he or she was convicted.[3]

Legal malpractice is "founded on an attorney's duty to exercise due care or to honor express contract commitments. In addition, an attorney has the basic fiduciary obligations of undivided loyalty and confidentiality."[4] Therefore, in Missouri, a plaintiff can also bring an action for breach of a fiduciary duty against his/her attorney.[5]

To establish a claim for a breach of a fiduciary duty, a plaintiff must show (1) an attorney-client relationship, (2) breach of a fiduciary obligation by the attorney, (3) proximate causation, (4) damages to the client, and (5) no other recognized tort encompasses the facts alleged.[6] Elements two and five distinguish this claim from one of legal malpractice.[7] If a cause of action could be made as an action for legal malpractice, then a plaintiff cannot allege an action for breach of fiduciary duty.[8] A breach of a fiduciary duty to a client can occur at any time during the relationship, and no proof of the attorney's intent is required to establish a claim for breach of fiduciary duty.[9]

Attorney-client relationship and non-client causes of action

For an attorney-client relationship to exist, a person must have sought and received legal advice and assistance from an attorney who intends to give such legal advice and assistance to that person.[10] Reliance upon the advice or conduct of the attorney by itself, however, is insufficient to establish an attorney-client relationship.[11] The relationship between a client and an attorney is "limited in scope to the purpose for which the attorney is employed," and "representation of the client in an unrelated matter is insufficient to establish that the attorney represented the client in another matter."[12]

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Although an attorney-client relationship is generally required in order for a plaintiff to maintain an action against an attorney, there are cases in Missouri in which an attorney is liable to a third party.[13] In exceptional cases, an attorney can be liable for acts of fraud, collusion, or malicious or tortious acts.[14] In less egregious circumstances, however, Missouri does recognize that an attorney can be liable to a third party if "an attorney-client relationship existed in which the attorney-defendant performed services specifically intended by the client to benefit the plaintiff."[15]

Whether an attorney has a legal duty to a non-client is determined by weighing the following factors:

1. The existence of a specific intent by the client that the purpose of the attorney's services were to benefit the plaintiff.

2. The foreseeability of the harm to the plaintiff as a result of the attorney's negligence.

3. The degree of certainty that the plaintiff will suffer injury from attorney misconduct.

4. The closeness of the connection between the attorney's conduct and the injury.

5. The policy of preventing future harm.

6. The burden on the profession of recognizing liability under the circumstances.[16]

"The ultimate factual issue that must be pleaded and proved is that an attorney-client relationship existed in which the client specifically intended to benefit the plaintiff."[17]

Missouri does not permit the assignment of legal malpractice actions.[18] Such assignments are against public policy because it would risk the acquisition of malpractice actions by economic bidder, would place an undue burden on the profession and justice system, and would endanger the attorney-client relationship.[19] Even if the assignment purportedly allows the assignee to bring the action in the name of the assignor, who would be the real party in interest, the assignment is prohibited by public policy.[20] However, a legal malpractice action does not abate upon the death of the client and can be continued on behalf of the estate.[21]

Negligence or breach by the attorney

Legal malpractice is based on "an attorney's duty to exercise due care or to honor express contract commitments."[22] An attorney is liable for malpractice when the attorney fails to exercise that degree of skill and diligence ordinarily used under the same or similar circumstances by other members of the legal profession.[23]

The question of what is an issue of law and what is an issue of fact has, historically, "posed problems in legal malpractice cases."[24] It is clear that when the facts are ascertained, "the question of negligence or want of skill is a question of law for the court."[25] In Missouri, "the jury's role as factfinder remains intact in a malpractice case without regard to who would have been or who was the factfinder in the underlying case."[26] In *Flavan v. Cundiff*, the Eastern District Court of Appeals favorably cited the proposition that issues of law in the underlying action do not become issues for the jury in a malpractice action.[27] Thus, issues of law in underlying actions, like the statute of frauds defense analyzed in *Flavan*, remain issues to be decided by the judge in malpractice actions.[28]

Except in cases where the standard of care for an attorney is displayed in a "clear and palpable" manner, an expert is required to establish a legal malpractice action.[29] "In order to escape the requirement of expert testimony, the alleged negligence or the question of negligence, must be clear and palpable to a jury of laymen, not a trial judge, although the trial judge is considered to be an expert."[30] Despite the trial judge's status as an expert, the trial judge "sets aside his own expertise and becomes a layman."[31]

Causation

A plaintiff must establish both causation in fact, otherwise known as "but-for" causation, and proximate causation.[32] Therefore, a plaintiff must both prove the "case within a case" by showing that plaintiff would have received a different result but for the attorney's negligence and prove that the injury to plaintiff was a reasonable and probable consequence of the attorney's negligence.[33]

Often the "case within a case" analysis will address both types of causation.[34] This is not always the case, however, because "the 'but for' test serves only to exclude items that

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are not causal in fact; it will include items that are causal in fact but that would be unreasonable to base liability upon because they are too far removed from the ultimate injury or damage."[35] Although the causal connection is a question of fact, cause cannot be based on speculation or conjection.[36] Additionally, when there is an intervening cause for the plaintiff's injury, the court shall interpose its judgment.[37]

A plaintiff can bring an action for legal malpractice after agreeing to settle the underlying action.[38] Because the plaintiff must prove that he or she would have been successful in the underlying action, however, the plaintiff can only be successful on a malpractice claim involving a case that settled if plaintiff can prove "that the settlement was necessary to mitigate damages or that the plaintiff was driven to the necessity of settling because, if the case had not settled, plaintiff would have been worse off."[39]

In addition, to prevail a plaintiff needs to establish that it could have overcome any affirmative defenses in the underlying suit whether or not it had settled.[40] Further, defendant-attorney need not plead the affirmative defenses from the underlying case as affirmative defenses in the malpractice action because the plaintiff has the burden of proving causation, or that he or she would have been successful but for the negligence of the attorney.[41] Thus, because evidence that plaintiff would not have overcome the affirmative defenses in the underlying case is part of proving the "case within a case," and because causation is an element of a legal malpractice action, affirmative defenses from the underlying case do not need to be pled as affirmative defenses in the legal malpractice action.[42]

Statute of Limitations

The statute of limitations for both legal malpractice actions and actions for breach of fiduciary duty actions are governed by R.S.Mo. § 516.120(4).[43] That provision sets a five-year limitation in which to bring such actions.[44] The statute begins to run when "damage is sustained and capable of ascertainment."[45] "Damage is ascertainable when the fact of damage can be discovered or made known, not when the plaintiff actually discovers injury or wrongful conduct," and "all possible damages do not have to be known, or even knowable, before the statute accrues."[46] This is an objective test, and "some damage for some amount is all that is necessary to trigger accrual of a cause of action."[47]

In other words, "the statute of limitations begins to run when the 'evidence was such to place a reasonably prudent person on notice of a potentially actionable injury.'"[48] However, in the case of a layman/expert relationship, such as the attorney-client relationship, the layman (client) is under no affirmative duty to double check the services provided by the expert (attorney).[49] Therefore, in a legal malpractice case, the statute of limitations does not begin to run until "the plaintiff knew or should have known of any reason to question the professional's work."[50] One Missouri court has stated that the statute will not begin to run until "plaintiff's right to sue arises or when the plaintiff could first successfully maintain his cause of action."[51]

Missouri considers statute of limitations issues to be procedural in nature and therefore governed by the forum state.[52] However, by statute, Missouri will employ the limitations period of another state if the cause of action "originates" in another state if that state's limitations period is shorter than Missouri's period.[53] For purposes of Missouri's borrowing statute, the term "originates" has the same meaning as "accrues."[54] Therefore, an action accrues both when and where the damage is sustained and capable of ascertainment.[55] The physical location of the plaintiff at the time he or she actually learns of the damage is not the test; rather, it based "on where the sustaining of damage first became capable of ascertainment".[56]

1 *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. 1997).
2 *Bryant v. Bryan Cave*, LLP, 400 S.W.3d 325, 331 (Mo. Ct. App. 2012).
3 *See Costa v. Allen*, 323 S.W.3d 383 (Mo. Ct. App. 2010). A convicted criminal must establish that he or she is innocent of the underlying crime forming the basis of the action because the criminal's own illegal actions are the full and proximate cause of his or her damages. *Costa*, 323 S.W.3d at 387. *Costa* suggests that a criminal cannot overcome the presumption of guilt imposed from a conviction and therefore could not bring an action for malpractice.
4 *Klemme*, 941 S.W.2d at 495.
5 *See Id.* at 495-496.
6 *Id.* at 496.
7 *Id.*
8 *Klemme*, 941 S.W.2d at 496 (stating "If the alleged breach can be characterized as both a breach of the standard of care (legal malpractice based on negligence) and a breach of a fiduciary obligation (constructive fraud), then the sole claim is legal malpractice").
9 *Id.* at 496.
10 *Collins v. Missouri Bar Plan*, 157 S.W.3d 726, 736 (Mo. Ct. App. 2005).
11 *Id.*

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12 *Schwartz v. Custom Printing, Co.*, 972 S.W.2d 487, 489 (Mo. Ct. App. 1998).
13 *See Donahue v. Shughart, Thomson, & Kilroy, P.C.*, 900 S.W.2d 624, 628 (Mo. 1995); *but see Wild v. Trans World Airlines, Inc.*, 14 S.W.3d 166 (Mo. Ct. App. 2000) (finding that an employee could not maintain an action for legal malpractice against his employer's in-house attorney for alleged negligence in advice about workers' compensation); *Minor v. Terry*, ED101131, 2014 WL 5462409 (Mo. Ct. App. Oct. 28, 2014) (holding that non-named beneficiaries to a wrongful death action class could not bring a malpractice action against the attorney for the named class members).
14 *Id.*
15 *Id.* at 628-29.
16 *Id.* at 629.
17 *Id.* at 628.
18 *VinStickers, LLC v. Stinson Morrison Hecker*, 369 S.W.3d 764, 766 (Mo. Ct. App. 2012).
19 *Id.* at 766-767.
20 *See Id.*
21 *See Roedder v. Callis*, 375 S.W.3d 824 (Mo. Ct. App. 2012).
22 *Klemme*, 941 S.W.2d at 495.
23 *Thiel v. Miller*, 164 S.W.3d 76, 82 (Mo. Ct. App. 2005).
24 *Flavan v. Cundiff*, 83 S.W.3d 18, 24 (Mo. Ct. App. 2002).
25 *Id.*
26 *Id.* at 25.
27 *Id.* (citing Mallen, Richard E. & Smith, Jeffrey M., LEGAL MALPRACTICE 86-87 (5th Ed. 2000).
28 *Id.*
29 *Thiel*, 164 S.W.3d at 85.
30 *Roberts v. Sokol*, 330 S.W.3d 576, 581 (Mo. Ct. App. 2011).
31 *Id.*
32 *Nail v. Husch Blackwell Sanders*, LLP, 436 S.W.3d 556, 562 (Mo. 2014).
33 *Id.*
34 *Id.*
35 *Id.* at 563
36 *Id.*; *see also Coin Acceptors, Inc. v. Haverstock, Garrett, & Roberts, LLP*, 405 S.W.3d 19, 24 (Mo. Ct. App. 2013) (stating "where the evidence connecting the injury to the negligence amounts to mere conjecture and speculation, the court must not allow the case to be submitted to the jury; rather the question becomes one of law for the court").
37 *Coin Acceptors*, 405 S.W.3d at 24.
38 *See Day Advertising, Inc. v. Devries and Associates, P.C.*, 217 S.W.3d 362, 367 (Mo. Ct. App. 2007).
39 *Id.*, 217 S.W.3d at 367.
40 *Id.*
41 *Id.*
42 *Id.*
43 *Klemme*, 941 S.W.2d at 497.
44 *Id.*
45 *Id.*
46 *Id.*
47 *Ferrellgas, Inc. v. Edward A. Smith, P.C.*, 190 S.W.3d 615, 620 (Mo. Ct. App. 2006).
48 *Wright v. Campbell*, 277 S.W.3d 771, 774 (Mo. Ct. App. 2009).
49 *Id.* at 775.
50 *Id.*
51 *English ex rel. Davis v. Hershewe*, 312 S.W.3d 402, 408 (Mo. Ct. App. 2010) (finding that the damage arising from an attorney's failure to send an offer to settle in order to preserve prejudgment interest was not ascertainable until an award in excess of the settlement offer had been made even though the attorney had informed the plaintiff that he might have a claim based on this error four years prior to the date of trial).
52 *Id.* at 774
53 *Ferrellgas*, 190 S.W.3d at 620; see also R.S.Mo. § 516.190; *see also Wright*, 277 S.W.3d at 773-774.
54 *Wright*, 277 S.W.3d at 774.
55 *Id.*
56 *Ferrellgas*, 190 S.W.3d at 621 (finding that plaintiff located in Missouri could have learned of his damages resulting from a California judgment at the moment they were read in California and that this precluded the cause of action from arising in Missouri).

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Attorney malpractice is a form of professional negligence. Suit may be brought against an attorney licensed to practice law in Montana or a paralegal assistant or a legal intern employed by an attorney.[1] Plaintiff must establish (1) the attorney owed the plaintiff a duty of care; (2) the attorney breached this duty by failure to use reasonable care and skill; (3) the plaintiff suffered an injury; and (4) the attorney's conduct was the proximate cause of the injury.[2] A plaintiff ordinarily must establish a breach of duty by an attorney through expert testimony unless the malfeasance would be obvious to a layperson without expert assistance.

Causation

If no issues of intervening causation are involved, the plaintiff must demonstrate the defendant's negligence was the direct cause of the injury. Proof of causation is analyzed by applying the "but for" test to determine if a party's conduct was the cause-in-fact of the damage alleged.[3] This means the injury would not have occurred "but for" the alleged negligence. The jury will be asked to evaluate the "suit within a suit" to decide what the outcome for the plaintiff would have been in the underlying case if it had been tried properly.[4]

Where the defendant alleges the chain of causation has been severed by an intervening cause, the plaintiff must also establish proximate cause by showing that it was the "defendant's breach which 'foreseeably and substantially' caused his injury."[5]

In the summary judgment context, in order to raise a triable issue of fact on causation, the clients need not fully establish the merits of the underlying case. They need only establish their underlying claims would have survived summary judgment and, therefore, had settlement value. In that situation, the plaintiff has lost an opportunity to pursue the case, which is a cognizable injury.[6] At the time of trial, however, the plaintiff will have to prove the "case within a case." In instances where an untimely filing caused the loss of a claim with some value (i.e. duty and breach), legal causation can be decided as a matter of law.[7]

Damages

The proper measure of damage is the difference between the client's recovery and the amount that would have been recovered by the client except for the attorney's negligence.[8] The loss of an opportunity to bring a claim can constitute prima facie evidence of an injury since it is unlikely the

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attorney would have agreed to handle a claim completely devoid of merit. The plaintiff must show the underlying claim would have resulted in a verdict (or settlement) in their favor and what value they likely would have gained from the disposition.[9]

Montana does allow for "reasonable" punitive damages when the defendant has been found guilty of actual fraud or actual malice.[10]

Statute of Limitations

An action must be commenced within three years after the Plaintiff discovers or through the use of reasonable diligence, should have discovered the negligence, whichever occurs last. In no case may the action be commenced after 10 years from the date of the act, error or omission.[11] The statute of limitations in a legal malpractice action does not begin to run until the negligent act was, or should have been, discovered, **and** all elements of the legal malpractice claim, including damages, have occurred.[12] The mere threat of future harm does not constitute actual damages.

The statute of limitations does not begin to run until both the "discovery rule" and the "accrual rule" have been satisfied. The "discovery rule" begins the statute of limitations when the negligent act is, or reasonably should have been, discovered. The "accrual rule" provides that the statute of limitations begins when all elements of a claim, including damages, have occurred.[13] A client-plaintiff's failure to discover facts constituting the claim during the period of *ongoing* legal representation *may* be excused, thus tolling the statute of limitations, depending on the circumstances.[14] A client-plaintiff's failure to discover negligence may also be excused if the legal transaction is beyond the understanding of a layperson. The question of when facts should have been knowable to the plaintiff may be a question for the jury.

Defenses

Defenses include: Failure to establish an attorney-client relationship existed; comparative fault of the plaintiff, failure to demonstrate a breach of duty (i.e. a violation of the standard of care; statute of limitations; an intervening cause of the injuries; and lack of actual damages.[15]

1 Mont. Code Ann. §27-2-206
2 *Spencer v. Beck*, 2010 MT 256, ¶13, 358 Mont. 295, 245 P.3d 21.
3 *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶¶36,39, Mont. 335, 181 P.3d 601.
4 *See Richards v. Knuchel*, 2005 MT 133, ¶14, 327 Mont. 249, 115 P.3d 189.
5 *Fisher v. Swift Transp. Co.* at ¶39 (quoting *Eklund v. Trost*, 2006 MT 333, ¶45, 335 Mont 112, 151 P.3d 870.)
6 *Labair v. Carey, 2012 MT 312, ¶34, 367 Mont.453, 466, 291 P.3ed 1160, 1168*
7 *Labair v. Carey*, 2012 MT 312, ¶36, 367 Mont.453, 466, 291 P.3ed 1160, 1168
8 *Merzlak v. Purcell*, 252 Mont. 527, 529, 830 P.2d 1278, 1279 (1992)
9 *Labair v. Carey, 2012 MT 312, ¶50, 367 Mont.453, 470, 291 P.3ed 1160, 1172*
10 Mont. Code Ann. §27-1-221 (2010)
11 Mont. Code Ann. §27-2-206.
12 Mont. Code Ann. § 27-2-102.
13 Mont. Code Ann. §§27-2-1-2(1)(a) and 2; *Uhler v. Doak* (1994) 268; Mont. 191, 195-220, 885 P.2d 1297. 13900-03.
14 *Shiplet v. First Sec. Bank of Livingston* (1988), 234 Mont. 166, 174, 762 P.2d 242, 247, overruled on other grounds by *Sacco v. High Country Indep. Press* (1995), 271 Mont. 209, 896 P.2d 411
15 Mont. Code Ann. §27-1-702

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In Nebraska, a claim for legal malpractice is a tort action rather than a breach of contract action because, although the basis of the attorney-client relationship is in contract, an action for damages flowing from the professional misconduct of an attorney is one for professional negligence and not one for breach of contract.[1] Therefore, a plaintiff cannot bring a breach of contract action against an attorney for professional misconduct, but needs to bring an action for professional negligence.[2] The Supreme Court of Nebraska has found, however, that it is possible that attorneys can be liable for other wrongs.[3]

To be successful in a legal malpractice action, a plaintiff must prove the following: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client.[4] In cases in which the plaintiff is a convicted criminal and is suing his/her criminal defense attorney for malpractice, Nebraska has required plaintiffs to prove a fourth element, which is the plaintiff's innocence of the underlying crime with which the plaintiff was charged.[5] "A convicted criminal who files a malpractice claim need not obtain exoneration through reversal or post-conviction relief in order to maintain an action for criminal malpractice."[6]

Employment of an attorney

As stated above, an attorney-client relationship is ordinarily based on a contract.[7] For an attorney-client relationship to exist, "it is not necessary that the contract be express or that a retainer be requested or paid."[8] Thus, the contract forming the relationship can be implied.[9]

An attorney-client relationship is formed through an implied contract when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.[10] The third element can be proven by detrimental reliance, "when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it."[11] A plaintiff must show that the relationship existed as to the conduct for which the malpractice claim is alleged.[12]

A non-client cannot bring an action against an attorney for professional misconduct unless the non-client can show that the attorney had a duty as to him/her.[13] Nebraska has joined the majority of jurisdictions that employ a balancing

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test to determine if an attorney owes a duty of care to a third party.[14] To determine if an attorney in fact does owe a duty to a non-client, the courts use the following factors:

> (1) The extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm, (3) the degree of certainty that the third party suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession.[15]

"The starting point for analyzing an attorney's duty to a third party is determining whether the third party was a direct and intended beneficiary of the attorney's services."[16]

In order to protect this expansion of an attorney's duty from becoming overly broad, Nebraska has instituted four rules restricting an attorney's responsibility to third-parties.[17] The rules are (1) the attorney's agreement with the client determines the scope of the attorney's duty to a third-party beneficiary; (2) a person who is adverse to the attorney's client cannot be a beneficiary of the attorney's retention; (3) an attorney's knowledge that the representation could injure or benefit an identified person will not, without more, create a duty to that person; and (4) a duty to a third party will not be imposed if that duty would potentially conflict with the duty the attorney owes his or her own client.[18]

Neglect of a reasonable duty

An attorney is required to provide a client with the skill, diligence, and knowledge as that commonly possessed by attorneys in a similar situation.[19] This duty is implied upon an attorney's agreement to accept employment to give advice or render other legal services.[20] "The question of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard is a question of fact."[21] This standard applies to situations in which the plaintiff alleges malpractice in a case that settled if the plaintiff can establish that the settlement agreement was the product of the attorney's negligence.[22]

Generally, the testimony of an expert is required to establish that an attorney has breached the standard of care in a legal malpractice action.[23] This is due to the fact that a "jury cannot rationally apply a general statement of the standard of care unless it is aware of what the common attorney would have done in similar circumstances."[24] In some situations, however, "where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laypersons, no expert testimony is required."[25]

An attorney will not be held liable for an error in judgment "on a point of law which has not been settled by [the Nebraska Supreme Court] and on which reasonable doubt may be entertained by well-informed lawyers."[26] Known as judgmental immunity, "an attorney's judgment or recommendation on an unsettled point of law is immune from suit, and the attorney has no duty to accurately predict the future course of unsettled law."[27] An attorney cannot quit his or her analysis, however, when he or she discovers that the area of law is unsettled, and the attorney must report reasonable alternatives to the client for the area of unsettled law based on their analysis.[28]

Proximate cause of the loss

A plaintiff must prove that the attorney's professional misconduct resulted in and was the proximate cause of damage to the plaintiff.[29] "Proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred."[30] Plaintiff must show proximate cause through three elements: (1) without the negligent action, the injury would not have occurred, commonly known as the "but for" rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause.[31]

In order to sustain a claim for legal malpractice, "a plaintiff has the burden of proving that he or she would have been successful in obtaining and collecting a judgment in the action for which he or she contracted with an attorney and that he or she was prevented from doing so by the attorney's negligence."[32] A plaintiff must establish, by a preponderance of the evidence, both the negligence of the attorney-defendant and the elements of the underlying action.[33]

Statute of Limitations

The statute of limitations for legal malpractice actions is established by Neb. Rev. Stat. § 25-222.[34] That statute provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional

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> services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence, breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis of the cause of action.[35]

The statute begins to run "upon the violation of a legal right, that is, when an aggrieved party has the right to institute and maintain suit."[36] Thus, the two-year limitation will begin with the occurrence of the act or omission upon which the negligence is based rather than upon the accrual of the plaintiff's cause of action.[37] For the statute to begin, the plaintiff need not have experienced actual damages and only the invasion of a legally protected interest needs to have occurred.[38] In other words, "it is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem exists."[39]

The statute can be tolled by a discovery exception, which occurs "when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery."[40] In addition to the discovery exception specifically provided for in the text of the statute, Nebraska has recognized a continuous relationship exception that can also toll the two year statute of limitations.[41] For the continuous relationship exception to take effect, "there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence."[42] The "mere continuity of the general professional relationship" is insufficient to establish this exception.[43]

1 *Swanson v. Ptak*, 682 N.W.2d 225, 230 (Neb. 2004).
2 *Id.*
3 *See Ferer v. Erickson & Sederstrom, P.C.*, 718 N.W.2d 501, 506, *opinion modified on denial of reh'g*, 759 N.W.2d 75 (Neb. 2006) (finding that a claim for wrongful registration could be stated against an attorney rather than legal malpractice when the attorney was acting as a transfer agent rather than as legal counsel).
4 *Boyle v. Welsh*, 589 N.W.2d 118, 123 (Neb. 1999).
5 *Rodriguez v. Nielsen*, 609 N.W.2d 368, 374-375 (Neb. 2000).
6 *Id.* at 375.
7 *McVaney v. Baird, Holm, McEachen, Pedersen, Hamann, & Strasheim*, 466 N.W.2d 499, 506 (Neb. 1991).
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *McVaney*, 466 N.W.2d at 506.
13 *Perez v. Stern*, 777 N.W.2d 545, 550 (Neb. 2010) (stating "a lawyer's duty to use reasonable care and skill in the discharge of his or her duties ordinarily does not extend to third parties, *absent facts establishing a duty to them*").
14 *Id.* at 550-554.
15 *Id.* at 550-551.
16 *Id.* at 551.
17 *Perez*, 777 N.W.2d at 551.
18 *Id.* at 551-552.
19 *Boyle*, 589 N.W.2d at 123; *see also Wolski v. Wandel*, 746 N.W.2d 143, 149 (Neb. 2008); *McVaney*, 466 N.W.2d at 507.
20 *Wolski*, 746 N.W.2d at 149.
21 *Id.*
22 *Id.* at 148-149.
23 *Boyle*, 589 N.W.2d at 123; Wolski, 746 N.W.2d at 149.
24 *Boyle*, 589 N.W.2d at 124 (internal citations omitted).
25 *Id.*
26 *Wood v. McGrath, North, Mullin, & Kratz, P.C.*, 589 N.W.2d 103, 106 (Neb. 1999).
27 *Id.*
28 *Id.*
29 *Boyle*, 589 N.W.2d at 123.
30 *Radiology Services, P.C. v. Hall*, 780 N.W.2d 17, 23 (Neb. 2010).
31 *Id.* at 24.
32 *McVaney*, 466 N.W.2d at 507; see also Eno v. Watkins, 429 N.W.2d 371, 372 (Neb. 1988).
33 *McVaney*, 466 N.W.2d at 507.
34 *See Behrens v. Blunk*, 822 N.W.2d 344, 348 (Neb. 2012); *Sass v. Hanson*, 554 N.W.2d 642, 645 (Neb. Ct. App. 1996).
35 Neb. Rev. Stat. § 25-222 (Reissue 2008).
36 *Behrens*, 822 N.W.2d at 348.
37 *Sass*, 554 N.W.2d at 646 ("Our statute of limitations for professional negligence utilizes the 'occurrence rule', not the 'damage rule').
38 *Id.*
39 *Id.*
40 *Behrens*, 822 N.W.2d at 349.
41 *Id.* at 350.
42 *Id.*
43 *Id.*

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A legal malpractice action under Nevada law requires an attorney-client relationship, a duty owed to the client by the attorney, breach of that duty, and damages proximately caused by the breach.[1] The contractual relationship between the attorney and client gives rise to the duty of care.[2] A client may bring a malpractice action under either a negligence or contractual theory.[3]

With respect to first element of a legal malpractice claim, the plaintiff must show more than the mere existence of an attorney-client relationship. "[T]he attorney must be employed in such a capacity as to impose a duty of care with regard to the particular transaction connected to the malpractice claim. Even with regard to a particular transaction or dispute, an attorney may be specifically employed in a limited capacity."[4]

Proving Causation

Expert testimony is generally required to establish the attorney's breach of the duty of care. However, expert testimony is not required where the breach, or lack of breach, is so obvious that it may either be determined by the court as a matter of law or is within the ordinary knowledge and experience of laymen.[5]

Damages Recoverable

There is little authority specifying precisely what categories of damage are recoverable in a Nevada legal malpractice action. Generally, damages for emotional distress are not recoverable.[6] The Supreme Court of Nevada has held that a claim of negligent infliction of emotional distress is inappropriate in the context of a legal malpractice suit when the harm resulted from pecuniary damages, even if the plaintiff can establish physical symptoms.[7]

Defenses

The statute of limitations for a claim of legal malpractice under Nevada law is set forth at Nevada Revised Statutes 11.207:

> 11.207. Malpractice actions against attorneys and veterinarians.
>
> 1. An action against an attorney or veterinarian to recover damages for malpractice, whether based on a breach of duty or contract, must be commenced within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or

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through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier.

2. This time limitation is tolled for any period during which the attorney or veterinarian conceals any act, error or omission upon which the action is founded and which is known or through the use of reasonable diligence should have been known to him.

In the context of litigation malpractice, the running of the two-year statute of limitations is tolled until the end of the litigation in which the legal malpractice occurred.[8] It remains an open question whether the four-year statute of limitations is also tolled until the conclusion of the underlying litigation.[9]

In an order issued by the United States District Court for the District of Nevada, the court interpreted the four-year statute of limitations as being triggered when the plaintiff sustains damage, regardless of whether the plaintiff subjectively discovered the material facts which constitute the cause of action:

> Pursuant to N.R.S. § 11.207(1), the statute of limitations expires two years after discovery of the cause of action or four years after injury, "whichever occurs earlier." Nev. Rev. Stat. § 11.207(1) (emphasis added). Therefore, even if the Court were to find that Plaintiffs discovered the malpractice much later, the statute of limitations on this claim indisputably expired on February 26, 2007, four years after Plaintiffs sustained damage.[10]

The Supreme Court of Nevada agreed with this interpretation in an unpublished 2014 opinion, stating, "Thus, the four year period begins upon the accrual of damages, but the two year period begins upon the discovery of the material facts supporting a claim of legal malpractice, and the start of the limitations period is based upon "whichever occurs earlier."[11]

NRS 11.207 has been applied slightly differently in the transactional context.[12] In *Gonzales v. Stewart Title*, a 1995 case involving transactional malpractice, the Supreme Court of Nevada held that an action for legal malpractice accrues when the client discovers, or should have discovered, the existence of damages, not the exact numerical extent of those damages.[13] In *Kopicko v. Young*, the Court distinguished Gonzales on the grounds that it involved transactional rather than litigation malpractice, and overruled *Gonzales* to the extent it rejected a distinction between the two.[14] Thus, it appears that in the context of transactional malpractice, the claim will accrue – at least for purposes of the two-year statute of limitations – when the client discovers or should have discovered "the material facts which constitute the cause of action," including the existence of damages.[15] However, where there is pending litigation the result of which will "define the extent of damages" resulting from the transactional malpractice, the malpractice action should be stayed pending the outcome of the underlying action.[16]

In the criminal defense context, a client cannot establish that he or she was damaged as the proximate result of the attorney's breach of the duty of care, and the client's malpractice claim does not accrue, unless and until the client obtains post-conviction or appellate relief.[17]

The Supreme Court of Nevada has not clarified what exactly constitutes "concealment" under NRS 11.207(2). However, the Court has done so in the context of medical malpractice. The United States District Court has predicted that the Supreme Court of Nevada would hold that concealment occurs when: (1) the defendant intentionally withheld information, and (2) this withholding would have hindered a reasonably diligent plaintiff from timely filing suit.[18]

NRS 11.207 is applicable to "actions against attorneys" whether arising out of contractual obligations or fidiciary duties.[19] However, a claim against an attorney for breach of fiduciary duty based on fiduciary relationships other than attorney-client are subject to the three year period of limitations set forth under NRS 11.190(3)(d).[20] Such claims may arise when at attorney becomes involved in business activities which do not involve the provision of legal services to the plaintiff.[21]

A defendant in a legal malpractice action arising out of the litigation context may assert the affirmative defense that the plaintiff failed to pursue an appeal of an adverse ruling in the underlying litigation.[22] However, a legal malpractice plaintiff does not abandon his or her claim by voluntarily dismissing a meritless or fruitless appeal in the underlying litigation.[23]

A violation of the Nevada Rules of Professional Conduct may be relevant to the standard of care owed by an attorney.[24] However, one may not base a civil action upon an alleged violation of the Rules, because the rules were not

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meant to create a cause of action for civil damages.[25] The Nevada Rules of Professional Conduct expressly state:

> (d) Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. ... The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. ... Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of care.[26]

The Supreme Court of Nevada in *Malfabon v. Garcia* rejected the holding of the Pennsylvania Supreme Court in *Muhammad v. Strassburger*[27] and held that a plaintiff who has voluntarily entered into a settlement agreement in the underlying litigation in which the malpractice allegedly occurred is not barred from bringing a legal malpractice action.[28] The standard of proof remains one of simple negligence or, in an action sounding in contract, the burden is based on the agreement between the parties.[29] In a subsequent opinion the Court held that, notwithstanding the *Malfabon* decision, a plaintiff was barred under the particular facts of that case from bringing a malpractice claim based on the settlement of the underlying litigation: "First, unique to the present case is the fact that the Naults expressly agreed not to contest the final settlement of the tort action or any other issue relating to the settlement, and that this agreement was approved by the district court. Second, the Naults approved of the settlement amount and complain only that the division of the proceeds was improper."[30]

The Supreme Court of Nevada has held that as a matter of public policy, one cannot enforce an unfiled legal malpractice action which has been transferred by assignment or by levy and execution sale.[31] However, the Court has not answered the question of whether an assignee may continue to pursue a malpractice action which was first asserted by the client prior to assignment or levy and execution sale. *Id.*[32]

1 *Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 667-68, 765 P.2d 184 (1989); *Warmbrodt v. Blanchard*, 100 Nev. 703, 706-07, 692 P.2d 1282 (1984).
2 *Warmbrodt*, 100 Nev. at 707, quoting *Ronnigen v. Hertogs*, 199 N.W.2d 420, 421 (Minn. 1972).
3 *Malfabon v. Garcia*, 111 Nev. 793, 796, 898 P.2d 108 (1995).
4 *Warmbrodt*, 100 Nev. at 707 (internal citations omitted).
5 *Allyn v. McDonald*, 112 Nev. 68, 71-72, 910 P.2d 263 (1996).
6 *Kahn v. Morse & Mowbray*, 121 Nev. 464, 478, 117 P.3d 227 (2005).
7 *Id.*, 121 Nev. at 478-79.
8 *Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 130 Nev. Adv. Rep. 68, 333 P.3d 229, 235 (2014) ("The two-year statute of limitations in NRS 11.207, as revised by the Nevada Legislature in 1997, is tolled against a cause of action for attorney malpractice, pending the outcome of the underlying lawsuit in which the malpractice allegedly occurred.") In the case of *Moon v. McDonald, Carano & Wilson, LLP*, 129 Nev. Adv. Rep. 56, 306 P.3d 406, 407 (2013), the Supreme Court of Nevada held that the non-adversarial portion of a bankruptcy proceeding does not constitute litigation for the purpose of the litigation malpractice tolling rule, and therefore does not toll the two-year statute of limitations under NRS 11.107(1).
9 *Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 130 Nev. Adv. Rep. 68, 333 P.3d 229, 230 n.3 (2014) ("We do not discuss whether NRS 11.207(1)'s four-year time limitation may be tolled, as that time limitation had not expired when the malpractice action at issue was filed and thus it need not be addressed.")
10 *Arndell v. Robison, Belaustegui, Sharp & Low*, 2012 U.S. Dist. LEXIS 126570, *15, 2012 WL 3886181 (D. Nev. Sept. 6, 2012).
11 *Coleman v. Romano*, 2014 Nev. Unpub. LEXIS 199, *6, 2014 WL 549489 (Nev. Feb. 10, 2014), quoting NRS 11.207(1).
12 *See Kopicko v. Young*, 114 Nev. 1333, 971 P.2d 789 (1998) (overruling *Gonzales v. Stewart Title*, 111 Nev. 1350, 905 P.2d 176 (1995) in part, to the extent that *Gonzales* "rejects a distinction between transactional and litigation malpractice").
13 *Gonzales v. Stewart Title*, 111 Nev. 1350, 1353, 905 P.2d 176, 178 (1995).
14 *Kopicko v. Young*, 114 Nev. 1333, 1337, 971 P.2d 789 (1998).
15 NRS 11.207(1). *See Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 130 Nev. Adv. Rep. 68, 333 P.3d 229, 235 (2014) ("The material facts for an attorney malpractice action include those facts that pertain to the presence and causation of damages on which the action is premised.")
16 *Kopicko v. Young*, 114 Nev. 1333, 1337, 971 P.2d 789 (1998). *See also Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 130 Nev. Adv. Rep. 68, 333 P.3d 229, 235 (2014) ("The two-year statute of limitations in NRS 11.207, as revised by the Nevada Legislature in 1997, is tolled against a cause of action for attorney malpractice, pending the outcome of the underlying lawsuit in which the malpractice allegedly occurred.")
17 *Clark v. Robison*, 113 Nev. 949, 951-952, 944 P.2d 788 (1997), citing *Morgano v. Smith*, 110 Nev. 1025, 1029, 879 P.2d 735, 737 (1994).
18 *Arndell v. Robison, Belaustegui, Sharp & Low*, 2012 U.S. Dist. LEXIS 126570, 16 (D. Nev. Sept. 6, 2012), citing *Winn v. Sunrise Hosp. & Med. Ctr.*, 277 P.3d 458, 464 (2012).
19 *Stalk v. Mushkin*, 125 Nev. Adv. Rep. 3, 199 P.3d 838, 843 (2009).
20 *Id.*, 199 P.3d at 844.
21 *Id.*, 199 P.3d at 844 n.3, citing *Quintilliani v. Mannerino*, 62 Cal. Capp. 4th 54, 72 Cal. Rptr. 2d 359, 365 (Cal. App. 1998).
22 *Hewitt v. Allen*, 118 Nev. 216, 43 P.3d 345, 348 (2002). *See also New Albertson's, Inc.*, 2012 U.S. Dist. LEXIS 42369, 13-16 ("[W]here litigation is not pursued to its conclusion, plaintiffs in legal malpractice actions may face affirmative defenses based on theories of abandonment or failure to mitigate damages, or that the malpractice action is premature.")
23 *Hewitt*, 118 Nev. at 217-218.
24 *Ricks v. Dabney (In re Jane Tiffany Living Trust 2001)*, 124 Nev. 74, 81, 177 P.3d 1060 (2008), citing *Mainor v. Nault*, 120 Nev. 750, 768-769 101 P.3d 308, 321 (2004); *see also* NRPC 1.0A(d).
25 *Mainor*, 120 Nev. at 769.
26 NRPC 1.0A(d). See also R. Mallen and J. Smith, 2 *Legal Malpractice*, sec. 19:7, p. 1208 (Thompson West 2007) ("With few exceptions, the courts agree that the violation of an ethics rule alone does not create a cause of action, constitute legal malpractice *per se* or necessarily create a duty").
27 587 A.2d 1346 (Pa. 1991), *cert. denied*, 502 U.S. 867 (1991).
28 *Malfabon*, 111 Nev. at 798.
29 *Id.*, 111 Nev. at 797.
30 *Mainor*, 120 Nev. at 762-63.
31 *Chaffee v. Smith*, 98 Nev. 222, 223, 645 P.2d 966 (1982)

New Hampshire

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Legal malpractice is a tort in New Hampshire,[1] but depending on the circumstances the facts may also support additional claims such as breach of contract.[2] There must be an attorney-client relationship, which placed a duty upon the attorney to exercise reasonable professional care, skill and knowledge in providing legal services to the client; a breach of the duty; and harm legally caused by the breach.[3]

A party has standing to sue for legal malpractice when there is an attorney-client relationship. The scope of the duty is usually limited to those in privity of contract with one another, but when determining if an attorney owes a duty to a third party, the courts examine the societal interest involved, the severity of the risk, the likelihood of the occurrence, the relationship between the parties, and the burden upon the defendant.[4]

New Hampshire doe recognize an exception to the privity requirement with respect to a the beneficiary of a will and has held that an attorney who drafts a will owes a duty to the beneficiaries of the will to draft the will "non-negligently."[5]

Expert testimony is required to establish the skill and care ordinarily exercised by lawyers, and to prove a breach of the standard.[6]

Proving Causation

To show causation the plaintiff must show that the defendant's actions were a cause-in-fact, or "but for" cause of the injury and that the defendant's actions were the proximate cause of the injury claimed.[7] A defendant's conduct is a legal cause of the harm if he could have reasonably foreseen that his conduct would result in an injury, or if his conduct was unreasonable in light of what he could anticipate.[8]

In cases in which an attorney's breach is alleged to have caused damage to the client because the client settled the underlying case for an amount less than he might otherwise have been awarded, the action then effectively becomes a "trial within a trial."[9] The measure of the damages in such a case are the difference between what the fact-finder determines the plaintiff should have recovered and what the plaintiff actually recovered.[10]

Damages

The plaintiff must establish the extent of the monetary value of the loss claimed reasonable certainty.[11] The question of damage calculation is properly left to the jury.[12]

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The defendant in a legal malpractice action is not permitted to offset the amount the defendant could have recovered in contingency fees. To allow a reduction would not put the plaintiff in the same position that he would have been in if the defendant had not been negligent in the underlying action, because the recovery would be reduced by both the defendant's contingent fee and the plaintiff's new attorney's fee.[13]

Defenses

The tort of legal malpractice is subject to the New Hampshire statute of limitations, RSA 508:4 and must be commenced within three years of having accrued.[14] A cause of action for legal malpractice accrues once the plaintiff knows, or should reasonably know, of the damage sustained. An action in tort arises when all the necessary elements are present, and may arise before it has accrued.

New Hampshire has adopted the discovery rule. RSA 508:4, provides that actions for personal injury must be brought within the three year statute of limitations except "when the injury and its causal relationship to the act or the omission were not discovered and could not reasonably have been discovered at the time of the act or omission…"

In cases of fraudulent concealment New Hampshire follows this rule: "when facts essential to the cause of action are fraudulently concealed, the statute of limitations is tolled until the plaintiff has discovered such facts or could have done so in the exercise of reasonable diligence." [15]

Under the law of comparative fault in New Hampshire is a comparative fault state. A plaintiff who is more than fifty percent at fault cannot recover damages. If a plaintiff is fifty percent or less at fault, damages are recoverable, but only in proportion to the amount of the legal harm caused by the defendant.[16]

A defense of judicial estoppel may be available. Where an admission contained in a settlement agreement would be inconsistent with an element of a malpractice claim, New Hampshire courts may bar the malpractice claim under the principle of judicial estoppel.[17] For judicial estoppel to apply, the prior admission must be "clearly inconsistent" with the client's malpractice claim, must have been accepted by the court, and the client must be seeking to derive an unfair advantage or place the defending lawyer at an unfair detriment.[18]

Local Considerations

A violation of the New Hampshire Rules of Professional Conduct does not, in and of itself, give rise to cause of action for malpractice, but may be used as evidence of a breach of the applicable standard of care.[19]

In most cases, expert testimony will be required to prove causation and show the standard of care in a legal malpractice action.[20]

1 *Furbush v. Mckittrick*, 149 N.H. 426 (2003)
2 *Wong v. Ekberg*, 148 N.H. 369, 376 (2002)
3 *Furbush v. Mckittrick*, 149 N.H. 426 (2003)
4 *Sisson v. Jankowski*, 148 N.H. 503 (2002)
5 *Simpson v. Calivas*, 139 N.H. 1, 650 A.2d 318 (1994)
6 *Carbone v. Tierney*, 151 N.H. 521, 527 (2004)
7 *Goss v. State*, 142 N.H. 915, 917 (1998)
8 *Goodwin v. James*, 134 N.H. 579, 595 A.2d 504, 507 (1991) and *LeFavor v. Ford*, 135 N.H. 311, 604 A.2d 570, 573 (1992)
9 *Witte v. Desmarais*, 136 N.H. 178 (1992)
10 *Witte v. Desmarais*, 136 N.H. 178, 189 (1992)
11 *Carbone v. Tierney*, 151 N.H. 521, 531 (2004)
12 *Witte v. Desmarais*, 136 N.H. 178, 188 (1992)
13 *Carbone v. Tierney*, 151 N.H. 521, 534 (2004)
14 *Draper v. Brennan*, 142 N.H. 780 (1998). [Note: Due to an amendment to the New Hampshire statute of limitations, torts which arose before July 1, 1986, but of which the plaintiff was not aware until after that date, are subject to a six-year statute of limitations from the date of accrual. Draper, at 787-788.]
15 *Bricker v. Putnam*, 128 N.H. 162, 165 (1986)
16 *Debenedetto v. CLD Consulting Engineers*, 153 N.H. 793 (2006); *Nilson v. Bierman*, 150 N.H. 393 (2003); and RSA 507:7-d
17 *Pike v. Mullikin*, 158 N.H. 267, 270-72 (2009). (divorce settlement signed under belief that prenuptial agreement was not enforceable; admission that negotiated stipulation was "fair and equitable" not clearly inconsistent with malpractice claim against lawyer who drafted prenuptial agreement).
18 *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001).
19 The Statement of Purpose, New Hampshire Rules of Professional Conduct (2008) provides: "The [New Hampshire Rules of Professional Conduct] are not designed to be a basis for civil liability. The purpose of the Rules can be subverted when the Rules are invoked by opposing parties as procedural weapons. Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. Violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer from a position or from pending litigation. Nevertheless, as the Rules establish a standard of conduct for lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."
20 *Carbone v. Tierney*, 151 N.H. 521, 528 (2004) ("In legal malpractice cases, expert testimony may be essential for the plaintiff to establish causation. The trier of fact must be able to determine what result should have occurred if the lawyer had not been negligent. Unless the causal link is obvious or can be established by other evidence, expert testimony may be essential to prove what the lawyer should have done.… [E]xpert testimony on proximate cause is required in cases where determination of that issue is not one that lay people would ordinarily be competent to make.")

New Jersey

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New Jersey legal malpractice actions are based on the tort of negligence.[1] Thus, a plaintiff must prove a deviation from the standard, proximate causation, and damages.[2] The elements of a cause of action for legal malpractice are (1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff.[3] The question of whether the attorney owes a duty to the client is a question of law to be decided by the court.[4]

Generally speaking, a lawyer is required to exercise that "degree of reasonable knowledge and skill that lawyers of ordinary ability and skill possess and exercise."[5] In most cases, the testimony of an expert is necessary to establish that the conduct of an attorney fell below the standard of care required of the profession.[6] Exceptions exist, such as "where the questioned conduct presents ... an obvious breach of an equally obvious professional norm."[7] For example, New Jersey courts have held a defendant attorney is required to inform his client of all settlement offers, and that a plaintiff need not produce an expert opinion confirming that obligation.[8] In such cases, the layman possesses sufficient ordinary knowledge to recognize the attorney's deviation from the standard of care. However, "a plaintiff's attorney who litigates a legal malpractice claim without the opinion testimony of a legal expert unnecessarily exposes his client to a serious risk of dismissal."[9]

Proving Causation

In the area of legal malpractice, the method by which a plaintiff must establish a claim against an attorney turns on the element of causation. To establish causation, the plaintiff must prove that the underlying case would have been successful absent the alleged malpractice. Evaluation of a legal malpractice claim against a defendant requires the court to determine the value of the plaintiff's claim against the defendant in the underlying action. There are several ways that a plaintiff in a legal malpractice case may go about proving causation and damages. Parties in New Jersey regularly use the "case within a case" method in which a plaintiff presents the evidence that would have been submitted at trial had no malpractice occurred. In short, a plaintiff in a legal malpractice action must prove two cases:

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the legal malpractice case against the attorney defendant and the underlying action in which the alleged malpractice occurred.

The plaintiff must prove that the former attorney was the proximate cause of the alleged injuries. Plaintiff's burden is to prove by a preponderance of the evidence that but for the malpractice or other misconduct he would have recovered a judgment in the action against the main defendant, the amount of that judgment and the degree of collectability of such judgment.[10] If the third element, the degree of collectability, is at issue, the case should be bifurcated, and the questions of malpractice and the amount of the judgment that would have been recoverable in the underlying action are tried first.[11] If plaintiff obtains a favorable verdict, the defendants may move for a trial as to the collectability of the judgment. In that proceeding, the burden of proof of non-collectability is on defendants.[12]

At times, there is a need to modify the "case within a case" method. The New Jersey Supreme Court opened the door in *Lieberman v. Employers Insurance of Wausau*[13] to use alternative approaches to the "case with in a case" method when in the interest of justice proving a legal malpractice claim through the conventional mode is not feasible. There, in finding the approach improper, the court relied primarily on the reversed roles of the parties in the malpractice and underlying actions: the plaintiff in the malpractice case had been the defendant in the underlying suit. The court identified the presence in that case of three extraordinary factors which warranted a departure from the conventional mode.[14] First, the plaintiff there proceeded against dual defendants on different theories; one was a malpractice claim against an attorney, and the other was a breach of contract claim against an insurer. Second, as stated earlier, there was a reversal of roles in which the plaintiff in the malpractice action was a defendant in the underlying negligence action so that a "case within a case" framework would be "awkward and impracticable" and "could well skew the proofs." The third factor was the passage of time.

With factors such as these present there is the potential that the legal malpractice trial would not really mirror the earlier suit and thus a jury in the legal malpractice case would not obtain an accurate evidential reflection of the original action, a facsimile which the "case within a case" approach is designed to present. Some of the alternatives presented by the court included a modified version of the "case within a case" approach, using expert testimony as to what as a matter of reasonable probability would have transpired at the original trial. Ultimately it is within the discretion of the trial judge as to the manner in which the plaintiff may proceed to prove his claim for damages. New Jersey later expanded on this flexible approach and permitted a hybrid approach in which a full "case within a case" providing evidence to support the jury verdict was produced and expert testimony was offered as an adjunct to address a different issue, the effect of the earlier settlement.[15]

Damages Recoverable

Reasonable legal expenses and attorney fees incurred in prosecuting the legal malpractice action are recoverable.[16] Economic damages may be recovered in all forms of legal malpractice cases. In litigation cases, economic damages may include any elements of damages that the client could have recovered in the underlying litigation, including out of pocket losses, mental anguish damages recoverable in the underlying litigation, lost pre-judgment and post-judgment interest, and lost court costs. In New Jersey emotional distress damages are generally not awarded in legal malpractice cases in the absence of egregious or extraordinary circumstances. However, New Jersey courts have allowed a claim for emotional distress damages in a case where a client brought a legal malpractice action against a former attorney when the client's relationship with the former attorney was predicated upon liberty interest (the client's interest in not being incarcerated for a crime), rather than purely economic interest. In one such case[17], the plaintiff did not retain counsel to prosecute a claim for economic loss. Rather, counsel was retained to provide a defense to criminal prosecution. The loss that plaintiff complained of was not purely pecuniary. Plaintiff complained of a twenty-month loss of liberty in a maximum security penitentiary. The court held that the client could recover damages for emotional distress.

Defenses

There are several defenses available to lawyers who are subject to legal malpractice action in New Jersey. Failure to file the action within the applicable statute of limitations

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will result in dismissal of the action. Under New Jersey law, legal malpractice claims are subject to a six year statute of limitations.[18] That period begins to run when a claim accrues, which is governed by the "discovery rule," which operates "to postpone the accrual of a cause of action when a plaintiff does not and cannot know the facts that constitute an actionable claim."[19] A legal malpractice claim accrues when the client gains knowledge of two elements: "fault" and "injury" (which is synonymous with "damage").[20]

Plaintiffs are also required to file an Affidavit of Merit. The New Jersey Affidavit of Merit statute[21] specifically prescribes that:

> In any action for damages for personal injuries, wrongful death or property damage *resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation*, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.

A "licensed person" is particularly defined in the statute as a defendant on an enumerated list of professionals, including "any person who is licensed as ... *an attorney admitted to practice law in New Jersey*."[22] If a plaintiff does not file and serve a timely affidavit of merit as required under the statute, "it shall be deemed a failure to state a cause of action," thereby subjecting the malpractice complaint to dismissal.[23] Significantly, the Appellate Division has held that although New Jersey's Affidavit of Merit Statute does not list a Law Firm as a "licensed person" against whom an Affidavit of Merit is required in a legal malpractice suit, the law firm entity is to be considered a "licensed person" within the meaning of the statute.[24]

Res judicata and collateral estoppel are sometimes raised as defenses to a legal malpractice case however, most courts have rejected these arguments and have required the lawyer to defend the malpractice lawsuit.

1 *McGrogan v. Till*, 167 N.J. 414, 425, 771 A.2d 1187 (2001), *certif. denied*, 192 N.J. 294 (2007).
2 *Id.*
3 *Id.*
4 . *DeAngelis v. Rose*, 320 *N.J.Super*. 263, 274, 727 A.2d 61 (App.Div.1999).
5 *Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo*, 345 *N.J.Super*. 1, 12, 783 A.2d 246 (App.Div.2001) (quoting *St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden*, 88 N.J. 571, 588, 443 A.2d 1052 (1982)) *abrogated in part by Segal v. Lynch*, 211 N.J. 230, 261-64 (2012)
6 *Sommers v. McKinney*, 287 *N.J.Super*. 1, 10-11, 670 A.2d 99 (App.Div.1996); *Brizak v. Needle*, 239 *N.J.Super*. 415, 432, 571 A.2d 975 (App.Div.), *certif. denied*, 122 *N.J.* 164, 584 A.2d 230 (1990).
7 *Brach*, 345 *N.J.Super*. at 12, 783 A.2d 246.
8 *Sommers* 287 *N.J.Super*. at 12, 670 A.2d 99 .
9 *Brizak, supra*, 239 *N.J.Super*. at 432, 571 A.2d 975.
10 *Hoppe v. Ranzini*, 158 *N.J.Super*. 158, 165, 385 A.2d 913 (A.D.1978).
11 *Id.* at 170, 385 A.2d 913.
12 *Id.* at 170-71, 385 A.2d 913.
13 84 N.J. 325, 419 A.2d 417 (1980).
14 *Id.* at 342-43, 419 A.2d 417.
15 *Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C.*, 179 N.J. 343, 359, 845 A.2d 602 (2004).
16 Saffer v. Willoughby 143 NJ 256, 670 A.2d 527 (1996).
17 *Lawson v. Nugent*, 702 F.Supp. 91 (D.N.J. 1988).
18 *See* N.J. Stat. Ann. § 2A:14-1; *Grunwald v. Bronkesh*, 131 N.J. 483, 621 A.2d 459, 461 (1993), cf. McGrogan v. Till, 327 N.J.Super. 595, 744 A.2d 255 (A.D.2000), cert. granted 165 N.J. 132, 754 A.2d 1209, aff'd as modified 167 N.J. 414, 771 A.2d 1187 (Applying two-year statute of limitations to former client's legal malpractice claim against attorney for alleged negligence in criminal defense that was provided, rather than six-year statute of limitations that governed economic injuries.)
19 *Grunwald*, 621 A.2d at 463.
20 *Id.*
21 N.J.S.A. 2A:53A-27 (emphasis added).
22 N.J.S.A. 2A:53A-26(c) (emphasis added).
23 N.J.S.A. 2A:53A-29.
24 *Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP*, 416 N.J.Super. 1, 3 A.3d 518 (N.J.Super.A.D. 2010).

New Mexico

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Under New Mexico law a plaintiff must prove three essential elements in order to recover on a claim of legal malpractice based on negligence: (1) the employment of the defendant attorney; (2) the defendant attorney's neglect of a reasonable duty and (3) and the negligence resulted in and was the proximate cause of loss to the plaintiff. *Hyden v. The Law Firm of McCormick, Forbes, Caraway & Tabor*, 115 N.M. 159, 162-163, 843 P.2d 1086, 1089-1090, 1993-NMCA-008 at ¶9.

Proof of the second essential element, the attorney's neglect of a reasonable duty, concerns violations of a standard of conduct. *Buke, LLC v. Cross Country Auto Sales, LLC*, 2014-NMCA-78, ¶50, 331 P.3d 942, 954. "Proof of the standard of conduct is necessary to maintain an action for malpractice." *Spencer v. Barber*, 2013-NMSC-0110, ¶17, 299 P.3d 388. The standard of conduct in a professional negligence case "is measured by the duty to apply the knowledge, care, and skill of reasonably well-qualified professionals practicing under similar circumstances." *Buke, supra, at* ¶50, *quoting, Adobe Masters, Inc. v. Downey*, 1994-NMSC-101, ¶3, 118 N.M. 547, 883 P.2d 133.

Expert testimony is generally necessary to explain and establish the applicable standard of conduct. Plaintiff's failure to present expert testimony to support a professional malpractice claim is usually fatal. *Buke, supra*, at ¶51. "To establish malpractice, testimony of another attorney as to the applicable standards of practicing attorneys is generally necessary." *Buke, supra, at* ¶51, quoting, *Clovis v. Diane, Inc.*, 1985-NMCA-025, ¶24, 102 N.M. 548, 698 P.2d 5. Expert testimony is generally needed to establish legal malpractice based on an alleged conflict of interest. *Buke, supra*, ¶55. In some cases, the asserted shortcomings of the attorney can be recognized or inferred from common knowledge or experience of laymen, thereby not requiring expert testimony. Expert testimony is not needed in cases involving an attorney missing deadlines, stealing client funds, failing to appear in court, failing to notify a client of termination of employment, failing to inform a client of a settlement offer, or failing to carry out a client's instructions. *Buke, supra*, at ¶51.

The measure of damages in a malpractice case is the amount the plaintiff would have received but for the attorneys' negligence. *Hyden, supra*., at 115 N.M. 167, 843

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P.2d at 1094, 1993-NMCA-008 at ¶24. The defendants are also entitled to show that the amount that plaintiff actually received was due to reasons other than their malpractice. *Id.* In the *Hyden* case, both plaintiff and defendants were entitled to have a jury determine whether plaintiff was deprived of the contract price of the automobile dealership and suffered damages as a result of his own negligence, his attorneys' malpractice, or as a result of the combination of the two factors. *Id.*

A defense to the claim for legal malpractice is the running of the statute of limitations. New Mexico courts have not resolved whether the three-year statute of personal injuries, NMSA 1978 §37-1-8, or the four-year statute for claims on unwritten contracts and "all other actions not herein otherwise provided for," NMSA 1978 §37-1-4, should apply in the legal malpractice context. *Spencer v. Sommer,* 91 Fed.Appx. 48, 50 (10th Cir. 2004). A malpractice claim accrues when an attorney causes actual injury to a client who knows, or by reasonable diligence should know, facts essential to a cause of action to address the injury. *Spencer, Id.; Sharts v. Natelson*, 118 N.M. 721, 885 P.2d 642, 645 (1994). "Thus, the statute of limitations does not begin to run until the client discovers, or should discover, that he or she had suffered a loss and that the loss may have been caused by the attorney's wrongful act or omission." *Id.* In *Sharts*, the New Mexico Supreme Court held that the plaintiff's letter accusing attorney of carelessness in preparing certain real estate covenants constituted sufficient knowledge to trigger the malpractice limitation. *Id.* at 647. In *Spencer*, the court found that the crucial juncture as to when the statute of limitations began to run is when Spencer knew or should have known that the attorney's advice may have been wrong. The claim accrued for limitations purposes, at the latest, when the beneficiary (plaintiff) asked the attorney to withdraw from the probate proceedings. *Spencer, supra* at 51. The limitations period begins to run when the plaintiff is on notice of the facts constituting the cause of action. The plaintiff does not need to know that all the elements of a cause of action. *Delta Automatic Systems, Inc. v. Bingham*, 1999-NMCA-029, ¶29, 126 N.M. 17, 974 P.2d 1174. "The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should know the relevant facts." *Coslett v. Third Street Grocery*, 117 N.M. 727, 735, 876 P.2d 654, 664 (Ct.App. 1994), quoting *Allen v. State*, 118 Wash.2d 753, 826 P.2d 200, 203 (1992).

Argument to toll the statute of limitations is sometimes raised under the "continuous representation" doctrine. The continuous representation doctrine tolls the limitation period until the attorney-client relationship terminates with respect to the matters that form the basis of the client's malpractice suit. Although a majority of states recognize this doctrine, New Mexico courts have thus far declined to adopt the continuous representation doctrine, at least in cases where compelling circumstances were not present. *Spencer, supra* at 52. Even if New Mexico recognized the continuous representation doctrine, it would not apply in a situation where there was no longer continuing trust and confidence between the client and attorney. It would also not apply where the representation continued as to unrelated matters. A general ongoing relationship on other matters is not sufficient to invoke the continuous representation doctrine. *Id.*

New York

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Legal malpractice cases in New York are subject to the same traditional tort analysis as other negligence cases. The client complaining of his or her attorney's mishandling of the case resulting in malpractice must be able to prove 1. The existence of an attorney client relationship which creates a duty of care owed by the attorney to the client, 2. breach of the duty of care by an act or omission on the part of the attorney, 3. proximate causation and 4. actual pecuniary damages.

Duty of Care

In order to be able to successfully bring an action of legal malpractice against an attorney the client must first establish the existence of an attorney client relationship.[1] In determining whether or not an attorney client relationship existed between the parties the court must look to the actions of the parties.[2] "It is necessary to look at the words and actions of the parties to ascertain" if an attorney client relationship was formed.[3] The unilateral belief of the "client" plaintiff is insufficient in and of itself to establish an attorney/client relationship.[4]

Breach of Duty

If the client establishes that an attorney client relationship existed, the client must then prove that the attorney failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession.[5] An error of judgment by an attorney does not rise to the level of malpractice.[6] Selection of one reasonable course of action among several reasonable courses of action does not constitute malpractice.[7]

Proximate Causation

The client may prove that the attorney's acts and/or omissions were the proximate cause by proving that "but for" defendant attorney's failure to exercise ordinary reasonable skill and knowledge there would have been a more favorable outcome in the underlying proceeding.[8] Therefore, plaintiff client must be able to prevail in the "trial within a trial". Since plaintiff client must prove that there would have been a more favorable outcome plaintiff client must prove that he or she would have prevailed in the underlying matter had the attorney not committed malpractice. Plaintiff client must be able to prove all of the elements of the underlying case b y a preponderance of the credible evidence in order to be able

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to then prove that the attorney's acts and/or omissions were the proximate cause of the damages sustained.

Damages

In other cases involving the tort of negligence the plaintiff is allowed to prove both pecuniary and nonpecuniary damages. However, it is well settled in New York that in legal malpractice cases arising out of both civil and criminal underlying matters the client plaintiff is limited to a recovery only for pecuniary damages.[9] Nonpecuniary damages relating to physical and psychological injuries allegedly sustained as the result of an attorney's malpractice are not recoverable.[10]

Statute of Limitations

The statute of limitations for legal malpractice actions is statutory. CPLR 214(6) sets the time period within which a plaintiff must commence a lawsuit seeking damages for legal malpractice at 3 years. The time starts to run from the date of the act or omission constituting the malpractice.[11] The claim accrues at this time regardless of the client's awareness of the malpractice.[12] It has also been held that the statute of limitations is tolled during a period of continuous legal representation after the act or omission constituting malpractice was committed.[13]

The cause of action accrues if and when the attorney client relationship terminates.[14] Claims against attorneys alleging breach of contract which carries a 6 year statute of limitations are really legal malpractice claims and are subject to the 3 year period accordingly.[15]

Affirmative Defenses

All affirmative defenses to plaintiff's allegations of legal malpractice must be pleaded in the attorney defendant's Answer. CPLR 3018(b). As with all affirmative defenses, the attorney defendant asserting the affirmative defense has the burden of proving the affirmative defense; client plaintiff need not disprove the affirmative defense.

The affirmative defense of comparative negligence is sometimes available to the attorney defendant. In order to succeed with this defense the attorney defendant must show that the client did of failed to do something that hindered the attorney from performing his or her duties toward the client.[16]

The affirmative defense of futility may also be available. The attorney client must be able to prove that his or her failure to perform an act alleged to constitute legal malpractice would have been futile.

Privity may also be raised as an affirmative defense in some cases. Generally, a third party without privity cannot maintain an action against an attorney absent fraud, collusion, malicious acts or other special circumstances.[17] However, for legal malpractice in estate planning privity or a relationship sufficiently approaching privity will exist between the personal representative of the estate and the estate planning attorney.

Settlement

Generally, a plaintiff is barred from bringing a legal malpractice action after signing a written settlement agreement in the underlying action. However, the rule is not universal. Plaintiffs who can demonstrate that the settlement was compelled by the malpractice and was diminished by same may still recover.[18] A client's voluntary plea of guilty in a criminal action precludes the client from bringing an action for legal malpractice against the attorney representing him in the underlying criminal matter.[19]

Expert Opinions

The client plaintiff is generally required to come forward with expert evidence regarding the standard of care applicable to the attorney's representation. However, this requirement may be dispensed with where the "ordinary experience of the fact finder provides a sufficient basis for judging the adequacy of the professional service.[20]

1 Volpe v. Canfield, 237 A.D.2d 282
2 McLenithan v. McLenithan, 273 A.D.2d 757
3 C.K. Indus. Corp. v. C.M. Indus. Corp. 213 A.D.2d 846
4 See Volpe and McLenithan, supra
5 AmBase Corp. v. Davis Polk & Wardwell, 8 N.Y.3d 428
6 Rosner v. Paley, 65 N.Y.2d 736
7 Byrnes v. Palmer, 18 App. Div.1
8 Stein v. Chiera, 130 A.D.3d 912
9 Dombrowski v. Bulson, 19 N.Y.3d 347
10 Dawson v. Schoenberg, 129 A.D.3d 656
11 Shumsky v. Eisenstein, 96 N.Y.2d 164
12 Johnson v. Proskauer Rose LLP 129 A.D.3d 59
13 Aseell v. Jonathan E. Kroll & Associates, PLLC, 106 A.D.3d 1037
14 Grace v. Law, 24 N.Y.3d 203
15 Gelfand v. Oliver, 29 A.D.2d 736
16 Whitney Group LLC v. Hunt-Scanlon Corp. 106 A.D.3d 671
17 Estate of Schneider v. Finmann, 15 N.Y.3d 306
18 Angeles v. Aronsky, 109 A.D.3d 720
19 Kaplan v. Khanna, 48 Misc 3d 665
20 Estate of Nevelson v. Carro, Spanbock, Kaster & Ciuffo, 259 A.D.2d 282

North Carolina

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In order for a plaintiff to sustain a malpractice action against an attorney for that attorney's negligence, the plaintiff must prove (1) that the attorney breached the duties owed to his[/her] client, as set forth in *Hodges* [*v. Carter*], 239 N.C. 517, 80 S.E.2d 144, and that this negligence (2) proximately caused (3) damage to the plaintiff.[1] The duties owed to a client have been described by the North Carolina Supreme Court as follows:

> Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, ***146** skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause. McCullough v. Sullivan, 102 N.J.L. 381, 132 A. 102, 43 A.L.R. 928; In re Woods, 158 Tenn. 383, 13 S.W.2d 800, 62 A.L.R. 904; Great American Indemnity Co. v. Dabney, Tex. Civ.App., 128 S.W.2d 496; Davis v. Associated Indemnity Corp., D.C., 56 F.Supp. 541; Gimbel v. Waldman, 193 Misc. 758, 84 N.Y.S.2d 888; Annotation 52 L.R.A. 883; 5 A.J. 287, s 47; Prosser Torts, p. 236, sec. 36; Shearman & Redfield Negligence, sec. 569.
>
> An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers. 5 A.J. 335, sec. 126; 7 C.J.S., Attorney and Client, s 142, page 979; McCullough v. Sullivan, supra; Hill v. Mynatt, Tenn.Ch.App., 59 S.W. 163, 52 L.R.A. 883.[2]
>
> Conversely, he is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from

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> the failure to exercise in good faith his best judgment in attending to the litigation committed to his care. 5 A.J. 333, sec. 124; In re Woods, supra; McCullough v. Sullivan, supra; Annotation 52 L.R.A. 883.

Although for a time North Carolina viewed attorney malpractice claims as sounding in contract, and such claims could only be brought by those in privity of contract with the attorney,[3] North Carolina now recognizes that attorney malpractice claims can arise from tort.[4] A plaintiff can pursue other actions against attorneys beyond negligence, such as breach of contract, breach of fiduciary duty, fraud, and constructive fraud.[5] Breach of fiduciary duty, however, is merely a species of negligence, and one court noted in a footnote that a claim for breach of fiduciary duty is really just a claim for negligence.[6]

To establish a claim for constructive fraud, a plaintiff must prove "that they and defendants were in a 'relation of trust and confidence…[which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.'"[7] The attorney-client relationship will establish the position of trust, but the "evidence must prove defendants sought to benefit themselves or to take advantage of the confidential relationship."[8] "[T]he benefit sought by the defendant must be more than a continued relationship with the plaintiff."[9] North Carolina has no specific requirements to prove actual fraud, but it has the following essential elements: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.[10] A claim for constructive fraud does not require the same strict adherence to elements as actual fraud.[11] Proof of fraud, regardless of whether actual or constructive, requires more than mere generalities and conclusory allegations.[12]

Attorney-client relationship and non-client causes of action

Although North Carolina originally required a party to be in privity of contract with an attorney in order to assert a claim for malpractice, it later relaxed this requirement and allowed claims for malpractice arising from tort by third-parties who did not have an attorney-client relationship with the attorney.[13] Thus, a party can bring an action against an attorney if 1) it is in privity of contract with the attorney, 2) it is a third-party beneficiary to the attorney-client contract, or 3) the attorney, by entering into a contract with another party, has placed himself in such a relation toward plaintiff that the law will impose upon the attorney an obligation, sounding in tort, to act in such a way that plaintiff will not be injured.[14]

For a non-client party to prove a claim in tort against an attorney, it must prove several factors:

(1) the extent to which the transaction was intended to affect the non-client;

(2) the foreseeability of harm to the non-client;

(3) the degree of certainty that the non-client suffered injury;

(4) the closeness of the connection between the attorney's conduct and the injury;

(5) the moral blame attached to such conduct; and

(6) the policy of preventing future harm.[15]

Courts have "focused on whether the attorney's (or other professional's) conduct, based on a contractual agreement with the attorney's client, was intended or likely to cause a third party to act in reliance on the deficient service performed by the attorney for his client."[16]

North Carolina does not permit the assignment of legal malpractice actions.[17] Such assignments are against public policy due to concerns of a "potential for a conflict of interest, the compromise of confidentiality, and the negative effect assignment would have on the integrity of the legal profession and the administration of justice."[18]

Negligence or breach by the attorney

"The third prong of *Hodges* requires an attorney to represent his client with such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks they undertake."[19] The standard of care required is that of members of the profession in the same or similar locality under similar circumstances.[20] "[A] plaintiff in a legal malpractice action must prove by a preponderance of the evidence that the attorney breached the duties owed to his client ..."[21]

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Expert testimony is not required to prove the standard applicable in a malpractice action, but it is "helpful."[22] Although expert testimony is not required, *Rorrer* does stress the importance of presenting evidence concerning the appropriate standard of care to be met.[23] The purpose of establishing the standard of care is to determine if the actions of the defendant attorney "lived up" to the standard.[24] Without evidence of the standard, the plaintiff cannot prevail.[25]

Causation and Damages

To prove causation, "the plaintiff must establish that the loss would not have occurred but for the attorney's conduct."[26] In cases involving litigation, the plaintiff must prove 1) the original claim was valid, 2) the claim would have resulted in a judgment in plaintiff's favor, and 3) the judgment would have been collectible.[27] Thus a plaintiff must prove a "case within a case," meaning a "showing of the viability and likelihood of success in the underlying action."[28] In cases involving legal malpractice in the representation of a client on criminal matters, the burden of proof required to show proximate cause is a higher one than civil cases for public policy reasons.[29]

In an action regarding potential attorney malpractice in the pursuit of a medical malpractice action, an affidavit of health care provider regarding the validity of the medical malpractice claim is not required to prove the case within a case even though North Carolina requires such an affidavit in medical malpractice cases.[30] In all legal malpractice actions, any contributory negligence of the client/plaintiff will be a defense to the malpractice action.[31]

"In a case of legal malpractice, the determination of proximate cause will ordinarily resolve any question as to the proper measure of damages since an attorney is liable only for those damages proximately resulting from his negligence."[32] Damages should be determined by measuring the difference between 1) plaintiff's actual pecuniary position and 2) "what it should have been had the attorney not erred."[33] If an attorney has committed some fraudulent act, then the attorney will be liable for double damages pursuant to statute.[34] If the plaintiff fails to state a claim for fraud or constructive fraud, or some underlying fraudulent act, then the plaintiff will be unable to make a claim for double damages under the statute.[35] Once such claims are dismissed from an action, the court should also dismiss the claim for double damages.[36]

Statute of Limitations

The appropriate statute of limitations to be used for claims against attorneys depends on the theory of the wrong or the nature of the injury.[37] The statute of limitations period for the failure to perform professional services, whether the action is based on negligence or breach of contract, is set by N.C. Gen. Stat. § 1-15(c), and it establishes a three-year statute of limitations for malpractice actions.[38] This provision also establishes a four-year statute of repose.[39] With the statute of repose, "a plaintiff is given an additional year to file a malpractice claim if and only if the malpractice was of a nature that was not readily apparent, and the plaintiff did not actually discover the injury from the malpractice until two or more years after the last act of malpractice.[40] N.C. Gen. Stat. § 1-15(c) states:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action…[41]

Both the three-year statute of limitations and the four-year statute of repose begin to accrue upon the date of the last act of the defendant giving rise to the cause of action.[42] Whether North Carolina recognizes the "continuous

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representation" doctrine as a means of tolling the statute of limitations is an open question.[43] "The determination as to the last act giving rise to an action for malpractice is a conclusion of law appropriate for the trial judge to make based on the facts presented, such as the dates of relevant events in the attorney-client relationship."[44] In limited circumstances, a claim may be brought beyond the limitation period if it is relates back to a claim raised in a previously filed petition.[45] Any such refiled claims must be brought within one year of the prior dismissal.[46]

Claims concerning fraud by an attorney, including claims of constructive fraud and breach of fiduciary duty, are not within the scope of "professional services" and are governed by North Carolina's fraud statute of limitations under N.C. Gen. Stat. § 1-52.[47] The three-year statute of limitations for fraud does not begin to accrue until discovery of the facts constituting the fraud by the aggrieved party.[48]

1 *Rorrer v. Cooke*, 329 S.E.2d 355, 366 (N.C. 1985).
2 *Hodges v. Carter*, 80 S.E.2d 144, 145-146 (N.C. 1954).
3 *See Chicago Title Ins. Co. v. Holt*, 244 S.E.2d 177, 180 (N.C. Ct. App. 1978).
4 *See United Leasing Corp. v. Miller*, 263 S.E.2d 313, 317 (N.C. Ct. App. 1980).
5 *See Wilkins v. Safran*, 649 S.E.2d 658 (N.C. Ct. App. 2007) (analyzing claims against an attorney for negligence, breach of fiduciary duty, and constructive fraud); Sharp v. Teague, 439 S.E.2d 792 (N.C. Ct. App. 1994) (analyzing the statute of limitations for claims of negligence, breach of contract, fraud, and constructive fraud made by client against former counsel).
6 *Teague v. Isenhower*, 579 S.E.2d 600, n.1 (N.C. Ct. App. 2003).
7 *Wilkins*, 649 S.E.2d at 663 (internal citation omitted).
8 *Id.*
9 *Self v. Yelton*, 668 S.E.2d 34, 39 (N.C. Ct. App. 2010) (internal citation omitted).
10 *Forbis v. Neal*, 649 S.E.2d 382, 387 (N.C. 2007) (fraud claim against testator's attorney-in-fact for diverted property).
11 *Id.* at 388
12 *Sharp*, 439 S.E.2d at 797 ("material facts and circumstances constituting fraud must be plead in a complaint with particularity").
13 *Supra* note 3, 4.
14 *Leary v. N.C. Forest Products, Inc.*, 580 S.E.2d 1, 6 (N.C. Ct. App. 2003).
15 *Id.* at 6-7.
16 *Id.* at 7.
17 *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 744 S.E.2d 130, 134 (N.C. Ct. App. 2013).
18 *Id.*
19 *Rorrer*, 329 S.E.2d at 366.
20 *Id.*
21 *Cheek v. Poole*, 390 S.E.2d 455, 460 (N.C. Ct. App. 1990) (internal citation omitted).
22 *Rorrer*, 329 S.E.2d at 366.
23 *Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady, & Davis*, 356 S.E.2d 372, 375 (N.C. Ct. App. 1987).
24 *Id.* at 375-376.
25 *Id.* at 376.
26 *Rorrer*, 329 S.E.2d at 369.
27 *Id.*
28 *Royster v. McNamara*, 723 S.E.2d 122, 126 (N.C. Ct. App. 2012).
29 *Belk v. Cheshire*, 583 S.E.2d 700, 706 (N.C. Ct. App. 2003).
30 *Formyduval v. Britt*, 630 S.E.2d 192, 195 (N.C. Ct. App. 2006).
31 *Piraino Bros., LLC v. Atlantic Financial Group, Inc.*, 712 S.E.2d 328, 334 (N.C. Ct. App. 2011) ("contributory negligence 'is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains'").
32 *Smith v. Childs*, 437 S.E.2d 500, 509 (N.C. Ct. App. 1993).
33 *Id.* (internal citation omitted).
34 N.C. Gen. Stat. § 84-13 ("[i]f any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages").
35 *Wilkins*, 649 S.E.2d at 664.
36 *Id.*
37 *Sharp*, 439 S.E.2d at 794.
38 *Id.*
39 *Id.*
40 *Ramboot, Inc. v. Lucas*, 640 S.E.2d 845, 847 (N.C. Ct. App. 2007).
41 N.C. Gen. Stat § 1-15(c).
42 *Sharp*, 439 S.E.2d at 795; see also Ramboot, 640 S.E.2d at 847 ("the statute plainly states that a malpractice action accrues from the date of the 'last act of the defendant,' not from the date when the attorney-client relationship either begins or ends").
43 See *Sharp*, 439 S.E.2d at 795-96; *Teague*, 579 S.E.2d at n. 2.
44 *Ramboot*, 640 S.E.2d at 848.
45 *Williams v. Lynch*, 741 S.E.2d 373 (N.C. Ct. App. 2013) ("it is immaterial that the first complaint identified the claim as a negligence claim and the second complaint identified the claim as a professional malpractice claim. When, as the first complaint alleged, the negligence arose out of Mr. Ruff's professional role, the two types of claims are synonymous").
46 *Id.*
47 *Sharp*, 439 S.E.2d at 794.
48 *Guyton v. FM Lending Services, Inc.*, 681 S.E.2d 465, 471 (N.C. Ct. App. 2009).

North Dakota

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In North Dakota, a successful claim against an attorney for legal malpractice requires four elements: 1) the existence of an attorney-client relationship, 2) a duty by the attorney to the client, 3) a breach of that duty by the attorney, and 4) damages to the client proximately caused by the breach of duty.[1]

The standard of care or duty to which an attorney is held in the performance of professional services is that degree of skill, care, diligence and knowledge commonly possessed and exercised by a reasonable, careful, and prudent attorney in the state.[2] Generally, expert testimony is necessary to establish the professional's standard of care (duty) and whether the professional's conduct in a particular case deviated from that standard of care (breach of duty).[3] If the professional's misconduct is so egregious and obvious that a layperson can comprehend the professional's breach of duty, expert testimony is not required.[4]

Proving Causation

Once the client has established the existence of an attorney-client relationship, the attorney's duty owed to the client, and the attorney's breach of that duty, the client has the burden of proving that the breach of that duty proximately caused damages.[5] Simply stated, the client must prove that had the attorney not acted in the manner alleged, a more favorable result to the client would have occurred.[6]

North Dakota courts utilize the "case-within-a-case doctrine in certain cases. The case-within-a-case doctrine "applies to allegedly negligently conducted litigation and requires that but for the attorney's alleged negligence, the litigation would have terminated in a result more favorable for the client."[7] Where the plaintiff claims that an attorney negligently failed to perform some act on behalf of the client, the plaintiff must prove that if the attorney had performed the act it would have turned out beneficially to the client.[8] A malpractice plaintiff must prove "by a preponderance of the evidence not only that his attorney was negligent, but that the negligence was the proximate cause of his damage."[9]

Damages Recoverable

In a North Dakota legal malpractice action, proof of damages is an essential element to a plaintiff's claims. If a plaintiff fails to establish an actual loss proximately caused by the attorney's breach of duty, no damages may be awarded.

North Dakota

Damages in a legal malpractice action are generally governed by the statutory provisions as damages for any other tort action.[10]

Exemplary damages may be awarded when the defendant is guilty of oppression, fraud, or malice, actual or presumed. The court strictly construes the requirements of *N.D. Cent. Code § 32-03-07*, holding that the absence of a specific finding of oppression, fraud, or malice, actual or presumed, is fatal to an award of exemplary damages.[11]

Attorney fees are not recoverable by a plaintiff in a legal malpractice case.[12] However, attorney fees are awardable where the wrongful act has forced the aggrieved person into litigation with a third party (as a result of the defendant's wrongful act).[13]

Defenses Available

North Dakota recognizes contributory negligence as an available defense in a legal malpractice claim.[14]

Other Considerations

The Code of Professional Responsibility does not "undertake to define standards for civil liability of lawyers for professional conduct",[15] and courts have held that violations of the Code constitute only rebuttable evidence of legal malpractice.[16] Thus, assuming that there was such a violation in this case, it merely constituted evidence to be considered by the trier of fact.[17]

North Dakota has a two-year statute of limitations on a claim for legal malpractice.[18] The statute of limitations does not begin to run until the client has incurred some damage from the alleged malpractice; until the client knows, or with reasonable diligence should know, of the injury, its cause, and the defendant attorney's possible negligence.[19] The statute of limitations is tolled: (1) by the continuous representation of a client in the same transaction or subject matter;[20] (2) the fraudulent concealment by the attorney;[21] (3) imprisonment of a legal malpractice plaintiff;[22] or (4) the absence of the attorney from the state.[23]

1 *Minn-Kota Ag Products, Inc. v. Carlson*, 684 N.W.2d 60 (N.D. 2004), Davis v. Enget, 779 N.W.2d 126, 129 (N.D. 2010).
2 *Sheets v. Letnes, Marshall & Fiedler, Ltd.*, 311 N.W.2d 175, 180 (N.D. 1981).
3 *Wastvedt v. Vaaler*, 430 N.W.2d 561, 565 (N.D. 1988).
4 *Id.*
5 *Martinson Bros. v. Hjellum*, 359 N.W.2d 865, 874 (N.D. 1985). *See also, Feil v. Wishek*, 193 N.W.2d 218 (N.D. 1971).
6 *Id.*
7 *Wastvedt*, 430 N.W.2d 561, 567.
8 *Swanson v. Sheppard*, 445 N.W.2d 654, 658 (N.D. 1989).
9 *Martinson Bros.*, 359 N.W.2d 865, 872 (N.D. 1985).
10 *See* N.D. Cent. Code 32-03-01, -20.
11 *Olson v. Fraase*, 421 N.W.2d 820 (N.D. 1988).
12 *Id.* at 829.
13 *Id.*
14 *Feil*, at 225.
15 Preliminary Statement, North Dakota Code of Professional Responsibility.
16 *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir.), *cert. denied*, 449 U.S. 888, 101 S. Ct. 246, 66 L. Ed. 2d 114 (1980); *Lipton v. Boesky*, 110 Mich.App. 589, 313 N.W.2d 163 (1981).
17 *Martinson Bros.*, 359 N.W.2d 865, 874 (N.D. 1985).
18 N.D.Cent. Code §28-01-18.
19 *Larson*, 2001 ND 103 at P9. *See also, Larson v. Norkot Manufacturing, Inc.*, 2002 ND 175 at P10; 653 N.W.2d 33, 36.
20 *Wall*, 393 N.W.2d at 762 (N.D. 1986).
21 *Binstock v. Tschider*, 374 N.W.2d 81, 85 (N.D. 1985).
22 N.D. Cent. Code §28-01-32.
23 *Berglund v. Gulsvig*, 448 N.W.2d 627, 628 (N.D. 1989).

Ohio

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An attorney is required to possess legal skill and knowledge ordinary to members of the legal profession and is required to be reasonably prudent and careful in discharging duties which he has assumed on behalf of a client. The failure to live up to the standards ordinarily expected of a lawyer can render him liable to his client for professional malpractice.[1] In an action against an attorney for malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) there was a breach of that duty and the attorney failed to conform to the standard required by law, and (3) there is a causal connection between the misconduct and resulting damage or loss.[2] For example, proof that an attorney has violated a Disciplinary Rule does not, by itself, entitle plaintiff to relief under a claim of malpractice. Plaintiff must also prove that the violation of the Disciplinary Rule was the proximate cause of his damages.[3] Generally speaking, the most difficult element of the attorney malpractice case is that of proving proximate cause and damages. For instance, if an attorney neglects to prosecute an action, interpose a defense, or properly perfect an appeal, in order to recover against him, the client must provide some evidence of the merits of the underlying claim but is not required to prove in every instance that he or she would have been successful in the underlying matter.[4]

In a legal malpractice action, expert testimony is generally relied upon to establish the professional standard of performance. "Expert testimony is not required, however, 'when the breach of duty is within the common understanding of lay persons or is so obvious that it may be determined as a matter of law.'"[5]

Proving Causation

"To establish a cause of action for legal malpractice, a claimant must demonstrate the existence of an attorney-client relationship giving rise to a duty, a breach of that duty, and damages proximately caused by that breach."[6] "Although the Ohio Supreme Court has held that the 'case-within-a-case' doctrine does not apply to every legal malpractice case, it remains relevant in cases where 'the theory of the malpractice case places the merits of the underlying litigation directly at issue.'"[7]

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In order to prove causation in these cases, the plaintiff must prove that but for the attorney's negligence, the plaintiff would have obtained a better outcome in the underlying case. All the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff's former lawyer, with the latter taking the place of and bearing the burdens that properly would have fallen on the defendant in the original action. Similarly, the plaintiff bears the burden the plaintiff would have borne in the original trial.[8] As the Ohio Supreme Court has reasoned:

> In this type of action, it is insufficient for the plaintiff to present simply 'some evidence' of the merits of the underlying claim. To permit the plaintiff to present merely some evidence when the sole theory is that that the plaintiff would have done better at trial would allow the jury to speculate on the actual merits of the underlying claim.[9]

A plaintiff need not allege a reversal of his or her conviction in order to state a cause of action for legal malpractice arising from representation in a criminal proceeding. To plead a cause of action for attorney malpractice arising from criminal representation, a plaintiff must allege (1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach.[10]

Defenses

Perhaps one of the most common defenses to a legal malpractice case is failure to commence the malpractice action within the statutory time limits, which require such an action to be brought within one year after the cause accrued.[11] An action for malpractice accrues—and the statute of limitations begins to run—whenever the later of the following two events occurs: (1) the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or (2) the attorney-client relationship for that particular transaction or undertaking terminates.[12]

An attorney cannot be held liable for malpractice for lack of knowledge as to the true state of the law where a doubtful or debatable point is involved. In a legal malpractice action, an attorney's acts must be governed by the law as it existed at the time of the act. Counsel's failure to predict a subsequent change in a settled point of law cannot serve as a foundation for professional negligence.[13]

The Supreme Court of Ohio has also held that a law firm does not engage in the practice of law and therefore cannot commit legal malpractice directly. Furthermore, a law firm is not vicariously liable for legal malpractice unless one of its principals or associates is liable for legal malpractice.[14]

Damages Recoverable

The Ohio Supreme Court has held that in an attorney-malpractice case, proof of the collectability of the judgment lost as a result of the attorney's malpractice is an element of the plaintiff's claim against the negligent attorney. The plaintiff's injury is measured by what he or she actually would have collected in the underlying lawsuit.[15]

Appellate courts in Ohio have upheld awards of punitive damages where actual malice is shown.[16] For example, an award of punitive damages was upheld against an attorney who accepted legal fees for work but failed to do the work and who also misrepresented to the client both that work would be performed, and later, that work had been performed.[17] The burden of proof rests with the plaintiff to establish his entitlement to punitive damages by clear and convincing evidence.[18] "Actual malice" in the context of punitive damages has been defined as "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm."[19]

An award of noneconomic compensatory damages has also been sustained where the plaintiff in a legal malpractice action established that she suffered serious emotional distress that was severe and debilitating as a result of the lawyer's misconduct.[20]

Furthermore, attorney fees are recoverable even if the result of the underlying case was settlement.

> Attorney fees incurred to rectify, or to attempt to rectify, the malpractice are recoverable as indirect, or consequential, damages in a legal malpractice action, even when the rectification is achieved through a settlement. But recovery is warranted only where the

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factfinder is persuaded that the fees and expenses of the successor attorney were causally related to an established cause of action for malpractice.[21]

There are no reported opinions in Ohio addressing a disgorgement theory of recovery in the legal malpractice context. However, in a case involving misappropriation of funds from an employer, the trial court's order requiring the compensation of a "faithless servant" to be disgorged was upheld.[22] It has also been held that an independent contractor was not entitled to keep commissions for accounts that he had sold under the faithless servant doctrine.[23] Under the faithless servant doctrine, disgorgement of an attorney's fees is a possibility if the facts and circumstances of the legal malpractice action warrants such equitable relief.

Although punitive damages may have been available in the underlying lawsuit, they will not be imposed upon the attorney in the malpractice action. Any award against the attorney for speculative lost punitive damages would be contrary to the very purpose of punitive damages. Punitive damages are available as a punishment or deterrent to future wrongdoing by a tortfeasor. Punishing the attorney for the tortfeasor's conduct by awarding speculative lost punitive damages would not accomplish this goal.[24]

1 John C. Nemeth, *Legal Malpractice in Ohio*, 40 Clev. St. L. Rev. 143, 159 (1992).
2 Vahila v. Hall, 77 Ohio St. 3d 421, 427, 674 N.E.2d 1164 (1997). *See also* Shoemaker v. Gindlesberger, 118 Ohio St. 3d 226, 228, 887 N.E.2d 1167 (2008). The elements of a legal malpractice claim are stated in the conjunctive, and the failure to establish an element of the claim is fatal. Rivera v. Crosby, 194 Ohio App. 3d 147, 152, 954 N.E.2d 1292 (2011).
3 Palmer v. Westmeyer, 48 Ohio App. 3d 296, 298, 549 N.E.2d 1202 (1988); Northwestern Life Ins. Co. v. Rogers, 61 Ohio App. 3d 506, 512, 573 N.E.2d 159 (1989).
4 Vahila v. Hall, 77 Ohio St. 3d 421, 428, 674 N.E.2d 1164 (1997); Campbell v. Elsass, 62 Ohio App. 3d 829, 835, 577 N.E.2d 699 (1989) (Failure to file a mechanics' lien as requested by a client was legal malpractice).
5 Werts v. Penn, 164 Ohio App. 3d 505, 515, 842 N.E.2d 1102 (2005). "Although expert testimony is generally required [in a legal malpractice action] to establish professional standards of performance, the testimony of an expert is not necessary where the claimed breach of professional duty is within the common understanding of the laymen on the jury." Nalls v. Nystrom, 159 Ohio App. 3d 200, 205, 823 N.E.2d 500 (2004).
6 C&K Indus. Servs. v. McIntyre, Kahn & Kruse Co., L.P.A., 8th Dist. No. 98096, 2012-Ohio-5177, 984 N.E.2d 45, ¶ 15 (citing Vahila v. Hall, 77 Ohio St. 3d 421, 674 N.E.2d 1164 (1997)). "If a plaintiff fails to establish a genuine issue of material fact as to any of the elements, [the attorney] is entitled to summary judgment on a legal-malpractice claim." Shoemaker v. Gindlesberger, 118 Ohio St. 3d 226, 228, 887 N.E.2d 1167 (2008).
7 C&K Indus. Servs. v. McIntyre, Kahn & Kruse Co., L.P.A., 8th Dist. No. 98096, 2012-Ohio-5177, 984 N.E.2d 45, ¶ 16 (citing Vahila v. Hall, 77 Ohio St.3d 421, 428, 674 N.E.2d 1164 (1997) & Eastminster Presbytery v. Stark & Knoll, No. 25623, 2012 Ohio App. LEXIS 779 (Ohio Ct. App. Mar. 7, 2012) (quoting Envtl. Network Corp. v. Goodman Weiss Miller, L.L.P., 119 Ohio St. 3d 209, 212-213, 893 N.E.2d 173 (2008))).
8 Envtl. Network Corp. v. Goodman Weiss Miller, L.L.P., 119 Ohio St. 3d 209, 212, 893 N.E.2d 173 (2008).
9 Envtl. Network Corp. v. Goodman Weiss Miller, L.L.P., 119 Ohio St. 3d 209, 213, 893 N.E.2d 173 (2008)
10 Krahn v. Kinney, 43 Ohio St. 3d 103, 105, 538 N.E.2d 1058 (1989); *but see* Canady v. Shwartz, 62 Ohio App. 3d 742, 745, 577 N.E.2d 437 (1989); Weaver v. Carson, 62 Ohio App. 2d 99, 101, 404 N.E.2d 1344 (1979).
11 O.R.C. § 2305.11. Because an attorney-client relationship is essential to support an action for legal malpractice, a complaint filed by the executrix of an estate against attorneys retained by another party to represent the estate does not state a cause of action in malpractice and is not barred by the one-year statute of limitations of R.C. § 2305.11(A). *Carrocia v. Carrocia*, 21 Ohio App. 3d 244, 246, 486 N.E.2d 1263 (1985).
12 Zimmie v. Calfee, Halter & Griswold, 43 Ohio St. 3d 54, 57, 538 N.E.2d 398 (1989); Skidmore & Hall v. Rottman, 5 Ohio St. 3d 210, 211, 450 N.E.2d 684 (1983).
13 Howard v. Sweeney, 27 Ohio App. 3d 41, 43, 499 N.E.2d 383 (1985).
14 National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, 122 Ohio St. 3d 594, 600, 913 N.E.2d 939 (2009).
15 Paterek v. Petersen & Ibold, 118 Ohio St. 3d 503, 509, 890 N.E.2d 316 (2008).
16 Kelley v. Buckley, 193 Ohio App. 3d 11, 36-37, 950 N.E.2d 997 (2011); Spalding v. Coulson, 104 Ohio App. 3d 62, 77-80, 661 N.E.2d 197 (1995); David v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A., 79 Ohio App. 3d 786, 799-800, 607 N.E.2d 1173 (1992); Williams v. Hyatt Legal Services, No. 14235, 1990 Ohio App. LEXIS 934 (Ohio Ct. App. Mar. 14, 1990); Linden v. Cooper & Hall, No. OT-84-11, 1984 Ohio App. LEXIS 11984 (Ohio Ct. App. Dec. 21, 1984).
17 Williams v. Hyatt Legal Services, No. 14235, 1990 Ohio App. LEXIS 934 (Ohio Ct. App. Mar. 14, 1990).
18 O.R.C. § 2315.21(D)(4) ("In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that the plaintiff is entitled to recover punitive or exemplary damages.").
19 Preston v. Murty, 32 Ohio St. 3d 334, 512 N.E.2d 1174, syllabus (1987); see Kelley v. Buckley, 193 Ohio App. 3d 11, 37, 950 N.E.2d 997 (2011); Pierson v. Rion, No. CA23498, 2010-Ohio-1793, 2010 Ohio App. LEXIS 1492, ¶ 48 (Ohio Ct. App. Mar. 23, 2010).
20 Williams v. Hyatt Legal Services, No. 14235, 1990 Ohio App. LEXIS 934 (Ohio Ct. App. Mar. 14, 1990).
21 Green v. Bailey, No. C-070221, 2008-Ohio-3569, 2008 Ohio App. LEXIS 3025, ¶ 17 (Ohio Ct. App. July 18, 2008) (citing Paterek v. Petersen & Ibold, 118 Ohio St. 3d 503, 507, 890 N.E.2d 316 (2008) & Pschesang v. Schaefer, No. C-990702, 2000 Ohio App. LEXIS 3602 (Ohio Ct. App. Aug. 11, 2000)); see Krahn v. Kinney, 43 Ohio St. 3d 103, 106, 538 N.E.2d 1058 (1989).
22 Columbus Homes, Ltd. v. S.A.R. Construction Co., Nos. 06AP-759 & 06AP-760, 2007-Ohio-1702, 2007 Ohio App. LEXIS 1549, ¶ 53 (Ohio Ct. App. Apr. 10, 2007).
23 Financial Dimensions, Inc. v. Zifer, Nos. C-980960 & C-980993, 1999 Ohio App. LEXIS 5879 (Ohio Ct. App. Dec. 10, 1999).
24 Friedland v. Djukic, 191 Ohio App. 3d 278, 285, 945 N.E.2d 1095 (2010).

Oklahoma

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A legal malpractice action brought in Oklahoma can sound in either tort or contract. However, unless the contract claim is specifically plead, Oklahoma courts will apply the shorter two-year statute of limitations for a tort action.[1] The elements of a legal negligence action are (1) an attorney-client relationship; (2) breach of the lawyer's duty to the client; (3) facts showing the alleged negligence; (4) a causal connection between the lawyer's alleged negligence and the resulting injury; and (5) but for the lawyer's conduct, the client would have succeeded in the underlying action.[2] A Plaintiff must prove these elements by a preponderance of the evidence.

The violation of an ethical rule does not, in and of itself, provide a basis for a legal malpractice action.[3] Actions against attorneys for negligence are governed by the same principles as other negligence actions.[4] As in other professional negligence actions, the primary issue is whether the lawyer's conduct fell below the acceptable professional standards of care.[5] The Oklahoma Supreme Court "possesses original and exclusive jurisdiction to prosecute any alleged attorney rule violations."[6]

If a contract claim is asserted, it is governed by the statute of limitations for such claims—three years if an oral contract and five years if a written contract is alleged.

Duty and Breach

To a client, an attorney owes the duty of reasonable care. This requires the attorney to exercise "ordinary professional skill and diligence" in representation of the client's interests.[7] In order to establish a duty, the Plaintiff must show the existence of an attorney-client relationship. This requires proof of two elements, (1) the client submitted confidential information to the lawyer; and (2) the party did so with the reasonable belief that the lawyer was acting as the party's attorney.[8]

An attorney may also owe limited duties to intended beneficiaries of the client and prospective clients.[9] For example, an "implied professional relationship" may exist in the preliminary consultation with a prospective client who has a view to retain the lawyer, even where actual employment does not result.[10]

Oklahoma

The second element of a legal malpractice claim is breach of duty. "A lawyer is not expected to be perfect in giving advice to her clients."[11] Therefore, expert testimony is usually required to prove this element.[12] In a professional negligence action in Oklahoma, the Plaintiff is required to include in the Petition an affidavit of consultation with a qualified expert. Additionally, upon request by the opposing party, the Plaintiff must also provide a written report from the qualified expert outlining the attorney's breach of the standard of care.[13]

Causation

The Plaintiff must prove a causal nexus between the lawyer's alleged negligence and the client's resulting injury.[14] This requires the Plaintiff to plead specific facts- more than conclusory statements- showing the attorney's alleged negligence.

Additionally, the Plaintiff must establish the attorney's alleged negligence was the proximate cause of the Plaintiff's resulting injury. Proximate cause is "that which in a natural and continuous sequence, unbroken by an independent cause, produces the event and without which the event would not have occurred."[15] The failure to establish a causal nexus between the lawyer's allegedly negligent act and the client's resulting injury is fatal to a legal malpractice claim.

Success in the Underlying Action

In order to bring an action for legal malpractice to a successful conclusion, the Plaintiff must prove injury or damages.[16] Damages are typically established through evidence of the value of the underlying claim.[17] Injury to the Plaintiff must be certain and not merely speculative.[18] Therefore, damages must be provable to a reasonable certainty.

An attorney will not be held liable unless it appears, absent the attorney's negligence, the client would have been successful in the underlying action.[19] Therefore, if there is no merit to the client's underlying action, the attorney will not be held liable regardless of any proof of professional negligence.[20] This is sometimes called the "case within a case" doctrine, which essentially requires the Plaintiff to prove both the professional negligence action and the merits of the action giving rise to the malpractice claim.[21]

Statute of Limitations

An action for malpractice is an action in tort, which is governed by the two-year statute of limitations.[22] The statute of limitation begins to run when the cause of action accrues, or "when a litigant could first maintain an action to a successful conclusion."[23] In Oklahoma, a cause of action has accrued only after the occurrence of the alleged tortuous act and after the Plaintiff has suffered damages.[24] Depending on the facts of the particular action, the limitation period may begin to run from the date the negligent act occurred, or from the date Plaintiff should have known of the negligent act.[25]

1 *See* Stephens v. General Motors Corp., 1995 OK 114, 905 P.2d 797, 799; Flint Ridge Development Co., Inc. v. Benham-Blair and Affiliates, Inc., 775 P.2d 797, 799-801; Close v. Coates, 187 OK 315, 102 P.2d 613 (1940); Freeman v. Wilson, 105 OK 87, 231 P. 869 (1924).
2 Manley v. Brown, 1999 OK 79, ¶ 8, 989 P.2d 448, 452.
3 Mahorney v. Waren, 2002 OK CIV APP 111, ¶ 4, 60 P.3d 38, 40.
4 Marshall v. Fenton, Fenton, Smith, Reneau & Moon, P.C., 1995 OK 66, ¶ 8, 899 P.2d 621, 623.
5 Manley, 989 P.2d at 452.
6 Mahorney, 60 P.3d at 40.
7 Worsham v. Nix, 2004 OK CIV APP 2, 83 P.3d 879, 883.
8 Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1384 (10th Cir. 1994); U.S. v. Stinger, 413 F.3d 1185, 1196 (10th Cir. 2005).
9 See Whitehead v. Rainey, Ross, Rice & Binns, 2000 OK CIV APP 5, 997 P.2d 177; Kimble v. Arney, 2004 OK CIV APP 43, 90 P.3d 598; Stinger, 413 F.3d at 1196; *but see* Trinity Mortgage Co., Inc. v. Dryer, 451 Fed.Appx.776 (10th Cir. 2011) (finding the assignment of a legal malpractice claim, like any other tort claim, is against public policy and prohibited).
10 Stinger, 413 F.3d at 1196.
11 Mahorney, 60 P.3d at 40; citing Myers v. Maxey, 1995 OK CIV APP 148, ¶ 11, 915 P.2d 940, 945.
12 12 O.S. § 19 (2009).
13 Id.
14 Manley, 989 P.2d at 452.
15 Elledge v. Staring, 1996 OK CIV APP 161, 939 P.2d 1163, 1165; *citing* Gaines v. Providence Apartments, 1987 OK 129, 750 P.2d 125, 126-27.
16 Stephens, 905 P.2d at 799; see also Sutton v.Whiteside, 1924 OK 189, 222 P.974.
17 Nichols, 58 P.3d at 780.
18 Stephens, 905 P.2d at 799.
19 Id.; *see also* Collins v. Wanner, 1963 OK 127, 382 P.2d 105, 108.
20 Birchfield v. Harrod, 1982 OK CIV APP 2, 640 P.2d 1003.
21 Nichols v. Morgan, 2002 OK 88, 58 P.3d 775, 781.
22 Stephens, 905 P.2d at 799; 12 O.S. § 95(A)(3).
23 Id.; *see also* Marshall, 899 P.2d at 623.
24 Stephens, 905 P.2d at 799.
25 Id.

Oregon

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In Oregon, there are generally two types of malpractice claims available against attorneys (1) breach of fiduciary duty claim; and (2) attorney negligence. Each of these claims is treated distinctly different by Oregon courts:

> Quite apart from the duty of competence and professional care, lawyers are fiduciaries to their clients. Lawyers can thus think of fiduciary breach as a form of professional malpractice or an entirely separate ground for liability. Whether or not both fiduciary breach and negligence both fit under the umbrella of professional malpractice, *the two torts are not the same*. 'Professional negligence implicates a duty of care, while breach of a fiduciary duty implicates a duty of loyalty and honesty.' Thus, if breach of fiduciary duty is a form of lawyer malpractice, it is a distinct one with rules that do not necessarily turn on traditional negligence analysis.[1]

Granted, the differences between the claims for legal negligence and breach of fiduciary duty may be subtle in some instances. However, as explained below, the claims are distinct. An attorney negligence claim concerns competence; a breach of fiduciary duty claim concerns loyalty. An attorney may be incompetent in his or her representation of a client, and that incompetence may harm the client's financial interests. However, that does not necessarily mean that the attorney will have been disloyal. Correspondingly, an attorney may act disloyally, and that disloyalty may harm the client's financial interests; however, that does not necessarily mean that the attorney will have been incompetent in representing the client.[2] Oregon courts have established distinct elements and rules for each type of claim.

Attorney Negligence

The traditional legal malpractice action (attorney negligence) "is not materially different from an ordinary negligence action."[3] "It is simply a variety of negligence in which a special relationship gives rise to a particular duty that goes beyond the ordinary duty to avoid a foreseeable risk of harm."[4] Accordingly, a plaintiff can prevail only if he or she proves "(1) a *duty* that runs from the defendant to the plaintiff; (2) a *breach* of that duty; (3) a resulting *harm* to the plaintiff measurable in damages; and (4) *causation*, i.e., a causal link between the breach of duty and the harm."[5]

Oregon

Duty & Breach

By virtue of their relationship, an attorney owes a client a duty of care.[6] In a legal negligence claim, the issue is whether the attorney violated the duty of care, which is "to act as a reasonably competent attorney in protecting and defending the interests of the client."[7] An attorney is required to use the care, skill, and diligence ordinarily used by lawyers in the community in similar circumstances.[8]

To prove breach, a jury often requires expert evidence setting forth the appropriate standard of care owed by a reasonable attorney and how the defendant failed to uphold that standard.[9] However, in Oregon, expert testimony is not always required in legal malpractice actions to establish breach of the standard of care.[10] Whether expert testimony is necessary to establish that a defendant's conduct fell below the standard of care is a legal question that the court must determine by examining the particular malpractice issues that the case presents.[11] Expert testimony is not required if, without an expert's opinion, the jury is capable of deciding whether the attorney's conduct was reasonable.[12]

Causation

To establish causation, the plaintiff must show that, but for the defendant's negligence, the plaintiff would not have suffered the claimed harm.[13] The plaintiff does so by showing that he or she would have obtained a more favorable result had the defendant not been negligent.[14] "The jury in the malpractice case is called upon, in effect, to decide what the outcome for plaintiff would have been in the earlier case if it had been properly tried, a process that has been described as a 'suit within a suit.' "[15] If the jury determines that the defendant was negligent but concludes that the outcome of the underlying case would have been the same in all events, the defendant's negligence is deemed not to have caused the plaintiff's harm.

Damages

A legal malpractice plaintiff must plead and prove that the attorney breached a duty causing foreseeable damages to the client.[16] Damages arising from legal malpractice claims are typically based on "purely economic loss."[17]

Defenses

DAMAGES

One of the most frequent defenses to a legal malpractice claim is that, regardless of any attorney negligence, there was no damage. For example, an attorney may admit negligence in handling a case but defend himself or herself on the grounds that the case itself had no value.[18]

AVOIDABLE CONSEQUENCES

Even if there are damages, legal malpractice plaintiffs must take reasonable steps to minimize their damages following a loss. They must avoid or minimize consequences that a reasonable person under the same or similar circumstances would avoid

COMPARATIVE NEGLIGENCE

The comparative-negligence defense arises in a few specific fact situations: (1) the client fails to supervise, review, or inquire about the attorney's representation; (2) the client fails to follow the attorney's advice or instructions; (3) the client fails to provide essential information; (4) the client actively interferes with the attorney's representation or fails to complete certain responsibilities; or (5) the client fails to pursue remedies to avoid or mitigate the effect of an attorney's negligence.

Breach of Fiduciary Duty Claim

An attorney owes a client a duty of loyalty, good faith, and fair dealing, which is the concern of a breach of fiduciary duty claim. In that instance, the party claiming the breach

> must plead and prove the breach, and must show that the breach caused an identifiable loss or resulted in injury to the party. Breach of the duty of loyalty is established by proof that the agent had a conflict of interest or was self-dealing. It is incumbent upon the agent to defend against the claim by showing full disclosure, or some other matter of defense.[19]

In other words, unlike in a legal negligence claim, a plaintiff pursuing a claim for breach of fiduciary duty need not prove the breach element using expert evidence establishing a "reasonable attorney" standard of loyalty, good faith, or fair dealing. Rather, a plaintiff needs to show by a preponderance of evidence that a defendant was disloyal.[20]

Oregon

1 Dan B. Dobbs, *The Law of Torts* § 487, 1392 (2000) (footnotes omitted; emphasis added).
2 *Pereira v. Thompson*, 230 Or.App. 640, 655, 217 P.3d 236 (2009)
3 *Watson v. Meltzer*, 247 Or.App. 558, 565, 270 P.3d 289 (2011).
4 *Id.*
5 *Stevens v. Bispham*, 316 Or. 221, 227, 851 P.2d 556 (1993) (emphasis in original).
6 *Onita Pacific Corp. v. Trustees of Bronson*, 315 Or. 149, 160, 843 P.2d 890 (1992).
7 *Id.*
8 *Sommerfeldt v. Trammell*, 74 Or.App. 183, 187, 702 P.2d 430 (1985).
9 *Vandermay v. Clayton*, 328 Or. 646, 655, 984 P.2d 272 (1999)
10 *Id.*
11 *Id.*
12 *Id.*
13 *Watson*, 247 Or.App. at 565, 270 P.3d 289.
14 *Id.* at 565–66, 270 P.3d 289.
15 *Chocktoot v. Smith*, 280 Or. 567, 570, 571 P.2d 1255 (1977). *See also Drollinger v. Mallon*, 350 Or. 652, 668, 260 P.3d 482 (2011) (referring to the process as "the 'case within a case' methodology").
16 Chocktoot, 280 Or. 463
17 *Hale v. Groce*, 304 Or. 281, 284, 744 P.2d 1289 (1987); *accord Lord*, 172 Or.App. at 276, 19 P.3d 358; *Roberts v. Fearey*, 162 Or.App. 546, 550, 986 P.2d 690 (1999).
18 *Wilkinson v. Walker*, 84 Or App 477, 734 P2d 385, rev den 303 Or 535 (1987); *Olson v. Wheelock*, 68 Or App 160, 680 P2d 719 (1984).
19 *Lindland v. United Business Investments*, 298 Or. 318, 327, 693 P.2d 20 (1984).
20 *Cf. Davis v. Brockamp & Jaeger, Inc.*, 216 Or.App. 518, 534, 174 P.3d 607 (2007) (plaintiff asserting breach of fiduciary duty has burden of proving his claim by a preponderance of evidence).

Pennsylvania

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An action for legal malpractice may be brought in either contract or tort.[1] To establish a legal malpractice action sounding in negligence, a plaintiff must prove 1) employment of the attorney or other basis for a duty; 2) the failure of the attorney to exercise ordinary skill and knowledge; and 3) that such negligence was the proximate cause of damage to the plaintiff.[2] The third element, concerning the client's loss, is not satisfied unless the client shows that there is an actual amount of damages which the client would have recovered *but* for the attorney's negligence.[3] With regard to a breach of contract claim, "an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large."[4] To avoid waiver of either claim, a plaintiff is required to assert them to-gether in one action, because the claims arise from the same 'transaction or occurrence' against the 'same person.'"[5]

Expert testimony is generally required in legal malpractice cases, unless the issue is so simple or the lack of skill or want of care is so obvious as to be within the range of an ordinary layperson's experience and comprehension.[6] In a legal malpractice action the question of whether expert testimony is required depends on whether the issue of negligence is sufficiently clear so lay persons could understand and determine the outcome , or whether the alleged breach of duty involves complex legal issues which require expert testimony to amplify and explain it for the fact finder.[7]

Proving Causation

The essential element to a legal malpractice cause of action in Pennsylvania is proof of actual loss rather than a breach of a professional duty causing only nominal damages, speculative harm or the threat of future harm.[8] A legal malpractice action in Pennsylvania requires the plaintiff to prove a "case with in a case." In other words, the plaintiff must prove that he or she had a viable cause of action against the party he wished to sue in the underlying case and that the attorney he hired was negligent in prosecuting or defending that underlying case.[9]

The Pennsylvania Supreme Court has ruled that "only after the plaintiff proves he would have recovered a judgment in the underlying action that the plaintiff can then

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proceed with proof that the attorney he engaged to prosecute or defend the underlying action was negligent in the handling of the underlying action and that negligence was the proximate cause of the plaintiff's loss since it prevented the plaintiff from being properly compensated for his loss."[10]

Defenses

Defenses to malpractice claims in Pennsylvania include many of the standard professional malpractice defenses including: failure to bring a claim within the statute of limitations; failure to demonstrate that the plaintiff would have prevailed in the underlying action; failure to establish an attorney-client relationship or some other basis for a duty; and failure to proffer expert testimony establishing the standard of care.

In Pennsylvania, the applicable statute of limitation for a claim of negligence against an attorney is two years.[11] However, claims for breach of contract are governed by a four year statute and courts have applied the four-year statute where there has been a written or oral retainer agreement and the plaintiff claims that there was a breach of an implied duty of proper professional service or explicit promises.[12]

Failure of a plaintiff to file a Certificate of Merit may result in dismissal of the cause of action. Because a legal malpractice action, whether based in tort or contract, requires the plaintiff to prove that the attorney failed to exercise the ordinary skill and knowledge of a member of the profession at large, the plaintiff must file a certificate of merit as required by Pennsylvania Rule of Civil Procedure 1042.3. Regarding an action for professional liability, the Pennsylvania Rule of Civil Procedure 1042.3 provides[13]:

(a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within 60 days after the filing of the complaint, a certificate of merit signed by the attorney or party that either

(1) an appropriate licensed professional *has supplied a written statement* that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or

(2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or

(3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

In addition, Pennsylvania recognizes two unique defenses to legal malpractice claims. The first is often known as the "Muhammed Doctrine" which precludes negligence or breach of contract actions against lawyers subsequent to the negotiation and acceptance of a settlement.[14] The doctrine requires that plaintiffs allege with specificity fraudulent inducement of a settlement to prevail on a legal malpractice claim arising out of the settlement.

The other unique defense is "collectibility." Pennsylvania courts have ruled that "collectability" is an affirmative defense that must be plead and proven by the defendant attorney.[15] The Supreme Court of Pennsylvania held that collectibility of damages is an issue which should be considered in a legal malpractice case, but that it would "adopt the minority position and hold that a defendant/lawyer in a legal malpractice action should plead and prove the affirmative defense that the underlying case was not collectible by a preponderance of the evidence."[16]

1 *Wachovia Bank N.A. v. Ferretti*, 935 A.2d 565, 570 (Pa. Super. 2007)
2 *Kituskie v. Corbman*, 552 Pa. 275, 281, 714 A.2d 1027, 1029 (1998).
3 *Id.*
4 Wachovia, 935 A.2d at 571
5 *Wachovia*, 935 A.2d at 570-71, citing Pa.R.C.P. 1020(d) and *D'Allessandro v. Wassel*, 526 Pa. 534, 537-38, 587 A.2d 724, 726 (1991) (indicating that actions in the nature of trespass or assumpsit arising from the same occurrence must be joined).
6 *Rizzo v. Haines*, 520 Pa. 484, 502, 555 A. 2d 58, 67, n. 10 (1989).
7 *Storm v. Golden*, 538 A.2d 61 (Pa. Super. 1988).
8 *Kituskie v. Corbman*, 552 Pa. at 281, 714 A.2d 1027.
9 *Id.* (citation omitted).
10 Id. at 282.
11 *Glenbrook Leasing Co. v. Beausang*, 839 A.2d 437 (Pa.Super. 2003).
12 *Gorski v. Smith*, 812 A. 2d 683 (Pa. Super 2002), alloc. den'd, 856 A.2d 834 (Pa. 2004). *But see Costello v. Primavera*, 39 D&C 4th 502 (Phila. C.P. 1988), *aff'd mem.*, 748 A.2d 1257 (Pa. Super. 1999), *alloc. den'd*, 563 Pa. 687, 760 A.2d 854 (Pa. 2000).
13 Pa.R.C.P. 1042.3(a). (emphasis added).
14 *Muhammed v. Strassburger*, 526 Pa. 541, 587 A.2d 1346 (1991).
15 *Kituskie v. Corbman*, 552 Pa. 275, 714 A.2d 1027 (1998).
16 *Id.* at 285.

Rhode Island

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It is well settled in Rhode Island that "the gravamen of an action for attorney malpractice is the 'negligent breach of [a] contractual duty.'...."[1] As such, an action for legal malpractice in Rhode Island requires proof of the following elements: (1) that an attorney-client relationship existed; (2) that there was an act of negligence; (3) that the negligence caused the plaintiff's damages; and (4) that but for the negligence of the attorney, the plaintiff would have been successful in the underlying action.[2]

Attorney-Client Relationship Required

In Rhode Island, whether an attorney-client relationship has formed is a question of fact governed by the principles of agency.[3] An agency relationship exists when: (1) the principal manifests that the agent will act for him, (2) the agent accepts the undertaking, and (3) the parties agree that the principal will be in control of the undertaking.[4] "Generally, the relationship of attorney and client arises by reason of agreement between the parties. The relationship is essentially one of principal and agent."[5] The existence of such a relationship, however, need not be proven by express agreement; rather, the conduct of the parties also may establish an attorney-client relationship by implication.[6] And where the advice and assistance of the attorney are sought and received in matters pertinent to the attorney's profession as a lawyer, such a relationship can still arise even in the absence of an express agreement.[7]

Breach of Duty of Care Typically Requires Expert Testimony

It is well settled in Rhode Island that a plaintiff alleging legal malpractice must prove the "want of ordinary care and skill" exercised by the defendant attorney.[8] The Rhode Island Supreme Court has stated that to prevail on a negligence legal malpractice claim, "a plaintiff must prove by a fair preponderance of the evidence not only a defendant's duty of care, but also a breach thereof and the damages actually or proximately resulting therefrom to the plaintiff."[9] "Failure to prove all three of those required elements, acts as a matter of law, to bar relief or recovery."[10]

Moreover, in a legal malpractice action, a plaintiff opposing a motion for summary judgment generally must present expert evidence, in the form of an affidavit or otherwise, establishing the standard of care and the alleged

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deviation therefrom that caused damages.[11] An exception to this general rule applies when the malpractice "is so obvious that the trier of fact can resolve the issue as a matter of common knowledge."[12] "Cases which fall into the 'common knowledge' category are those where the negligence is 'clear and palpable,' or where no analysis of legal expertise is involved."[13] Such an instance might occur when an attorney accepts a fee to do certain work for a client and then fails to do any work.[14] In addition, "[w]hatever form a legal malpractice action takes, the plaintiff has the burden of introducing evidence to justify an award of consequential damages."[15]

The "But For" Requirement and Damages

Courts in Rhode Island have consistently recognized that an integral part of negligent legal malpractice claims and breach of fiduciary duty legal malpractice claims requires plaintiffs to prove actual damages resulting from an attorney's breach of duty arising out of the attorney-client relationship.[16]

In *Evora*, the Rhode Island Supreme Court specifically adopted the views held in other jurisdictions such as California, Connecticut, D.C., Maryland, New Jersey and Vermont that a plaintiff in a legal-malpractice case must prove that the attorney's negligence was the proximate cause of his or her damages.[17] This position was later reaffirmed in *Scunio Motors, Inc. v. Teverow*.[18]

Assignment of Legal Malpractice Claims

In a case of first impression, the Rhode Island Supreme Court in *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057 (R.I.1999) specifically allowed the assignment of a legal malpractice claim, even though the action sounded in tort and its assignment was prohibited by a majority of jurisdictions.[19] *Cerberus Partners* involved a suit by a purchaser of a secured commercial loan against a law firm that, while representing the original lender, failed to properly perfect the security interest. There, despite the absence of a duty running from the attorney defendants to the assignee plaintiffs, the Court concluded that the "legal malpractice claims, *transferred along with other assets and obligations to an assignee in a commercial transaction*, are assignable."[20] Refusing to "blindly" adhere to a general rule of prohibition in all cases of assignment, the Court acknowledged a distinction between market assignments involving purely economic transactions and freestanding malpractice personal injury claim assignments, only approving assignments in situations involving the former.[21]

Statute of Limitations

Pursuant to the General Laws 1956, §9-1-14.3, Rhode Island maintains a three-year statute of limitations on actions for legal malpractice based upon the occurrence of the incident which gave rise to the action. However, an individual who is under a disability by reason of age, mental incompetence may be permitted to commence an action within three (3) years of the removal of the disability. The Rhode Island statute also provides that those acts of legal malpractice "which could not in the exercise of reasonable diligence be discoverable at the time of the occurrence of the incident which gave rise to the action", be commenced within three (3) years of the time that the act or acts of legal malpractice should, in the exercise of reasonable diligence, have been discovered."[22] This subsection [subsection b] provides an exception to the general three-year requirement and has come to be known as the discovery rule.[23]

In the *Zanni* matter, the plaintiff urged the Court to apply the statute of limitations discovery rule claiming that determining when he had knowledge of the alleged malpractice is inappropriate for disposition by summary judgment and should be left to be resolved for the trier of fact.[24] The *Zanni* court rejected the plaintiff's argument in determining that "the statutory period begins to run not when the plaintiff has actual knowledge of alleged acts of malpractice, but rather when he becomes aware of facts or by exercising reasonable diligence could discover facts that would place a reasonable person on notice that a potential claim exists."[25] In so holding, the *Zanni* court noted that there were several undisputed facts and/or "red flags" that clearly demonstrated that the plaintiff knew of the alleged acts of malpractice, or that he was aware of facts that placed him on notice of a potential claim for malpractice (i.e. the dismissal the plaintiff's complaint by the Pennsylvania court due to the attorney's failure to sue the correct party).[26] This is true because dismissal of a claim for failure to sue the correct party is a "red flag" to a client that malpractice might have occurred.[27]

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1 *Church v. McBurney*, 513 A.2d 22, 24 (R.I.1986) (*quoting Flaherty v. Weinberg*, 303 Md. 116, 492 A.2d 618, 627 (1985).
2 *See Macera Bros. of Cranston, Inc. v. Gelfuso & Lachut, Inc.*, 740 A.2d 1262, 1264 (R.I. 1999). *See also Evora v. Henry*, 559 A.2d 1038 (R.I.1989).
3 *Rosati v. Kuzman*, 660 A.2d 263, 265 (R.I. 1995). *See also State v. Austin*, 462 A.2d 359, 362 (R.I. 1983).
4 *Lawrence v. Anheuser-Busch, Inc.*, 523 A.2d 864, 867 (R.I. 1987); *see also Rosati*, 660 A.2d at 265 ("The essence of an agency relationship is the principal's right to control the work of the agent, whose actions must primarily benefit the principal.").
5 *State v. Cline*, 122 R.I. 297, 309, 405 A.2d 1192, 1199 (1979).
6 *See id.*
7 *See id.*
8 *Clauson v. Kirshenbaum*, No. 92-3410, 1997 WL 1051019, at *2 (R.I. Super. July 2, 1997) (*quoting Holmes v. Peck*, 1 R.I. 242, 245 (1849). *See also Vallinoto v. DiSandro*, 688 A.2d 830, 834 (R.I. 1997) ("[t]hat duty includes in essential part providing competent representation to the client, including the utilization of competent legal knowledge, skill, thoroughness and case preparation reasonably necessary both to protect and to advance the client's interests."(*citing* Art. V, Rule 1.1 of the Supreme Court Rules of Professional Conduct).
9 *Macera Brothers of Cranston, Inc. v. Gelfuso & Lachut, Inc.*, 740 A.2d 1262, 1264 (R.I.1999) (per curiam).
10 *Id.* (*quoting Vallinoto v. DiSandro*, 688 A.2d 830, 836 (R.I.1997)).
11 *Ahmed v. Pannone*, 779 A.2d 630, 632 (R.I. 2001) (citing .
12 *Focus Investment Associates, Inc. v. American Title Insurance Co.*, 992 F.2d 1231, 1239 (1st Cir.1993) (expert testimony required at trial of legal malpractice case to establish standard of care).
13 *Id.*; *accord Suritz v. Kelner*, 155 So.2d 831, 833-34 (Fla.Dist.Ct.App.1963) (expert testimony not required where attorney directed clients not to answer interrogatories in violation of judge's order to answer on penalty of dismissal); *Collins v. Greenstein*, 61 Haw. 26, 595 P.2d 275, 276, 282 (1979) (expert testimony not required where attorney failed to file suit *174 within the appropriate statute of limitations period); *Sommers v. McKinney*, 287 N.J.Super. 1, 670 A.2d 99, 105 (App.Div.1996) (no expert testimony needed to evaluate attorney's failure to inform client of settlement offer).
14 *Id.*
15 *Flanders & Medeiros, Inc.*, 65 F.3d 198 (1st Cir. 1995) (holding that summary judgment was appropriate on all the nonmoving party's claims that required the analysis of legal expertise where there was no expert testimony to support those claims).
16 *Vallinoto v. DiSandro*, 688 A.2d 830, 834 (R.I. 1997)
17 *Evora v. Henry*, 559 A.2d 1038, 1039 (R.I. 1989) (describing nature of breach for legal malpractice claim and holding that "the client must still prove, in order to prevail in a legal malpractice action, that the negligence was the proximate cause of his or her damages or loss."); *Somma v. Gracey*, 15 Conn. App. 371, 374-75, 544 A.2d 668, 670 (1988) (setting out plaintiff's burden to show legal malpractice).
18 *Scuncio Motors, Inc. v. Teverow*, 635 A.2d 268, 269 (R.I. 1993) (stating attorney's negligence must proximately cause client's damages).
19 *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057 (R.I.1999).
20 *Id.* at 1062 (emphasis added).
21 *Id.*
22 *See* R.I. Gen. Laws Ann. § 9-1-14.3 (West).
23 *See Penn-Dutch Kitchens, Inc. v. Grady*, 651 A.2d 731, 733 (R.I. 1994).
24 *Zanni v. Voccola*, 13 A.3d 1068, 1071 (R.I. 2011).
25 *Id. citing Canavan v. Lovett, Schefrin and Harnett*, 862 A.2d 778, 783–84 (R.I. 2004).
26 Id.; *See Harvey v. Snow*, 281 F.Supp.2d 376, 382 (D.R.I.2003).
27 *See Canavan*, 862 A.2d at 783; *see also Rocchio v. Moretti*, 694 A.2d 704, 706 (R.I. 1997) (describing the undisputed facts and concluding that, based on those facts, the statute of limitations expired before plaintiffs brought suit).; *Guay v. Dolan*, 685 A.2d 269, 271 (R.I. 1996).

South Carolina

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Like most professional malpractice actions in South Carolina, an action for legal malpractice is based on the tenets of negligence.[1] To prevail on a legal malpractice claim, the plaintiff must satisfy the following elements: (1) the existence of an attorney-client relationship; (2) breach of a duty by the attorney; (3) damage to the client; and (4) proximate causation of the client's damages by the breach.[2] The plaintiff must prove each element by a preponderance of the evidence.[3]

Establishing standard of care and breach of that standard.

The standard of care for attorneys is "the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession."[4] The Supreme Court of South Carolina has rejected as a matter of law that a bad result is evidence of the breach of the standard of care, noting, "to do so would change the landscape of our malpractice law, for all professionals."[5] Moreover, the attorney's exercise of professional judgment must be considered at the time that the attorney provided professional services, rather than through the lens of hindsight.[6] Our Court has fortunately astutely summarized the issue of standard of care with respect to the practice of law:

> The practice of law is not an exact science. The practice of law involves the exercise of judgment based on the circumstances known and reasonable ascertainable at the time the judgment was rendered. "[A] lawyer shall exercise independent professional judgment and render candid advice." *Rule 2.1, RPC, Rule 407, SCACR*. Rules of professional conduct are replete with the recognition that a lawyer cannot pursue every issue that arises in a case while effectively representing his or her client. To the contrary, the rules recognize that in order to provide a client the best and most competent representation, a lawyer has the professional discretion to make a judgment call as to which legal theories are the strongest and will best serve the client's interest.[7]

As such, the exercise of professional judgment weighs heavily in the analysis of breach of the standard of care by an attorney.

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It should also be noted that failure to comply with the Rules of Professional Conduct is not negligence per se, but merely one circumstance that may be considered along with other facts and circumstances in determining whether an attorney acted with reasonable care.[8] However, one can expect the expert witness for the plaintiff to rely upon the Rules of Professional Conduct in establishing a breach of the standard of care by the defendant attorney.

Traditionally, a plaintiff in a legal malpractice action must rely upon expert testimony to establish the standard of care unless the subject matter is of common knowledge to lay persons.[9] In addition to the long standing case law regarding expert testimony, effective July 1, 2005, South Carolina statutory law requires that the plaintiff must file as part of a Complaint alleging negligence against an attorney an affidavit of an expert witness specifying at least once negligent act or omission claiming to exist and the factual basis for each claim based upon the available evidence at the time of filing the affidavit.[10]

The issue of causation

In order to establish proximate cause in a legal malpractice action, the plaintiff must prove that he most probably would have been successful if the alleged malpractice had not been committed.[11] South Carolina Courts have established that the plaintiff does not meet his burden by establishing that the plaintiff would have been generally more successful in the underlying case had his attorney not committed malpractice. (emphasis added) In *Harris Teeter v. Moore and Van Allen*, the court found the testimony of the plaintiff's experts was not adequate because the experts did not affirmatively state that the plaintiff would have been successful in the underlying action had his attorneys provided adequate representation. The court wrote, "Instead of stating that the respondent's conduct most probably caused the outcome, [expert] said, "had [respondents] done these things, the percentage of success would have been greater."[12] The court concluded that this testimony was not adequate as it did not establish that but for the defendant attorney's negligence, the plaintiff would have been ultimately successful in the underlying action.[13] The question of the success of the underlying claim, if suit had been brought, is a question of law.[14]

Moreover, an attorney is not liable where the plaintiff/client had no meritorious defense to the underlying lawsuit in the first place, notwithstanding the question of negligence in defense of the attorney's own suit.[15] However, this must be balanced with the holding in *Doe v. Howe*[16]:

> The client's burden of establishing proximate cause in a legal malpractice action requires that he prove that he would have obtained a better result in the underlying matter if the attorney had exercised reasonable care. The burden does not necessarily compel the client to demonstrate that he would have won the underlying case. Rather, it is enough for the legal malpractice plaintiff to show that he has lost a valuable right; e.g., the settlement value of the underlying case. Stated otherwise, "The client need not show a perfect claim. But the client must show at least that he has lost the probability of success as a result of the attorney's negligence."[17]

In sum, the plaintiff must establish that, more likely than not, he would have been successful in the underlying action but for the negligence of his attorney.

Available defenses

The majority of the defenses available to defendants in general negligence actions are also available to defendants in legal malpractice actions. In addition to the standard defenses, one can also defend a legal malpractice action by establishing the following: failure to demonstrate that the plaintiff would have prevailed in the underlying action; failure to establish that the attorney-client relationship existed; and failure to provide expert testimony by way of affidavit at the time of filing suit (as well as failing to provide expert testimony to establish breach of the standard of care and causation).

With respect to the requirement that an affidavit of an expert witness be filed in conjunction with a Complaint, the expert must establish at least one negligent act or omission and provide the factual basis for the claim.[18] S.C. Code Ann. Section 15-36-100(c)(1) provides that the contemporaneous filing requirement does not apply to any case in which the period of limitation will expire within ten days of the date of filing and the plaintiff alleges that an affidavit of an expert could not be prepared due to these time constraints. In such circumstances, the plaintiff must file a supplemental affidavit within 45 days of filing the complaint. Based

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upon the recent holding in *Renucci v. Crain*,[19] a medical malpractice action requiring an affidavit of an expert pursuant to S.C. Code Ann. Section 15-36-100, failure to comply with this statute may result in the dismissal of the claim with prejudice.

Legal malpractice actions are governed by a three year statute of limitations.[20] The discovery rule applies to legal malpractice actions.[21] Pursuant to the discovery rule, the statute of limitations begins to run from the date the injured party either knows of should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct.[22] The exercise of reasonable diligence means that the party must act with some promptness if the facts and circumstances would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.[23] The statute of limitations is triggered not merely by knowledge of an injury, but by knowledge of the facts sufficient to put an injured person on notice of the existence of cause of action.[24] The Supreme Court has explicitly rejected the theory that the statute of limitations in a legal malpractice case necessarily does not start to run until an adverse judgment in the underlying action is returned.[25] The determination of the running of the statute of limitations must therefore be made on a case-by-case, rather than pursuant to a bright line rule.

1 An attorney may be sued for a breach of fiduciary duty, as South Carolina courts have long recognized that an attorney-client relationship is a fiduciary relationship. Spence v. Wingate, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (S.C. Ct. App. 2011). However, where the plaintiff's claim for breach of fiduciary duty arises out of the duty inherent in the attorney-client relationship and the same factual allegations upon which the legal malpractice claim is based, the legal malpractice claim encompasses the breach of fiduciary duty claim and is duplicative by nature. RFT Mgmt. Co., LLC v. Tinsley & Adams, LLP, C.A. No. 2010-175606 (S.C. Ct. App. 2012). (RFT Management also holds that a claim for violation of the South Carolina Unfair Trade Practices Act may be viable against an attorney.).
2 Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 435 n.2, 472 S.E.2d 612, 613 n.2 (S.C. Ct. App. 1996).
3 Shealy v. Walter, 273 S.C. 330, 256 S.E.2d 739 (S.C. Ct. App. 1979).
4 Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (S.C. Ct. App. 2000).
5 Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 291, 701 S.E.2d 742, 750 (S.C. Ct. App. 2010).
6 *Id.*
7 *Id.* at 292-293.
8 Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (S.C. Ct. App. 2007).
9 Sims v. Hall, 357 S.C. 288, 295-96, 592 S.E.2d 315, 319 (S.C. Ct. App. 2003).
10 S.C. CODE ANN. § 15-36-100.
11 Brown v. Theos, 345 S.C. 626, 630, 550 S.E.2d 304, 306 (S.C. 2001).
12 Harris Teeter at 289, 701 S.E.2d 742.
13 *Id.*
14 Manning v. Quinn, 294 S.C. 383, 386, 365 S.E.2d 24, 25 (S.C. 1988).
15 Floyd v. Cosko, 285 S.C. 390, 393, 329 S.E.2d 459, 460-461 (S.C. Ct. App. 1985).
16 367 S.C. 432, 626 S.E.2d 25 (S.C. Ct.App. 2007).
17 *Id* at 32, 626 S.E.2d 25.
18 S.C. CODE ANN. § 15-36-100.
19 397 S.C. 168, 723 S.E.2d 242 (S.C. Ct.App. 2012).
20 S.C. CODE ANN. §§ 15-3-530 (1),(5).
21 Kelly v. Logan, Jolley & Smith, LLP, 383 S.C. 626, 632-33, 682 S.E.2d 1, 4 (S.C. Ct. App. 2009).
22 Dean v. Ruscon Cor., 321 S.C. 360, 468 S.E.2d 645 (S.C. 1996).
23 Epstein v. Brown, 363 S.C. 372, 375, 610 S.E.2d 816, 818 (S.C. 2005).
24 True v. Monteith, 327 S.C. 116, 120, 49 S.E.2d 615, 617 (S.C. 1997).
25 Kimer v. Wright, 396 S.C. 53, 58-59, 719 S.E.2d 265, 268 (S.C. Ct. App. 2011).

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South Dakota recognizes legal malpractice claims based upon negligence or breach of contract.[1] In order to prevail in a legal malpractice claim in South Dakota, a plaintiff must prove: (1) the existence of an attorney-client relationship giving rise to a duty; (2) the attorney, either by an act or failure to act, breached that duty; (3) the attorney's breach of duty proximately caused injury to the client; and (4) the client sustained actual damage.[2]

The plaintiff must prove that the attorney failed to comply with the applicable standard of care. An attorney typically fails to act with ordinary care when the attorney fails to act as a reasonably prudent attorney engaged in the same line of practice in the same or similar locality would under the circumstances.[3] Generally, expert testimony is necessary to establish the applicable standard of care.[4]

Proving Causation

The plaintiff must prove that the attorney's failure to exercise ordinary care is the proximate cause of the plaintiff's injury in order to recover on a claim for legal malpractice. The South Dakota Supreme Court defines "proximate cause" as a cause that produces a result in the natural and probable sequence and without which the result would not have occurred.[5] Further, for proximate cause to exist, the harm suffered must be found to be a foreseeable consequence of the act complained of.[6]

The plaintiff in a legal malpractice case must also prove "but for" causation, i.e., that but for the attorney's failure to exercise ordinary care, the plaintiff would not have been harmed.[7] In an action based upon alleged errors which occurred in an underlying litigation, the plaintiff must prove that but for the attorney's failure to exercise ordinary care, he or she would have obtained a more favorable result in the underlying litigation, i.e., proving a case within a case.[8]

Causation is typically a question of fact to be determined by the jury unless there is no dispute as to the facts.[9] The plaintiff carries the burden of proof.[10]

Damages Recoverable

In South Dakota, an attorney is liable for all damages proximately caused by his or her wrongful act or omission.[11] Compensatory damages for negligence are those which flow directly and proximately from a defendant's breach of his or her duty to the plaintiff.[12]

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Attorney fees are not generally included in the measure of recoverable damages for legal malpractice except those fees incurred in other litigation which is necessitated by the act of the party sought to be charged.[13] Otherwise, attorney fees are generally awarded only as permitted by statute or pursuant to a contract.

Punitive damages are recoverable under S.D. Codified Laws Section 21-3-2 where the plaintiff establishes evidence of oppression, fraud, or malice.[14] Claims against attorneys for legal malpractice may support recovery of punitive damages.[15]

Recovery of lost punitive damages is also permitted as a measure of damages in a legal malpractice claim if the attorney's negligence prevented the client from recovering punitive damages in the underlying action.[16]

Defenses Available

The Supreme Court of South Dakota recognizes defenses against a legal malpractice claim, including contributory negligence[17] and assumption of the risk.[18] The Court in certain instances also recognizes the doctrine of in *pari delicto* as a defense to a legal malpractice claim if the attorney and client were complicit in the alleged wrongdoing.[19]

Other Considerations

South Dakota recognizes a three-year statute of limitations for a legal malpractice claim.[20] The statute of limitations begins to run at the time the alleged negligence occurs and not from the time the alleged negligence is discovered or the damages are incurred.[21] The South Dakota Supreme Court has recognized only two theories upon which the statute of limitations may be tolled: (1) the continuous representation doctrine and (2) fraudulent concealment.[22]

In a legal malpractice action resulting from an underlying lawsuit where the aggrieved client was the plaintiff, the plaintiff must prove that any judgment or damages that he or she would have recovered would have also been collectible, i.e., he or she would have been able to collect against the defendant in the underlying litigation.[23]

In a legal malpractice action based upon the failure to file a proper appeal, the plaintiff must prove that he or she would have prevailed on the appeal has it been properly filed.[24] Whether the appeal would have been successful is a question of law for the court to decide as a matter of law.[25]

1 *Haberer v. Rice*, 511 N.W.2d 279, 286 (S.D. 1994).
2 *Peterson v. Issenhuth*, 842 N.W.2d 351, 355 (S.D. 2014); *Chem-Age Indus., Inc. v. Glover*, 652 N.W.2d 756, 767 (S.D. 2002).
3 *Lenius v. King*, 294 N.W.2d 912, 913 (S.D. 1980).
4 *Id.*
5 *Peterson*, 842 N.W.2d 351, 355.
6 *Id.*
7 *Haberer*, 511 N.W.2d 279, 284.
8 *Id.* at 285.
9 *Weiss v. Van Norman*, 562 N.W.2d 113, 116-117 (S.D. 1997).
10 *Id.*
11 *Haberer*, 511 N.W.2d 279, 288. *See also, Taylor Oil Co. v. Weisensee*, 334 N.W.2d 27 (S.D. 1983).
12 *Id.*
13 *Grand State Property, Inc. v. Woods, Fuller, Shultz & Smith, P.C.*, 556 N.W.2d 84, 88 (S.D. 1996).
14 S.D. Codified Laws § 21-3-2.
15 *Chem-Age Indus., Inc.*, 652 N.W.2d 756, 766.
16 *Haberer*, 511 N.W.2d 279, 286.
17 *Behrens v. Wedmore*, 698 N.W.2d 555, 571-72 (S.D. 2005).
18 *Id.*
19 *Quick v. Stamp*, 697 N.W.2d 741 (S.D. 2005).
20 S.D. Codified Laws §15-2-14.2.
21 *Williams v. Maulis*, 672 N.W.2d 702, 705 (S.D. 2003).
22 *Green v. Morgan, Theeler, Cogley & Peterson*, 575 N.W.2d 457, 459 (S.D. 1998).
23 *Estate of Gaspar v. Vogt, Brown, & Merry*, 670 N.W.2d 918, 921 (S.D. 2003).
24 *Yarcheski v. Reiner*, 669 N.W.2d 487, 493 (S.D. 2003).
25 *Id.*

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Introduction

A lawyer in Tennessee can be sued for breach of contract and/or legal malpractice as a result of his or her representation of a client. Tennessee courts have recognized a distinction between a breach of contract action against an attorney and a legal malpractice action by making it clear that the issues in a breach of contract and legal malpractice action each require proof of different elements both as to liability and damages. The trial court is required in each instance of litigation against a lawyer to review the gravamen of the complaint in order to determine whether the case sounds in contract or in tort.[1] This paper focuses on issues relating to legal malpractice claims and lawsuits only.

Elements

A plaintiff asserting a legal malpractice claim must establish the following *prima facie* elements: (1) that the attorney owed a duty to the plaintiff; (2) that the attorney breached the duty owed to the plaintiff; (3) that the plaintiff suffered damages; (4) that the breach was the cause in fact of the plaintiff's damages; and (5) that the attorney's negligence was the proximate, or legal cause of the plaintiff's damages.[2] The elements therefore essential to establish a claim for legal malpractice in Tennessee mirror the prima facia elements for an ordinary negligence claim.[3]

As a general rule, a lawyer's duty arises from his or her employment relationship with his or her client in which both consent to the establishment of an attorney-client relationship.[4] A lawyer breaches his or her duty owed to the client when his or her conduct falls below the applicable standard governing the actions and activities required of the lawyer.[5] A plaintiff in a legal malpractice lawsuit must also establish that he or she has been damaged by evidence proving that he or she has lost a legal right, remedy, or interest as a result of the lawyer's conduct.[6]

Proving the Case

A lawyer may be liable to his or her client for damages if he or she fails to exercise the ordinary care, skill and diligence commonly possessed and exercised by attorneys practicing in the same jurisdiction.[7] The plaintiff in a legal malpractice lawsuit has the burden of proving each of the elements

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set forth above.[8] In that respect, the plaintiff is required to present expert testimony in support of his or her legal malpractice claim against a lawyer unless the alleged legal malpractice is within the common knowledge of laymen.[9] In this respect, the determination as to whether or not a lawyer's conduct meets or not the applicable professional standard is generally considered beyond the common knowledge of laypersons. Accordingly, except in cases involving clear and palpable negligence, expert proof and evidence is going to be required.[10]

When a legal malpractice lawsuit is premised upon the negligent handling of litigation that results in an adverse judgment or dismissal of a claim, then it is incumbent upon the plaintiff to prove that he or she would have prevailed in the underlying case had it not been for the negligent conduct of his or her lawyer.[11] A plaintiff in a legal malpractice action must prove a case-within-a-case.[12] The plaintiff must therefore establish in the first case that the lawyer's conduct fell below the applicable standard of care and in the second case that the plaintiff had a meritorious claim or remedy that he or she lost or was found liable when he or she should not have been due to the attorney's negligence.[13]

Damages

The Tennessee Supreme Court has observed that the "settled general rule … is that an attorney … may be held liable to his [or her] client for damages resulting from his [or her] failure to exercise [the] ordinary care, skill, and diligence … which is commonly possessed and exercised by attorneys in practice in the jurisdiction."[14] In a legal malpractice lawsuit, the injury that the client suffers is the loss of a right, remedy or interest or the imposition of liability. If the client establishes the prima facia elements set forth above, then compensatory damages are awarded and consist both of direct and consequential damages. The direct damages include the difference between the amount actually received or paid and the amount that would have been received or paid but for the lawyer's negligence. The consequential damages can include damages for emotional distress and related personal injuries, injuries to reputation, economic losses, and the expenses incurred in prosecuting the legal malpractice action.[15]

Tennessee recognizes that punitive damages may be awarded in a legal malpractice lawsuit. Punitive damages are recoverable only if the plaintiff can establish by clear and convincing evidence the requisite culpable conduct sufficient to support the recovery of this measure of damage. More particularly, the plaintiff must present evidence of intentional, fraudulent, malicious, or reckless conduct by the lawyer.[16] Factors to be considered in determining whether or not there is clear and convincing evidence sufficient to support an award of punitive damages are as follows: (1) intentional misrepresentation of an existing, material fact or production of a false impression, in order to mislead another or to obtain an undue advantage; (2) injury because of reasonable reliance upon that representation; (3) malicious actions of a party, which are actions motivated by ill will, hatred, or personal spite; (4) reckless conduct when it is established that the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances.[17] The ultimate purpose in awarding punitive damages is punishment and deterrence.[18]

As it relates to the recovery of legal fees, Tennessee has recognized three categories that may constitute damages resulting from legal malpractice as follows: (1) initial fees that a plaintiff pays or agrees to pay an attorney for legal services that were negligently performed; (2) corrective fees incurred by the plaintiff for work performed to correct the problem caused by the negligent lawyer; and (3) litigation fees, which are fees paid by the plaintiff to prosecute the malpractice lawsuit against the lawyer.[19] That having been said, Tennessee courts have long adhered to the American rule that an award of attorney's fees as part of the prevailing party's damages is contrary to public policy and therefore not recoverable in the absence of an agreement between the parties (e.g. contract) or a controlling statute providing for the recovery of attorney's fees for the prevailing party, attorney's fees in legal malpractice lawsuit may not be awarded as a measure of damage.[20] Tennessee courts have yet to make an exception to the American rule as it relates to legal malpractice lawsuits.

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Defenses

The statute of limitations for legal malpractice is one (1) year from the time the cause of action accrues.[21] For the purpose of determining whether or not the applicable statute of limitations has expired, Tennessee follows the discovery rule. The discovery rule provides that a cause of action accrues when the plaintiff asserting the claim knows or in the exercise of reasonable care and diligence should know that an injury has been sustained as a result of the conduct of the defendant.[22] Further inquiry, however, is necessary as it relates to the discovery rule.

The discovery rule requires (1) that the plaintiff must suffer a legally cognizable damage as a result of the defendant's conduct or negligent conduct, and (2) that the plaintiff must have known or in the exercise of reasonable diligence should have known that the injury was caused by the defendant's conduct or negligent conduct.[23] The knowledge requirement of the discovery rule may be established by evidence of actual or constructive knowledge to the extent that if "the plaintiff is deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of the wrongful conduct."[24] It is not necessary that the plaintiff/client know the full extent of the legal theory upon which his or her cause of action is based.

There is, of course, an available defense that the lawyer did not deviate from the applicable standard of care. If in that circumstance the lawyer presents expert proof that he or she did not breach the duty of care owed to the client, then the client is required to present rebuttal expert proof that a breach of care did occur in order to create a genuine issue of material fact."[25] As discussed above, unless the case involves clear and palpable negligence, if the defendant attorney in a legal malpractice action moves for summary judgment and establishes, through expert proof, that he did not breach his duty of care, then in order to create a genuine issue of material fact, the plaintiff must respond with rebuttal expert proof that a breach occurred.[26]

1 *Keller v. Colgems-EMI Music*, 924 S.W.2d 357, 359 (Tenn. Ct. App. 1996).
2 *Gibson v. Trant*, 58 S.W.3d 103, 108 (Tenn. 2001). See also, *Tenn-Fla. Partners v. Shelton*, 233 S.W.3d 825, 834 (Tenn. Ct. App. 2007); *Shearon v. Seaman*, 198 S.W.3d 209, 214 (Tenn. Ct. App. 2005); and *Lazy Seven Coal Sales, Inc. v. Stone & Hinds*, 813 S.W.2d 400, 403 (Tenn. 1991).
3 *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993).
4 *Akins v. Edmondson*, 207 S.W.3d 300, 306 (Tenn. Ct. App. 2006).
5 *Chapman v. Bearfield*, 207 S.W.3d 736, 739-40 (Tenn. 2006) and *Sanjines v. Ortwein & Assocs., P.C.*, 984 S.W.2d 907, 910 (Tenn. 1998).
6 *John Kohl & Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 532 (Tenn. 1998).
7 *Spalding v. Davis*, 674 S.W.2d 710, 714 (Tenn. 1984).
8 *Horton v. Hughes*, 971 S.W.2d 957, 959 (Tenn. Ct. App. 1998).
9 *Rose v. Welch*, 115 S.W.3d 478, 484 (Tenn. Ct. App. 2003). See also, *Bursack v. Wilson*, 982 S.W.2d 341, 343 (Tenn. Ct. App. 1998).
10 *Cleckner v. Dale*, 719 S.W.2d 535, 540 (Tenn. Ct. App. 1986).
11 *Shearon v. Seaman*, 198 S.W.3d 209, 214 (Tenn. Ct. App. 2005).
12 *Viar v. Palmer*, 2005 Tenn. App. LEXIS 389 (Tenn. Ct. App. July 6, 2005).
13 *Id.*
14 *Spalding v. Davis*, 674 S.W.2d 710, 714 (Tenn. 1984).
15 *Austin v. Sneed*, 2007 Tenn. App. LEXIS 688 (Tenn. Ct. App. December 6, 2006).
16 *Roy v. Diamond*, 16 S.W.3d 783, 791-92 (Tenn. Ct. App. 1999) (citing *Metcalfe v. Waters*, 970 S.W.2d 448, 450-51 (Tenn. 1998)).
17 *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992).
18 *Clanton v. Cain-Sloan Co.*, 667 S.W.2d 441, 445 (Tenn. 1984) (citing *Liberty Mutual Ins. Co. v. Stevenson*, 368 S.W.2d 760 (Tenn. 1963)).
19 *John Kohl & Co., P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 534 (Tenn. 1998).
20 *Pullman Standard v. Abex Corp.*, 693 S.W.2d 336, 338 (Tenn. 1985).
21 Tenn. Code Annotated § 28-3-104(a)(2).
22 *Shadrick v. Coker*, 963 S.W.2d 726, 733 (Tenn. 1998).
23 *Carvell v. Bottoms*, 900 S.W.2d 23, 28-30 (Tenn. 1995).
24 *Id.* at 29.
25 *Bursack v. Wilson*, 982 S.W.2d 341, 343-45 (Tenn. Ct. App. 1998).
26 *Id.*

Texas

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Though often pled as a variety of causes of action, including breach of fiduciary duty, fraud, and negligence, legal malpractice in Texas is typically a tort, based on a theory of negligence.[1] To recover in an action for legal malpractice, a claimant must prove the following elements: duty, breach of duty, proximate cause, and damages.[2] A claimant must also prove the existence of an attorney-client relationship. Whether or not an attorney owed a duty to his or her clients is a question of law for the court to decide.[3]

The Disciplinary Rules of Professional Conduct, which govern members of the Texas Bar, do not determine the standard for an attorney's civil liability for professional conduct.Thus, violations of disciplinary rules do not give rise to private causes of action or create a presumption that an attorney breached a duty owed to a client.[4] An attorney's duty of care in malpractice actions is generally defined by the following standard: attorneys are required to exercise a degree of care commensurate with the knowledge and skill required of an ordinarily prudent member of the legal profession.[5] The right to bring an action for legal malpractice is considered unique to the client and thus generally cannot be assigned to another party.[6]

Proving Causation

In legal malpractice suits in Texas, the claimant must prove that his or her injury was proximately caused by the attorney's breach of duty.[7] To prove proximate causation, a claimant must show that the attorney's acts or omissions were the cause-in-fact of the claimant's injury and that the claimant's injury was a foreseeable result of such acts or omissions.An attorney's acts or omissions were the cause-in-fact of a client's injuries if those acts or omissions were a substantial factor in bringing about the client's injuries.[8]

When the attorney's alleged malpractice occurred during litigation, the claimant must show in the malpractice suit that he or she would have recovered in the underlying litigation but for the attorney's negligence.[9] Some courts have opted for a broader approach and evaluated instead whether or not the value of the underlying suit changed as a result of an attorney's negligence.For example, in a suit where the court issued a sanction order and partial default judgment against a client because of the attorney's negligence and the client then settled the case, the client was required to show in the malpractice suit not that the sanction order would

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have been overturned on appeal, but that the sanction order increased the value of the underlying suit and forced the client to settle for a larger amount.[10]

Expert testimony is not always required to show proximate causation.If a determination regarding proximate causation is one that lay people ordinarily are competent to make, then expert testimony is generally not required.[11]In appellate malpractice cases, the claimant establishes proximate cause by proving that he or she would have prevailed on appeal but for the attorney's negligence. Because such a determination involves analysis of legal and procedural rules, proximate cause regarding appellate malpractice is a question of law.[12]

Defenses

Because malpractice actions are considered negligence actions, they are subject to a two-year statute of limitations.[13]Malpractice actions typically accrue at the time of the attorney's negligent act or omission.[14] This is called the "occurrence rule."[15] The occurrence rule, in turn, is subject to the Hughes tolling rule, which provides that where an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitation on the malpractice claim is tolled until all appeals on the underlying claim are exhausted.[16] This rule prevents claimants from taking inherently inconsistent positions in the underlying case and the malpractice action.[17] The rule is applied only as long as filing a malpractice action would require the client to assume inconsistent positions and require the client to obtain new counsel, e.g. the malpractice action would make it impossible for the attorney to continue representing the client in the underlying case.[18]

The "discovery rule" applies to legal malpractice actions. This rule tolls the accrual of a cause of action for legal malpractice until a client discovers, or in the exercise of reasonable diligence should have discovered, the nature of his or her injury.[19] If an attorney is under a duty to disclose information to a client and fraudulently conceals the information, the attorney cannot rely on the statute of limitation as a defense until the client's cause of action for malpractice is, or in the exercise of reasonable diligence should be, discovered.[20]

In addition to a statute of limitation defense, an attorney sued for malpractice can assert any defenses in the malpractice suit that the defendant in the original suit could have asserted.[21] A client may also be estopped in a malpractice action from asserting positions contrary to statements the client made in the underlying action.[22] Res judicata bars re-litigation of issues litigated in an underlying suit if the underlying action was between the same parties or their representatives.[23]

Liability for legal malpractice is limited by the rule of privity.An attorney is not liable to a person with whom he or she does not have an attorney-client relationship.[24] For example, an attorney who represents a corporation does not owe a fiduciary duty to the shareholders of the corporation.[25]However, an attorney may be liable to a non-client if the attorney knows or should know that his or her conduct is likely to lead a non-client to assume that the attorney represents that person or his or her interests.[26] The absence of privity is not a defense to fraud, deceptive trade practices, or an attorney's negligent failure to inform a non-client that the attorney was not representing that person.[27]

The good faith defense has been abolished in legal malpractice claims in Texas.[28] Also, a client cannot sue his or her attorney for malpractice to recover damages caused by the client's own willful criminal act.[29] Thus, in a suit for malpractice related to criminal proceedings, a client who pleads guilty, remains convicted of the offense, and is unable to prove innocence may not recover in a suit for legal malpractice.The client's criminal conduct is considered the sole proximate cause of his or her conviction.[30]

Damages

In malpractice actions where the attorney's negligence caused his or her client to lose or fail to recover on a claim, recovery of malpractice damages is subject to the "suit within a suit" requirement.[31] A claimant's malpractice damages for the loss of his or her claim in the underlying suit are equal to the amount the client would have collected in the underlying suit from the defendant had the client prevailed.[32] Thus, the claimant in a malpractice suit must prove he or she would have prevailed on his or her claim(s) in the underlying suit, as well as the amount that would have been collected from the adverse party in the underlying suit

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had the client prevailed.[33] In a malpractice suit related to appellate proceedings, a claimant must show the amount that would have been collectible if he or she recovered judgment.[34]

When an attorney's negligence causes his or her client to lose a defense, the client in the malpractice action must prove that the defense was meritorious, or that the defense, if asserted, would have caused a different result in the underlying suit.[35] The measure of damages is shown under these circumstances by proving that the underlying case was settled for an amount higher than its value.[36]

A claimant may recover attorney fees when the attorney's negligence rendered his or her services of no value or where the attorney failed to perform a service or task he or she was hired to perform.[37] Damages for mental anguish may be awarded, but only where the circumstances of the malpractice are egregious.[38] Exemplary damages may also be awarded in legal malpractice cases.[39]

1 *Barcelo v. Elliot*, 923 S.W.2d 575, 579 (Tex. 1996).
2 *GMAC v. CD&M*, 986 S.W.2d 632, 636 (Tex.App.—El Paso 1998, pet. denied).
3 *Id.*
4 Texas Disciplinary Rules of Professional Conduct, Preamble: Scope, § 15.
5 *Khalig v. Boyd*, 980 S.W.2d 685, 689 (Tex.App.—San Antonio 1998, pet. denied).
6 *Zuniga v. Groce, Locke, & Hebdon*, 878 S.W.2d 313, 316-18 (Tex.App.—San Antonio 1994, writ ref'd).
7 *GMAC*, 986 S.W.2d at 636.
8 *Roberts v. Healey*, 991 S.W.2d 873, 878 (Tex.App.—Houston [14th Dist.] 1999, pet. denied).
9 *Balesteros v. Jones*, 985 S.W.2d 485, 489 (Tex.App.—San Antonio 1998, pet. denied).
10 *Stonewall Surplus Lines v. Drabek*, 835 S.W.2d 708, 712 (Tex.App.—Corpus Christi 1992, writ denied).
11 *Delp v. Douglas*, 948 S.W.2d 483, 495-496 (Tex.App.—Fort Worth 1997), *rev'd on other grounds*, 987 S.W.2d 879 (Tex. 1999); *Onwuteaka v. Gill*, 908 S.W.2d 276, 281 (Tex.App.—Houston [1st Dist.] 1995, no writ).
12 *Millhouse v. Wiesenthal*, 775 S.W.2d 626, 628 (Tex. 1989).
13 *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988).
14 *Cox v. Rosser*, 579 S.W.2d 73, 76 (Civ.App.—Eastland 1979, writ ref'd n.r.e.).
15 *Id.*
16 *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 156-57 (Tex. 1991).
17 *Id.*
18 *Murphy v. Campbell*, 964 S.W.2d 265, 273 (Tex. 1997).
19 *Burns v. Thomas*, 786 S.W.2d 266, 267-68 (Tex. 1990).
20 *Nichols v. Smith*, 507 S.W.2d 518, 519 (Tex. 1974).
21 *Mathew v. McCoy*, 847 S.W.2d 397, 401 (Tex.App.—Houston [14th Dist.] 1993, no writ).
22 *Howell v. Witts*, 424 S.W.2d 19, 23 (Civ.App.—Dallas 1967, writ ref'd n.r.e.).
23 *Goggin v. Grimes*, 969 S.W.2d 135, 138 (Tex.App.—Houston [14th Dist.] 1998, no pet.).
24 *Dolenz v. A--- B---*, 742 S.W.2d 82, 84-85 (Tex. App. 1987).
25 *Gamboa v. Shaw*, 956 S.W.2d 662, 665 (Tex.App.—San Antonio 1997, no pet.).
26 *Parker v. Carnahan*, 772 S.W.2d 151, 157 (Tex.App.—Texarkana 1989, den.).
27 *Stagner v. Friendswood Development Co., Inc.*, 620 S.W.2d 103, 103 (Tex. 1981); *Parker v. Carnahan*, 772 S.W.2d 151, 158 (Tex.App.—Texarkana 1989, writ denied).
28 *Cosgrove v. Grimes*, 774 S.W.2d 662, 664-65 (Tex. 1989).
29 *Saks v. Sawtelle, Goode*, 880 S.W.2d 466, 469-71 (Tex.App.—San Antonio 1994, writ denied).
30 *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 498 (Tex. 1995).
31 *Ballesteros*, 985 S.W.2d at 489.
32 *Cook v. Irion*, 409 S.W.2d 475, 476 (Tex.Civ.App.—San Antonio 1966, no writ).
33 *Ballesteros*, 985 S.W.2d at 489.
34 *Smith v. Heard*, 980 S.W.2d 693, 696 (Tex.App.—San Antonio 1998, pet. denied).
35 *Heath v. Herron*, 732 S.W.2d 748, 753 (Tex.App.—Houston [14th Dist.] 1987, writ denied).
36 *Id.*
37 *Yarbrough v. Cooper*, 559 S.W.2d 917, 920-21 (Civ.App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).
38 *Heath*, 732 S.W.2d at 753.
39 *Rhodes v. Batilla*, 848 S.W.2d 833, 843-44 (Tex.App.—Houston [14th Dist.] 1993, writ denied).

Utah

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Utah legal malpractice actions may be based on a breach of contract, breach of fiduciary duty, or negligence.[1] When a legal malpractice action is based on a theory of negligence, the client must prove "(i) an attorney-client relationship; (ii) a duty of the attorney to the client arising from their relationship; (iii) a breach of that duty; (iv) a causal connection between the breach of duty and the resulting injury to the client; and (v) actual damages."[2] These elements are substantially the same as when a breach of fiduciary duty is alleged.[3] However, when a client brings a malpractice claim based on a contract theory, the client must base his claim on a breach of a specific term of the contract and prove: "(1) a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of the express promise by the defendant; and (4) damages to the plaintiff resulting from the breach."[4] Regardless of the legal theory upon which the malpractice claim is brought, the client must prove causation, and "the same standard of causation applies" in any malpractice case.[5]

In Utah, "[a]n attorney has a duty to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake."[6] Additionally, expert testimony "may be helpful, and in some cases necessary, in establishing the standard of care required in cases dealing with the duties owed by a particular profession."[7] Concerning the causation element, however, expert testimony is required "in all but the most obvious cases."[8] In a legal malpractice action, whether expert testimony is required depends on whether the connection between fault and damages is beyond the fact-finder's common understanding so as to require expert testimony.[9]

Proving Causation

Utah courts "have long recognized that the standard for causation in a legal malpractice action requires 'the client to show that if the attorney had adhered to the ordinary standards of professional competence and had done the act he failed to do or not done the act complained about, the client would have benefited.'"[10] This causation element requires a connection between fault and damages that is not based on "speculation or conjecture."[11]

In the area of legal malpractice, the method by which a plaintiff must establish a claim against an attorney turns

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on the element of causation. To establish causation, the plaintiff must prove by a preponderance of the evidence that the underlying case would have been successful absent the alleged malpractice.[12] "The objective is to establish what the result of the underlying litigation should have been (an objective standard), not what a particular judge or jury would have decided (a subjective standard)."[13] Parties in Utah regularly use the "trial-within-a-trial" method in which a plaintiff presents the evidence that would have been submitted at trial, had no malpractice occurred.[14] In short, a plaintiff in a legal malpractice action must prove two cases: the legal malpractice case against the attorney defendant and the underlying action in which the alleged malpractice occurred.

Damages Recoverable

Under Utah law, "damages cannot properly be based on speculation or conjecture. They can be awarded only if there is a basis in the evidence upon which reasonable minds acting fairly thereon could believe with reasonable certainty that the plaintiff suffered injury and damage and also that it was proximately caused by the negligence of the defendant."[15] Thus, plaintiffs in Utah are not entitled to nominal damages, but must prove actual damages in order to recover. Punitive damages are also available inasmuch as a legal malpractice claim sounds in tort or a breach of fiduciary duty, even where such duty is founded in contract.[16]

Defenses

There are several defenses available to lawyers who are subject to legal malpractice actions in Utah:

1. **Failure to file the action within the applicable statute of limitations.** Under Utah law, legal malpractice claims are subject to a four year statute of limitations.[17] The statute of limitations begins to run "upon the occurrence of the last event required to form the elements of the claim."[18] In certain situations, the application of a discovery rule tolls the running of the statute of limitations until the plaintiff discovers the alleged act of legal malpractice, or, in the exercise of reasonable care, should have discovered it.[19] The discovery rule applies "(1) where the application of the rule is mandated by statute; (2) where a plaintiff is unaware of the cause of action because of the defendant's misleading conduct or concealment; and (3) application of the rule is warranted by special circumstances that would, based on a balancing test, render the application of the statute of limitations unjust or irrational."[20]

2. **Failure to establish an attorney-client relationship or some other basis for a duty.** "[I]n a legal malpractice action, the threshold question is whether an attorney-client relationship was established."[21] Such relationship is generally established by contract, except where the attorney is appointed by a court.[22] Where there is no express written contract, the relationship may be implied where "the [client] seeks and receives the advice of the lawyer in matters pertinent to the lawyer's profession."[23] "However, a party's belief that an attorney-client relationship exists, unless reasonably induced by representations or conduct of the attorney, is not sufficient to create a confidential attorney-client relationship."[24]

3. **Failure to demonstrate that the plaintiff would have prevailed in the underlying action.** Under the "trial-within-a-trial" doctrine, as discussed supra, a plaintiff in a legal malpractice action must prove the legal malpractice case against the defendant, as well as the underlying action in which the alleged malpractice occurred. Where the trier of fact concludes that the plaintiff would not have been successful in the underlying suit, based on a preponderance of the evidence, the plaintiff may not recover in the malpractice action.[25]

4. **Waiver and estoppel.** Under Utah law, courts have held that "waiver and estoppel are widely considered appropriate defenses to a claim of legal malpractice."[26] Thus, where there is sufficient evidence to support such claims, a defendant may assert them, and the issues may be submitted to the trier of fact.[27]

Utah

5. **Comparative fault of the plaintiff.** As in other actions sounding in tort, a defendant attorney in a legal malpractice action may assert the defense of comparative fault. Under Utah law, fault may be allocated between plaintiffs, defendants, and any other third parties to the litigation "whether joined as a party to the action or not and whose identity is known or unknown to the parties to the action."[28]

6. **Failure to establish standing.** Under Utah law, a dissolved corporation does not have standing to maintaining a legal malpractice action. In the absence of a statute to the contrary, Utah law "do[es] not allow a dissolved corporation to pursue claims for malpractice after it has ceased to exist in any manner as a corporate entity."[29]

1 *Christensen & Jensen, P.C. v. Barrett & Daines*, 194 P.3d 931, 937 (Utah 2008).
2 *Id.* at 938.
3 *Id.*
4 *Id.*
5 *Id.*
6 *Watkiss & Saperstein v. Williams*, 931 P.2d 840, 846 (Utah 1996).
7 *Iacono v. Hicken*, 2011 UT App 377, 265 P.3d 116, 125 (UT App. 2011).
8 *Id.*
9 *Id.*
10 194 P.3d at 938 (*quoting Harline v. Barker*, 854 P.2d 595, 600 (Utah Ct.App.1993)).
11 *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1291 (Utah Ct. App. 1996).
12 *Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996).
13 *Id.* at 440 (quoting 2 *Ronald E. Mallen & Jeffrey M. Smith*, Legal Malpractice § 27.7, at 641-42 (3d ed. 1989)).
14 *Id.*
15 *Dunn v. McKay, Burton, McMurray & Thurman*, 584 P.2d 894, 896 (Utah 1978).
16 *Norman v. Arnold*, 57 P.3d 997, 1006 (Utah 2002).
17 UTAH CODE ANN. § 78B-2-307.
18 *Williams v. Howard*, 970 P.2d 1282, 1284 (Utah 1998).
19 *Id.*
20 *Id.*
21 *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 727 (Utah Ct. App. 1990).
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id. See generally Christensen & Jensen*, 194 P.3d 931.
26 *Id. Kilpatrick v. Wiley, Rein & Fielding*, 37 P.3d 1130, 1143 (Utah 2001).
27 *Id.*
28 *Id.* (citing UTAH CODE ANN. § 78-27-39(1) (Supp.2000)).
29 *Holman v. Callister, Duncan & Nebeker*, 905 P.2d 895, 897 (Utah Ct. App. 1995).

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Claims against a lawyer or a law firm for unintentional wrongs usually typically pled as claims of negligence. There must be an attorney client relationship.An attorney who fails to perform his duties for the client in accordance with established standards of legal skill and care is negligent. If the client shows that the attorney's negligence was the proximate cause of the client's damages, then the attorney is liable to the client for the damage caused.[1]

Claims can also be pled as breach of contract although such claims will probably not be successful unless the lawyer undertook a particular obligation beyond merely counseling or representing the client.[2]

Vermont law imposes upon an attorney the legal duty to perform his or her professional services with the same degree of skill, care, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in the State of Vermont. It is a statewide standard.There is no case approving a different standard of care for specialists.[2a]

Proving Causation

A negligent person is liable for all injurious consequences flowing from his negligence whether they could be reasonably anticipated or not, until diverted by the intervention of an efficient cause making the injury its own, or until the force set in motion by the negligence has become too small for the law to notice.[3] To prevail in a legal malpractice action based upon an attorney's failure to timely file allowance of a claim against an estate, the client had to show she would have prevailed but for the attorney's failure.[4]

Damages

The measure of damages for legal malpractice is all damages proximately caused by the wrongful act or omission.[5]Damages are determined as of the date the lawyer committed malpractice.[6] Fees paid to the negligent lawyer cannot be recovered as long as the client received some value from the lawyer's work.[7]

Mental Anguish.Emotional distress damages are available against a lawyer only if the plaintiff has suffered

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physical contact or "substantial bodily injury or sickness."[8] There are no reported appellate cases against lawyers specifically for the tort of intentional infliction of emotional distress.[9]

Fees and expenses incurred on account of a lawyer's negligence are recoverable.[10]

Defenses

Statute of Limitations.In Vermont the nature of the damages, not the nature of the action, determines the applicable statute. Injuries to person or property are subject to the three year period in 12 V.S.A. § 512. Most other claims are subject to the six year period in 12 V.S.A. § 511.[11]

Regardless of the nature of the damage, the discovery rule applies. Under both 12 V.S.A. § 511 and 12 V.S.A. § 512, and action accrues when the plaintiff discovers the wrongful act or, through the exercise of reasonable care and diligence, should have discovered it.[12]The period of limitation is tolled only until there is a judgment that will cause the client some damage, not until all appeals are exhausted. The focus is on a plaintiff's knowledge of facts that would put a reasonable person on notice of the general nature of damage and that the damage was caused by a lawyer's wrongful conduct.[13]

In addition to the other tolling statutes beginning with 12 V.S.A. § 551, Vermont has a statute, 12 V.S.A. § 555, stating that the period of limitation begins when, despite the defendant's fraudulent concealment of the cause of action against him, the plaintiff finally discovers his claim.[14]

Vermont recognizes comparative negligence. A negligent plaintiff may recover an amount reduced by the amount of his negligence, as long as it is not greater than the negligence of all defendants combined. 12 V.S.A. § 1036. The defendant bears the burden of proving this affirmative defense.[15]

The concept of "judgmental immunity" may apply.An attorney's conduct is not necessarily to be judged according to the situation as it appeared to him, but the proper test is how it would have appeared to and been handled by a reasonable, careful and prudent lawyer in the practice of law in Vermont.[16] Nevertheless, an attorney who acts in good faith and in an honest belief that his advice and acts are well-founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake on a point of law which has not been settled by the court of last resort, and on which reasonable doubt may be entertained by well-informed lawyers, as long as he has performed reasonable research to inform the decision.[17]

There is statutory immunity applicable to prosecutors and public defenders who are state employees.[18]

Local Consideration

Except as required by Fed. R. Civ. P. 26(A)(2)(B), no expert report is required. Expert testimony usually is necessary at trial.[19]Vermont recognizes an exception where "a professional's lack of care is so apparent that only common knowledge and experience are needed to comprehend it." [20]

Admissibility of Disciplinary Rules.Insofar as the Vermont Code of Professional Responsibility states minimum standards of competence, the trier of fact may consider it as evidence. As stated in the Reporter's Notes to the Vermont Rules of Professional Conduct, Section II, the Court in an adversary proceeding could hold that the rules set forth standards of civil liability.[21] Under general principles of tort law, violation of a rule may be prima facie evidence of malpractice, and the rules are presumably admissible as evidence of the standard of care a malpractice action.[22]

1 *Washington Electric Cooperative, Inc. v. Massachusetts Municipal Wholesale Electric Co.*, 894 F. Supp. 777 (D.Vt. 1995).Cody v. Cody, 2005 VT 116, 179 Vt. 90, 889 A.2d 733 (2005).Brown v. Kelly, 140 Vt. 336,338, 437 A.2d 1103 (1981)

2 In *Deptula v. Kane*, 2008 Vt. Unpub. LEXIS 268 (2008), not binding precedent under Vt. R. App. P. 33.1(c), the Court made the statement that,"an action to recover for legal malpractice lies in tort, on the theory of the attorney's negligence, *Bloomer v. Gibson*, 2006 VT 104, ¶ 24, 180 Vt. 397, 912 A.2d 424, and it is readily apparent that plaintiff's action for breach of contract 'to provide competent legal services' was, as the trial court here found, merely a restatement of the negligence claim. See id. (where plaintiff did not allege that defendant attorney "breached any special obligation in his employment contract" court correctly treated plaintiff's complaint as "a tort claim veiled as a breach of contract claim.")

2a *Russo v. Griffin*, 147 Vt. 20 (1986)

3 *Perkins v. Vt. Hydro-Electric Corp.*, 106 Vt. 367 (1935) and *Wagner v. Village of Waterbury*, 109 Vt. 368 (1938); Bennett v. Robertson, 107 Vt. 202 (1935)

4 *Knott v. Pratt*, 158 Vt. 334, 609 A.2d 232 (1992)

5 *Bloomer v. Gibson*, 2006 VT 104, 180 Vt. 397, 912 A.2d 424 (2006).

6 *Westine v. Whitcomb, Clark & Moeser*, 150 Vt. 9, 547 A.2d 1349 (1988)(valuation date where attorney malpractice causes failure of title to land is date when attorney breached duty to client).

7 *Bloomer v. Gibson*, 2006 VT 104, 180 Vt. 397, 912 A.2d 424 (2006).

8 In *Fitzgerald v. Congleton*, 155 Vt. 283, 583 A.2d 595 (1990), the plaintiff alleged that the defendant's negligent representation of her caused her to lose custody of

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her son. In a footnote,the Court indicates that it may relax the injury requirement in an appropriate case"we do not necessarily foreclose the possibility of allowing for emotional-distress damages absent physical manifestations under special circumstances where the nature of the tortious act guarantees the genuineness of the claim. (citation omitted.)"

9 In *Schwartz v. Frankenhoff*, 169 Vt. 287, 733 A.2d 74 (1999), the Court did, state what had to be pled and showed that the pleading did not suffice. Id. at 299. A claim was dismissed at summary judgment and not appealed in Bloomer v. Gibson, 2006 VT 104, 180 Vt. 397, 912 A.2d 424 (2006).

10 *Bourne v. Lajoie*, 149 Vt. 45, 540 A.2d 359 (1987) (fees and expenses in title reformation action necessitated by negligent deed drafting).

11 An illustrative case is *Fitzgerald v. Congleton*, 155 Vt. 283, 583 A.2d 595 (1990). The client alleged that his lawyer improperly handled a juvenile proceeding in which the state alleged that the client's son was a child in need of care and supervision. The client sought damages both for economic loss, including the costs she encouraged to secure the return of her child, and for emotional distress. The former were subject to the six-year period of limitation, while the latter were subject to the three-year period.

12 *University of Vt. v. W. R. Grace & Co.*, 152 Vt. 287, 565 A.2d 1354 (1989); *Dulude v. Fletcher Allen Health Care, Inc.*, 174 Vt. 74, 807 A.2d 390 (2002)

13 *Fritzeen v. Gravel*, 2003 VT 54 ¶ 8, 175 Vt. 537,539, 830 A.2d 49 (2003). Having to hire new counsel to remedy the negligent lawyer's omission is sufficient damage. Id.

14 In light of the discovery rule regarding §§ 511-512, this seems significant only in the unlikely event that one would have a claim against a lawyer governed by some other section. No reported cases involve lawyers could be located.

15 *Barber v. LaFramboise*, 2006 VT 77, 180 Vt. 150, 908 A.2d 436 (2006). A client's own intentional wrongful conduct does not automatically shield the attorney from legal malpractice liability. State v. Therrien, 2003 VT 44, 175 Vt. 342, 830 A.2d 28 (2003).

16 *LaFaso v. LaFaso*, 126 Vt. 90, 223 A.2d 814 (1966); State v. Graves, 119 Vt. 205, 112 A.2d 840 (1956).

17 *Washington Electric Cooperative, Inc. v. Massachusetts Municipal Wholesale Electric Co.*, 894 F. Supp. 777 (D.Vt. 1995); see Roberts v. Chimileski, 2003 VT 10, 175 Vt. 480, 820 A.2d 995 (2003). Whether the law was unsettled when the lawyer rendered his opinion is a question of law. Washington, 894 F. Supp. 777. Whether the lawyer's research was adequate is a question of fact. Id.

18 *Bradshaw v. Joseph*, 164 Vt. 154, 666 A.2d 1175 (1995)

19 *Roberts v. Chimileski*, 2003 VT 10, 175 Vt. 480, 820 A.2d 995 (2003). "Generally, negligence by professionals is demonstrated using expert testimony to: (1) describe the proper standard of skill and care for that profession, (2) show that the defendant's conduct departed from that standard of care, and (3) show that this conduct was the proximate cause of plaintiff's harm." *Estate of Fleming v. Nicholson*, 168 Vt. 495, 497, 724 A.2d 1026 (1998).

20 *Estate of Fleming v. Nicholson*, 168 Vt. 495, 497-498, 724 A.2d 1026 (1998).

21 *Estate of Kelly v. Moguls, Inc.*, 160 Vt. 531, 630 A.2d 360 (1993); cf. *In re Vt. Electric Power Producers*, 165 Vt. 282, 680 A.2d 716 (1996).

22 *Bacon v. Lascelles*, 165 Vt. 214, 670A.2d 902 (1996); Smith v. Blow & Cote, 124 Vt. 64, 196 A.2d 489 (1963).

Virginia

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Legal Malpractice in Virginia Is an Action for Breach of Contract

In Virginia, an action for the legal malpractice, while sounding in tort, is an action for breach of contract,[1] and but for the contract, the attorney owes no duty.[2] The contractual attorney-client relationship forms the predicate for the cause of action, while the remaining aspects of the cause are assessed using common professional negligence concepts: a breach of the duty of reasonable care required of the attorney in carrying out the responsibilities of the relationship which proximately cause damages.

Courts have defined this duty as a "reasonable degree of care, skill, and dispatch in carrying out the business for which he is employed"[3]:

> The attorney-client relationship is formed by a contract. Nonetheless, the duty upon the attorney to exercise reasonable care, skill, and diligence on behalf of the client arises out of the relationship of the parties, irrespective of a contract, and the attorney's breach of that duty, i.e., the appropriate standard of care, constitutes negligence.[4]

Because a legal malpractice claim is treated as a breach of contract arising in a tort setting, the litigant will find contract and tort law principles will dictate many aspects of the litigation, including the nature of the damages available, the application of defenses and the applicable statute of limitations.For example, the three and five year contract statutes of limitations apply to legal malpractice (as opposed to the two year limitation for personal injury actions), as discussed in more detail below.

Because legal malpractice is a contract action, "punitive damages may not be awarded for any such breaches in the absence of an independent, willful tort giving rise to such damages."[5]

Similarly, emotional distress is generally not recoverable in a contract action and would likely be struck from a legal malpractice case.

Virginia law generally makes it difficult to advance an action for fraud in a contract dispute, especially if the damages alleged for the alleged fraud constitute the same damages which flow from the breach of contract.A fraud count may be struck unless the plaintiff can allege a distinct set of damages independent of the breach of the duty of reasonable care.

Virginia

Causes of Action

A cause of action for legal malpractice in Virginia has three separate elements: 1) the existence of an attorney-client relationship creating a duty; 2) a breach of that duty by the attorney; and 3) damages that were proximately caused by the attorney's breach of duty.[6] A plaintiff in a legal malpractice action bears the burden of proving all three elements.[7]

Generally, the attorney's reasonable exercise of professional judgment, which later proves unsuccessful, cannot form the basis of a legal malpractice action by a client who believes a different approach should have been taken and might have been successful.Similarly, there can be no breach against an attorney for applying the law as it exists at the time the legal action is taken despite a subsequent change in the law which results in a negative outcome; an attorney cannot be negligent for failing to correctly anticipate changes in the law.[8]

Causation

The Virginia Supreme Court has stated that a "proximate cause" is an act or omission that, in natural and continuous sequence unbroken by a superseding cause, produces a particular event and without which that event would not have occurred.[9] An event may have more than one proximate cause.If a subsequent independent cause produces the damages without the slightest contribution from the attorney's prior conduct, this new cause will supersede the attorney's conduct and sever the link of proximate causation between an initial negligent act and the resulting harm, thereby relieving the initial tortfeasor of liability.[10]

Causation and the "Case within a Case"

A legal malpractice action often involves a "case within the case," in which the plaintiff former client must present sufficient evidence of a breach of duty, proximate causation and damages to convince the trier of fact that, in the absence of the attorney's alleged negligence, the plaintiff would have prevailed in the underlying action.[11] The plaintiff therefore must present virtually the same evidence that would have been presented in the underlying action. Similarly, the defendant (attorney) is entitled to present evidence and assert defenses that would have been presented by the opposing party in the underlying action to establish that the former client would not have prevailed in the underlying case.[12]

Expert Testimony

Standard of care often requires expert testimony, unless the matters pertaining to the breach are obvious, "from ordinary human knowledge and experience".[13] No expert testimony is permitted, however, if issues are within the jurors' understanding: "Expert testimony is not required, indeed is inadmissible, in cases in which the facts and circumstances are within the common understanding and experience of the average, lay juror."[14]

Expert testimony generally cannot be introduced to advise the jury what the law is, as the presiding judge in a legal malpractice case retains that role.However, when the issue presented involves an argument about why an attorney should or should not have applied the facts to the law under the circumstances of the case, an expert likely would be permitted to provide an opinion.

Affirmative Defenses

Defenses available in legal malpractice cases include those generally applicable in other negligence actions.[15]

In particular, contributory negligence is available as an affirmative defense in a legal malpractice action where the negligence is a proximate cause of the damages.[16]

"Collectability" is an affirmative defense in Virginia as well and may be advanced in the responsive pleading. For example if the plaintiff (former client as a plaintiff in the underlying case) would not have been able to collect damages in the underlying action, then the plaintiff cannot force the defendant attorney to pay damages, despite malpractice.Similarly, if the plaintiff (former client as a defendant in the underlying case) lost a case because of alleged malpractice, but can avoid paying any damages, that situation too could afford the defendant attorney with a collectability defense.[17]

Other limitations to damages also exist:the plaintiff (former client) cannot collect the attorney's fees the former client paid to the attorney in the underlying case, nor can the plaintiff former client collect attorney fees expended to litigate the legal malpractice case brought by the plaintiff

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against the attorney.However, legal fees expended by the plaintiff former client required to fix a problem proximately caused by the attorney's malpractice may be recovered as damages.

Limitations

Because an action for the negligence by an attorney in the performance of professional services, while sounding in tort, is an action for breach of contract, it is governed by the statute of limitations for contracts.[18] The statute of limitations for oral contracts in Virginia is three years and the period is five years for written contracts.[19] Therefore, it is often significant whether there exists a written engagement setting forth a written contract of the terms of the representation.

The accrual of the right of action is similarly governed by the law applicable to breach of contract, which usually means when the damage first occurred, not when the breach of contract was discovered.[20]

However, the start of any statute of limitations period may be postponed by the "continuing representation rule."The statute of limitations does not begin to run until the attorney completes the particular representation which is the subject to the malpractice claim.Once the relevant matter is concluded, the statute begins to run, even if the attorney continues to represent the client in other matters:

> when malpractice is claimed to have occurred during the representation of a client by an attorney with respect to a particular undertaking or transaction, the breach of contract or duty occurs and the statute of limitations begins to run when the attorney's services rendered in connection with that particular undertaking or transaction have terminated, notwithstanding the continuation of a general attorney-client relationship, and irrespective of the attorney's work on other undertakings or transactions for the same client.[21]

1 *Oleyar v. Kerr*, 217 Va. 88, 225 S.E.2d 398 (1976).
2 *Johnson v. Hart*, 279 Va. 617625; 692 S.E.2d 239, 243 (2010).*Cox v. Geary*, 271 Va. 141, 152, 624 S.E.2d 16, 22 citing *O'Connell v. Bean*, 263 Va. 176, 180, 556 S.E.2d 741, 743 (2002).
3 *O'Connell v. Bean*, 263 Va. 176, 180; 556 S.E.2d 741,743 (2002) citing Ortiz v. Barrett, 222 Va. 118, 126, 278 S.E.2d 833, 837 (1981).*Cox v. Geary*, 271 Va. 141, 152; 624 S.E.2d 16, 22 (2006), citing *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 264 Va. 310, 313, 568 S.E.2d 693, 695 (2002).
4 *Lyle, Siegel, Croshaw & Beale*, 249 Va.426, 432, 457 S.E.2d 28, 32 (1995).
5 *O'Connell v. Bean*, 263 Va. 176, 180; 556 S.E.2d 741,743 (2002); *Kamlar Corp. v. Haley*, 224 Va. 699, 707; 299 S.E.2d 514, 518 (1983).
6 *Williams v. Joynes*, 278 Va. 57, 62; 677 S.E.2d 261, 264 (2009) citing *Shipman v. Kruck*, 267 Va. 495, 501, 593 S.E.2d 319, 322 (2004); *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 264 Va. 310, 313, 568 S.E.2d 693, 695 (2002); *Allied Productions v. Duesterdick*, 217 Va. 763, 766, 232 S.E.2d 774, 776 (1977).
7 *Williams v. Joynes*278 Va. at 62; 677 S.E.2d at 264.*See Campbell v. Bettius*, 244 Va. 347, 352, 421 S.E.2d 433, 436, 9 Va. Law Rep. 294 (1992); *Duvall, Blackburn, Hale & Downey v. Siddiqui*, 243 Va. 494, 497, 416 S.E.2d 448, 450, 8 Va. Law Rep. 2838 (1992); Cox v. Geary, 271 Va. 141, 152; 624 S.E.2d 16, 22 (2006), *citing Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 264 Va. 310, 313, 568 S.E.2d 693, 695 (2002).
8 *Smith v. McLaughlin*, 289 Va. 241, 709 S.E.2d 7 (2015).
9 *Williams v. Joynes*, 278 Va. 57, 62; 677 S.E.2d 261, 264 (2009), citing *Williams v. Le*, 276 Va. 161, 167, 662 S.E.2d 73, 77 (2008); *Jenkins v. Payne*, 251 Va. 122, 128, 465 S.E.2d 795, 799 (1996); *Beale v. Jones*, 210 Va. 519, 522, 171 S.E.2d 851, 853 (1970).
10 *Williams v. Le*, , 276 Va. at 167, 662 S.E.2d at 77; *Jenkins*, 251 Va. at 128-29, 465 S.E.2d at 799; *Coleman v. Blankenship Oil Corp.*, 221 Va. 124, 131, 267 S.E.2d 143, 147 (1980).
11 *Williams v. Joynes*, 278 Va. 57, 62; 677 S.E.2d 261, 264 (2009); *Whitley v. Chamouris*, 265 Va. 9, 11; 574 S.E.2d 251,252-53 (2003); *Campbell v. Bettius*, 244 Va. 347, 352, 421 S.E.2d 433, 436 (1992).
12 *Whitley v. Chamouris*, 265 Va. 9, 11; 574 S.E.2d 251,252-53 (2003).*Campbell v. Bettius*, 244 Va. 347, 352, 421 S.E.2d 433, 436 (1992).
13 *Nelson v. Commonwealth*, 235 Va. 228; 368 S.E.2d 239 (1988). See, Bly v. Rhoads, 216 Va. 645, 650, 222 S.E.2d 783, 787 (1976) (medical malpractice); see also Ford Motor Co. v. Bartholomew, 224 Va. 421, 430, 297 S.E.2d 675, 679 (1982) (automotive transmission design).
14 *Nelson v. Commonwealth*, 235 Va. 228,236; 368 S.E.2d 239, 243 (1988).*See, Richmond Newspapers v. Lipscomb*, 234 Va. 277, 296, 362 S.E.2d 32, 42 (1987); *Coppola v. Commonwealth*, 220 Va. 243, 252, 257 S.E.2d 797, 803-04 (1979), cert. denied, 444 U.S. 1103 (1980).
15 *Allied Productions v. Duesterdick*, 217 Va. 763, 765; 232 S.E.2d 774, 775 (1977).
16 *Lyle, Siegel, Croshaw & Beale v. Tidewater Capital*, 249 Va. 426, 432; 457 S.E.2d 28,32 (1995).
17 *Smith v. McLaughlin*, 289 Va. 241, 709 S.E.2d 7 (2015).
18 *Keller v. Denny*, 232 Va. 512, 516 and 520 (Stephenson, J., concurring), 352 S.E.2d 327, 329 and 331-32 (1987).
19 Virginia Code § 8.01-246.
20 Keller v. Denny, 232 Va. 512, 352 S.E.2d 327 (1987); Code of Virginia § 8.01-230: *Accrual of right of action*.In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, when the breach of contract occurs in actions *ex contractu* and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250 or other statute.
21 *Keller v. Denny*, 232 Va. 512, 352 S.E.2d 327 (1987).

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Legal malpractice in Washington may be classified as a tort or a breach of contract.[1] Proving legal malpractice requires the following four elements: (1) An attorney-client relationship that gave rise to a duty of care; (2) the attorney breached that duty by an act or omission; (3) the client was damaged; and (4) the breach was a proximate cause of the client's damages.[2] Additionally, when the underlying claim was a criminal matter and the client is seeking civil relief, a client must also show "(1) postconviction relief and (2) demonstrate his innocence by a preponderance of the evidence."[3] Serving additional jail time as a result of an attorney's negligence may suffice under the second prong of that test.[4]

Traditionally, only an attorney's client could bring a malpractice action.[5] However, Washington makes an exception and allows non-clients to bring a malpractice claim if the non-client was owed a duty.[6] To determine if an attorney owed a duty to a non-client Washington courts apply the following factors: (1) the extent to which the transaction was intended to affect the non-client, (2) the foreseeability of harm to the non-client, (3) the degree of certainty that the non-client suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury, (5) the policy of preventing future harm, and (6) the extent to which the profession would be unduly burdened by a finding of liability.[7] The non-client must first prove the threshold inquiry; that the primary purpose and intent of the attorney-client relationship was to benefit the non-client.[8] Whether an attorney owes another a legal duty is a legal question to be determined by the court.[9]

The standard of care for an attorney is the "decree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction."[10] A failure to meet this standard would serve as grounds for malpractice in both contract and tort.[11] Generally speaking, expert testimony is required to prove proper trial tactics and procedure or other difficult matters to prove.[12] However, expert testimony is not required if the accused negligence is within the common knowledge of lay persons.[13] Failure of a plaintiff to produce any expert testimony is grounds for summary judgment if such testimony is required.[14]

Washington

Washington has adopted an "attorney judgment rule" to determine when an attorney's professional judgment breaches the duty of care.[15] Specifically, an attorney can not be held liable for a decision he or she made if it was made honestly, in good faith, and if "(1) that decision was within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington; and (2) in making that judgment decision the attorney exercised reasonable care."[16] Generally, whether or not an attorney breached the standard of care under the attorney judgment rule is a question of fact.[17]

Proximate Cause

Proximate cause in Washington is proved by showing "but for" causation and legal causation.[18] For any legal malpractice claim, the plaintiff must be able to show that but for the attorney's malpractice she would have fared better in their underlying claim, essentially retrying the original claim.[19] When the alleged malpractice occurred during a trial, that error must have caused a worse outcome for the plaintiff at trial.[20] With respect to perfecting an appeal, the inquiry into the malpractice must find that the client's appeal would have been successful if properly filed; i.e. the appellate court would have granted review and rendered a judgment more favorable to the client.[21] Legal causation "rests on policy considerations determining how far the consequences of a defendant's acts should extend."[22]Essentially, should liability attach as a matter of law even if evidence establishes cause in fact.[23]

Damages

Damages are measured by the amount of loss actually sustained as a proximate result of the attorney's conduct.[24] This is the measure of damages because the purpose of legal malpractice actions is to place the plaintiff in the condition she would have been in had the wrong not occurred.[25] The evidence provided by the plaintiff must be shown with enough certainty to provide a reasonable basis for establishing damages.[26] Damages may not be proven by mere speculation or conjecture.[27] While the exact amount need not be shown, there must be competent evidence in the record to establish any amount by a reasonable basis.[28]

Additionally, because damages are only intended to put the plaintiff back where they would have been without any alleged malpractice any settlement or value from the underlying claim is considered.[29] It would be inequitable to ignore other sources of income from the same alleged malpractice, which would provide the plaintiff with more than she would have gotten.[30]

Defenses

The statute of limitations for the tort of attorney malpractice is three years.[31] An action being brought under a written contract has a six year statute of limitations, whereas an action based on an oral contract has a three year statute of limitations.[32] Allegations that an attorney breached implied contractual duty to perform legal services at some level of competence on behalf of a client is not an action based on a written agreement.[33]

Washington employs the discovery rule which tolls the statute of limitations until either the plaintiff discovers the underlying facts that would give rise to her claim or until they should have discovered the facts in the exercise of reasonable diligence.[34] A plaintiff does not need to know the legal cause of action, only the facts that would amount to malpractice.[35] Washington also recognizes the continuous representation rule.[36] The continuous representation rule tolls the statute of limitations for the matter in which the alleged malpractice occurred so long as the attorney and client maintain an attorney-client relationship.[37] This is done for two reasons, to not disrupt the attorney client relationship and give the attorney a chance to remedy mistakes before being sued.[38] Overall, however, Washington favors finality to prevent stale claims from being brought against an attorney.[39]

While the doctrine of res judicata applies in legal malpractice cases, the defense may only be raised if it is based on the same action.[40] Additionally, res judicata only applies to "claims actually adjudicated which were or should have been raised in the proceeding."[41]

Washington

1 *Peters v. Simmons*, 87 Wn.2d 400, 404, 552 P.2d 1053 (1976).
2 *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992).
3 *Powell v. Associated Counsel for Accused*, 125 Wn. App. 773, 775, 106 P.3d 271 (2005) review granted, cause remanded, 155 Wn. 2d 1024, 123 P.3d 120 (2005) and opinion adhered to on reconsideration, 131 Wn. App. 810, 129 P.3d 831 (2006).
4 *Id* at 777.
5 *Trask v. Butler*, 123 Wn.2d 835, 840, 872 P.2d 1080 (1994).
6 *Id.*
7 *Id.* at 841.
8 *Id.*
9 *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998); *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992).
10 *Walker v. Bangs*, 92 Wn.2d 854, 859, 601 P.2d 1279 (1979).
11 *Peters*, 87 Wn.2d at 404.
12 *Walker* , 92 Wn.2d at 858.
13 *Id.*
14 *Geer v. Tonnon*, 137 Wn. App. 838, 852, 155 P.3d 163 (2007).
15 *Clark Cnty. Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 704, 324 P.3d 743 *review denied sub nom. Am. Alternative Ins. Corp. v. Bullivant Houser Bailey, P.C.*, 181 Wn.2d 1008, 335 P.3d 941 (2014).
16 *Id.*
17 *Id.* at 706.
18 *City of Seattle v. Blume*, 134 Wn.2d 243, 251, 947 P.2d 223 (1997).
19 *Schmidt v. Coogan*, 162 Wn.2d 488, 492, 173 P.3d 273 (2007).
20 *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 591-92, 999 P.2d 42 (2000).
21 *Daugert v. Pappas*, 104 Wn.2d, 254, 258, 704 P.2d 600 (1985).
22 *Blume*, 134 Wn.2d at 252.
23 *Id.*
24 *Tilly v. Doe*, 49 Wn. App. 727, 731, 746 P.2d 323 (1987).
25 *Id.* at 731-32.
26 *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997), aff'd, 135 Wn.2d 820 (1998).
27 *Id.*
28 *Id.*
29 *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wn. App. 677, 685, 50 P.3d 306 (2002).
30 *Id.*
31 *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 816, 120 P.3d 605 (2005); RCWA 4.16.080(3).
32 RCW 4.16.040(1); *Davis v. Davis Wright Tremaine, L.L.P.*, 103 Wn. App. 638, 649-50, 14 P.3d 146 (2000).
33 *Id.*
34 *Peters*, 87 Wn.2d at 406.
35 *Cawdrey*, 129 Wn. App. at 816-17.
36 *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 663, 37 P.3d 309 (2001).
37 *Id.* at 662.
38 *Id.* at 662-663.
39 *Id.* at 662.
40 *Powell*, 146 Wn. App. at248-49.
41 *In re Estate of Black*, 153 Wn.2d 152, 171, 102 P.3d 796 (2004).

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Overview

To prevail in an action for legal malpractice in West Virginia, a plaintiff must prove: "(1) the attorney's employment; (2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client."[1] The action may sound in contract or in tort.[2]

> Where the act complained of in a legal malpractice action is a breach of specific terms of the contract without reference to the legal duties imposed by law on the attorney/client relationship, the action is contractual in nature. Where the essential claim of the action is a breach of duty imposed by law on the attorney/client relationship and not of the contract itself, the action lies in tort.[3]

The standard of care for an attorney in performing his or her duty is "to exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances."[4] Further, "[t]he relationship of attorney-at-law and client is of the highest fiduciary nature, calling for the utmost good faith and diligence on the part of such attorney."[5]

The Attorney's Employment

An attorney's employment "speaks to whether the attorney owed a duty to the person claiming to have been harmed by the attorney's negligence, as 'no action for negligence will lie without a duty broken.'"[6]

> Where a client hires an attorney for a matter, a duty is owed as to that matter.[7]

> As soon as a client has expressed a desire to employ an attorney and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity, the relation of attorney and client has been established; and all dealings thereafter between them relating to the subject of the employment will be governed by the rules applicable to such relation.[8]

Employment does not require payment of, or agreement for, a fee – the relationship is not dependent upon payment of fees, and services may be rendered by the attorney gratuitously – and fees for services may be paid by a client or a third party.[9]

Where a plaintiff did not hire an attorney, such as a trust beneficiary (*Calvert v. Scharf*)[10] or an implied attorney-client

relationship (*Lawyer Disciplinary Bd. v. Nace*)[11], establishing existence of a duty is critical to a legal malpractice action "because, without a duty owed, a person claiming to have been harmed by an attorney's negligence does not have standing to assert a claim."[12] Also, duties such as confidentiality under West Virginia Rules of Professional Conduct (WVRPC) Rule 1.6 may attach when an attorney considers whether to proceed with an attorney-client relationship.[13]

In *Calvert v. Scharf*, a husband's will established a Marital Trust, granted a power of appointment to the wife over the assets in the Marital Trust as constituted at the time of her death to her designee(s), and established a Residual Trust. Following husband's death, the wife hired an attorney to prepare a will and a Living Trust, such will to include appointment of the Living Trust as beneficiary of the assets of the Marital Trust. Following wife's death, One Valley Bank as executor of her estate and trustee of the Living Trust, Marital Trust and Residuary Trust filed a declaratory judgment action, including the Living Trust and Residual Trust beneficiaries as parties, seeking a judicially determined distribution of the assets of the Marital Trust. The parties settled the declaratory judgment action before determination, and the Living Trust beneficiaries filed suit against the attorney. The court held that direct, intended, and specifically identifiable beneficiaries, such as the Living Trust beneficiaries, have standing to sue based on allegations that the attorney's negligence caused the beneficiaries' interests under the will to be lost or diminished.[14]

In *Lawyer Disciplinary Bd. v. Nace, Barbara Miller* hired Michael Burke to pursue a medical malpractice claim. Burke contacted Barry Nace to serve as co-counsel. Subsequently, Miller filed for Chapter 7 bankruptcy, the bankruptcy trustee wrote to Burke, and Burke replied that Miller's claim was being reviewed by co-counsel Nace. The trustee then sent a letter, application to employ counsel, proposed order, and affidavit to Nace in January 2005 asking Nace to sign the affidavit if the documents met his approval, and Nace returned the affidavit to the trustee.

In September 2006, Nace obtained a partial settlement of the medical malpractice claim. In October 2006, Nace tried the balance of the claim. In March 2008, Nace disbursed the net proceeds of the judgment to Miller. There was no communication between Nace and the trustee, however, until the trustee initiated contact with Nace in November 2008.[15]

Nace denied employment by the trustee. The court, however, held that the first step of employment was met when the trustee sent the January 2005 letter, application, order and affidavit to Nace and the second step was met when Nace signed and returned the affidavit.[6]

Consistent with WVRPC Rule 1.2(c)[17], an attorney's duties may be limited by the terms of the agreement between attorney and client.[18] Even if limited by contract, however, an attorney's duties as local counsel generally may not fall beneath the duties expressly or impliedly imposed by the relevant rules of practice, these rules should make it clear that local counsel incurs significant responsibility in undertaking supervision of visiting counsel, and at least with respect to West Virginia Rules for Admission to the Practice of Law Rule 8.0(c)(8)[19], local counsel is expected to perform more than a mere perfunctory role.[20]

A defendant attorney in a legal malpractice action may implead another attorney who has provided legal services to the client as a third party defendant on a contribution claim.[21]

Representation of two or more clients with adverse or conflicting interests constitutes such misconduct that, unless the attorney has obtained the consent of the clients after full disclosure of all the facts concerning the dual representation, the attorney is subject to liability for malpractice."[22]

An attorney for a party in a civil lawsuit does not owe a duty of care to that party's adversary in the lawsuit pursuant to the litigation privilege[23], the privilege is extended to communications and conduct during a civil action[24], but malicious prosecution and fraud are not privileged.[25] Further, the privilege applies to evaluating, investigating and filing the lawsuit against the adversary.[26]

Assignment of a malpractice claim is contrary to public policy and void as a matter of law.[27]

The Attorney's Neglect of a Reasonable Duty

An attorney is not to neglect a reasonable duty.[28]

In *Sells v. Thomas*, a passenger on a motorcycle involved in a collision with a pickup truck retained an attorney for her personal injury claim. The attorney learned that the client was covered by, and had received medical payments

benefit from, her father's insurer, but the attorney failed to investigate or pursue an underinsured motorist claim until after he settled with the pickup driver's insurer.[29] The court held that the attorney neglected a reasonable duty.[30]

In *West Va. Canine College v. Rexroad*, a client purchaser hired an attorney in 1988 to examine title to 13.65 acres of a larger tract of 122 acres. In 1990, the attorney represented the seller in a suit challenging a 1958 oil and gas lease on an adjacent section of the 122 acres. The prior client purchaser sued the attorney alleging that the attorney's title report implied that there was a valid oil and gas lease on the adjacent property.[31] The amended complaint, however, recognized that the minerals underlying the 13.65 acres were reserved by the seller, and there was nothing in the title report that misrepresented the quantity or quality of the estate conveyed to the prior client.[32] With no error in the title report, the attorney did not neglect a reasonable duty and no malpractice occurred.[33]

Consistent with the general rule in West Virginia that expert testimony is admissible where an expert opinion would help the jury, expert testimony is admissible in legal malpractice actions[34], including whether an attorney neglected a reasonable duty and the standard of care.[35]

The Attorney's Negligence Resulting in and Proximately Causing Loss to Plaintiff

An attorney's negligence alone is insufficient to prevail in a malpractice action. It must also appear that a client's damages are the direct and proximate result of the attorney's negligence, and the client has the burden of proving causal connection to the attorney's negligence.[36] Thus, the proper method to determine whether the attorney's omission is a cause in fact of damage to the client is to determine whether performance of that act would have prevented the damage.[37]

In *Keister v. Talbott*, an attorney hired in 1986 mistakenly advised the client purchasers that title included rights to the underlying coal. The clients brought a malpractice action for deprivation of the underlying coal. The court held that the clients could not prove a causal connection between their alleged loss of coal rights and the attorney's negligence because, had the attorney correctly examined title, he would have discovered that the coal had been conveyed out of the chain of title forty years before in 1946. Thus, though the clients may have lost the opportunity to rescind the purchase contract had they known that title did not include coal rights as a proximate result of the attorney's negligence, the attorney's negligence did not deprive the clients of the coal rights.[38]

In *Harrison v. Casto*, Paul Harrison sued attorney Carroll Casto for failing to sue Harrison's first attorney, Don Kingery. Harrison had hired Kingery to bring a personal injury action against an airline, Kingery did not file suit, and Harrison hired Casto to sue Kingery for malpractice. Instead of suing Kingery, Casto unsuccessfully sued the airline. Harrison then sued Casto for failing to bring a malpractice action against Kingery sounding in tort within the two-year statute of limitations applicable to torts.[39] At the time that Harrison filed the malpractice action against Casto, however, a malpractice action against Kingery sounding in contract was not barred by the statute of limitations applicable to contracts. As such, Harrison could have brought a malpractice action against Kingery, and so Casto's negligence deprived the client of nothing.[40]

In litigation preceding *Calvert v. Scharf*, One Valley Bank filed a declaratory judgment action to determine whether the wife's will effected appointment of her Living Trust as beneficiary of the assets of her husband's Marital Trust.[41] In *Calvert*, the Living Trust beneficiaries brought a legal malpractice action to recover the portion of the Marital Trust paid to the Residuary Trust beneficiaries to settle the declaratory judgment action. The court held that an intended beneficiary must suffer an actual loss and the loss must be the direct result of the attorney's negligence in drafting a will, but if the defect is cured so that the intended beneficiary receives his or her bequest pursuant to the will, then there is no causal connection between the attorney's negligence and the beneficiary's loss because the loss is not proximately caused by the attorney's negligence.[42] Had the declaratory judgment action proceeded to a determination that the wife's exercise of her power of appointment had failed, it would have established causal connection between the attorney's negligence and the loss, but the loss to which the Living Trust beneficiaries voluntarily agreed pursuant to the prior settlement bore no causal relationship to the attorney's alleged negligence.[43]

To prevail in a legal malpractice claim arising from negligent representation of a defendant in a criminal

proceeding, the plaintiff who was the defendant in the criminal proceeding must establish by a preponderance of the evidence that he or she is actually innocent of the underlying criminal offense for which he or she was originally convicted and/or any lesser included offenses involving the same conduct: "Consequently, there is no cause of action as long as the determination of the plaintiff's guilt of that offense remains undisturbed."[44] Further, if the plaintiff entered a plea of nolo contendere and is convicted and sentenced as a result thereof, the plaintiff cannot contend that the attorney's negligence was the proximate cause of the conviction and sentence the valid conviction and sentence are the sole legal cause for the plaintiff's incarceration and related damages.[45]

Damages

In West Virginia,

> …suits against attorneys for negligence are governed by the same principles as apply in other negligent actions. If an attorney, in disregard of his duty, neglects to appear in a suit against his client, with the result that a default judgment is taken, *it does not follow that the client has suffered damage*, because the judgment may be entirely just, and one that would have been rendered notwithstanding the efforts of the attorney to prevent it. It is said that there is a difference between the case of an attorney who fails to do anything for his client, and one who makes an inexcusable mistake in attempting to comply with instructions; but we do not perceive any basis in principle for such a distinction. In either case *the burden is upon the client to prove the damages he has suffered*.[46]

Damages are not presumed and a client has the burden of proving the client's loss,[47] and "damages are calculated on the basis of the value of the claim lost or judgment suffered by the alleged negligent attorney."[48]

Returning to *Keister*, if an attorney overlooks an out-conveyance of property which results in the client purchaser receiving less than what the client had contracted to buy, damages are ordinarily determined by subtracting the value of the property actually received from the purchase price paid.[49] The plaintiffs' expert testified that the value of the property actually received (the property without the coal) was $6,200, and the defendant attorney's expert testified that the value of the property actually received was $16,200. The purchase price was $15,000. The jury did not award damages to the plaintiffs because the jury evidently believed the defendant attorney's expert that the value of the property actually received was $16,200 which was in excess of the purchase price of $15,000.[50]

If an attorney fails to perfect an appeal from a judgment adverse to a client, the speculative nature of whether (1) the West Virginia Supreme Court of Appeals would have granted the petition for appeal or application for writ of error, (2) the Court would have reversed the judgment and (3) the judgment would have favored the client upon new trial is no defense, and a court can "award damages in the full amount of the judgment suffered and paid by the client where the client can prove that a timely appeal, which the attorney negligently failed to file, would have resulted in a reversal of the underlying judgment and entry of judgment in his favor as a matter of law."[51]

Special damages, such as lost profits,[52] can be awarded but only when they are the proximate result of the attorney's wrongdoing.

The West Virginia Code provides for damages for neglect of duty[53], recovery of lost debt or money[54], and penalty for failure to pay over moneys collected.[55]

Contract and Tort Statutes of Limitation; Accrual; Tolling

A malpractice action that can be construed as either on contract or in tort is presumed to be on contract when it would be barred by the statute of limitations if construed as being in tort.[56]

West Virginia Code §55-2-6 provides for a limitation of time within which a contract action can be brought to ten years if the contract is in writing and five years if not in writing.[57] West Virginia Code §55-2-12 provides for a limitation of time within which a tort action can be brought to two years for damage to property or for personal injuries.[58]

Generally, a cause of action for a tort accrues when an injury occurs, subject to tolling by the discovery rule, in that "a plaintiff's duty to file suit is not triggered until the plaintiff knows, or by the exercise of reasonable diligence should have known, of a cause of action against the

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defendant."[59] More specifically, a cause of action for legal malpractice does not commence to run until a client knows, or by reasonable diligence should know, of the malpractice.[60]

When a victim of legal malpractice terminates his or her relationship with the negligent attorney, subsequent efforts by a new attorney to reverse or mitigate the harm through administrative or judicial appeals do not toll the statute of limitations.[61]

Further as to tolling of the statute of limitations, West Virginia has adopted the continuous representation doctrine where an attorney and a client continue their relationship with respect to the specific matter underlying the alleged malpractice beyond the time of that alleged malpractice.[62] The continuous representation doctrine "is an adaptation of the 'continuous treatment' rule applied in the medical malpractice forum and is designed, in part, to protect the integrity of the professional relationship by permitting the allegedly negligent attorney to attempt to remedy the effects of the malpractice and providing uninterrupted service to the client."[63]

The continuous representation doctrine in West Virginia specifies that:

> …the doctrine is to be utilized only where the attorney's "involvement after the alleged malpractice is for the performance of the same or related services and is not merely continuity of a general professional relationship." (Citation omitted.) We strongly emphasize the necessity of examining the nature of the continuing representation. The continuous representation doctrine applies only to malpractice actions in which there is clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney. The doctrine should only be utilized only where the attorney's involvement after the alleged malpractice is for the performance of the same or related services and is not merely continuity of a general professional relationship. We further impose the restriction that the burden of establishing the elements necessary for the application of the doctrine is upon the client.[64]

Consistent with the foregoing, the limitations period for a legal malpractice action is not tolled by the continuous representation doctrine where an attorney's subsequent role is only tangentially related to legal representation in which the attorney was allegedly negligent: "the inquiry is not whether an attorney-client relationship still exists on any matter or even generally, but when the representation of the specific matter concluded."[65]

West Virginia has also adopted the doctrine of adverse domination which tolls the statute of limitations for corporate claims against lawyers who previously represented the corporation adversely controlled by officers and directors who had retained the lawyers:

> In West Virginia, the doctrine of adverse domination tolls statutes of limitation for tort claims against officers and directors who acted adversely to the interests of the company and against lawyers and accountants, owing fiduciary duties to the company, who took action contributing to the adverse domination of the company.[66]

Comparative Negligence

West Virginia has adopted "modified" comparative negligence.[67] Although the Supreme Court of Appeals of West Virginia has not addressed comparative negligence in a legal malpractice action, it is noteworthy that the Virginia Supreme Court has held that contributory negligence is available as a defense in a legal malpractice action.[68]

Immunity

Under common law, prosecutors:

> …enjoy absolute immunity from civil liability for prosecutorial functions such as, initiating and pursuing a criminal prosecution, presenting a case at trial, and other conduct that is intricately associated with the judicial process. . . . It has been said that absolute prosecutorial immunity cannot be defeated by showing that the prosecutor acted wrongfully or even maliciously, or because the criminal defendant ultimately prevailed on appeal or in a habeas corpus proceeding.
>
> The absolute immunity afforded to prosecutors attaches to the functions they perform, and not merely to the office. Therefore, it has been recognized that a prosecutor is entitled only to qualified immunity when performing actions in an investigatory or administrative capacity.[69]

West Virginia

The Public Defender Services Act of 1989 provides immunity from malpractice liability for attorneys appointed by a circuit court, family court or the Supreme Court of Appeals of West Virginia pursuant to West Virginia Code §55-29-21-20 provided that the only compensation is that paid under Article 21 Public Defender Services.[70]

In *Powell v. Wood County Commission*, the court found that immunity from liability "in the same manner and to the same extent that prosecuting attorneys are immune from liability" implicitly indemnifies the appointed attorney for any costs incurred in the defense of any suit arising out of the appointed representation[71], and the court held that when an attorney appointed under Article 21 Public Defender Services is sued for malpractice in connection with the representation and actually incurs costs in defending such suit, the costs incurred are ultimately chargeable to the State Board of Risk and Insurance Management.[72]

In *Mooney v. Frazier*, the court held that, to extend the same degree of immunity under W.Va. Code § 29-21-20 for attorneys appointed by West Virginia courts to attorneys appointed by federal courts, an attorney appointed by a federal court to represent a criminal defendant in a federal criminal prosecution in West Virginia has absolute immunity from state law claims of legal malpractice that derive from the attorney's conduct in the underlying criminal proceedings.[73]

1 *Keister v. Talbott*, 182 W. Va. 745, 748-749, 391 S.E.2d 895, 898-899, 1990 W. Va. LEXIS 42, ***9 (1990), *quoting Maryland Casualty Co. v. Price*, 231 F. 397, 401, 1916 U.S. App. LEXIS 1658, **4 (4th Cir. 1916); *see also Humphries v. Detch*, 227 W. Va. 627, 631, 712 S.E.2d 795, 799, 2011 W. Va. Lexis 52, ***9-10 (2011); *Sells v. Thomas*, 220 W.Va. 136, 140, 640 S.E.2d 199, 203, 2006 W. Va. LEXIS 99, ***12 (2006); *Calvert v. Scharf*, 217 W. Va. 684, 690, 619 S.E.2d 197, 203, 2005 W. Va. LEXIS 77, ***16 (2005); *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W. Va. 318, 333 n.13, 547 S.E.2d 256, 271 n.13, 2001 W. Va. LEXIS 36, ***33 n.13 (2001); *Armor v. Lantz*, 207 W. Va. 672, 681, 535 S.E.2d 737, 746, 2000 W. Va. LEXIS 97, ***26-27 (2000); *McGuire v. Fitzsimmons*, 197 W. Va. 132, 136-37, 475 S.E.2d 132, 136-37, 1996 W. Va. LEXIS 119, ***13 (1996).

2 *Harrison v. Casto*, 165 W. Va. 787, 789, 271 S.E.2d 774, 775, 1980 W. Va. LEXIS 597, ***4 (1980) (citations omitted); *Hall v. Nichols*, 184 W. Va. 466, 468, 400 S.E.2d 901, 903, 1990 W. Va. LEXIS 255, ***5-6 (1990); *Smith v. Stacy*, 198 W.Va. 498, 502-503, 482 S.E.2d 115, 119-120, 1996 W. Va. LEXIS 255, ***15 (1996).

3 *Hall*, 184 W. Va. at 469, 400 S.E.2d at 904, 1990 W. Va. LEXIS 255, ***8; *Smith*, 198 W.Va. at 502-503, 482 S.E.2d at 119-120, 1996 W. Va. LEXIS 255, ***15.

4 *Keister*, 182 W. Va. at 748-749, 391 S.E.2d at 898-899, 1990 W. Va. LEXIS 42, ***9; *West Va. Canine College v. Rexroad*, 191 W. Va. 209, 211 n.3, 444 S.E.2d 566, 568 n.3, 1994 W. Va. LEXIS 52, ***6 n.3 (1994).

5 *Committee on Legal Ethics of W. Va. State Bar v. Cometti*, 189 W. Va. 262, 267, 430 S.E.2d 320, 325, 1993 W. Va. LEXIS 44, ***13 (1993); *see also Del. CWC Liquidation Corp. v Martin*, 213 W. Va. 617, 622, 584 S.E.2d 473, 478, 2003 W. Va. LEXIS 59, ***14 (2003) ("An attorney's nondelegable duty of loyalty to his client and the level of trust a client places in his attorney are also essential elements of the attorney-client relationship").

6 *Calvert*, 217 W. Va. at 690, 619 S.E.2d at 203, 2005 W. Va. LEXIS 77, ***16-17 (citations omitted).

7 *Id.* at 690, 619 S.E.2d at 203, 2005 W. Va. LEXIS 77, ***17 (citation omitted).

8 *Keenan v. Scott*, 64 W. Va. 137, 143, 61 S.E. 806, 809, 1908 W. Va. LEXIS 24, ***12-13 (1908); *Lawyer Disciplinary Bd. v. Nace*, 232 W. Va. 661, 671, 753 S.E.2d 618, 628, 2013 W. Va. LEXIS 260, ***28 (2013) (citation omitted); *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 160, 697 S.E.2d 740, 752, 2010 W. Va. LEXIS 85, ***32-33 (2010); *Committee on Legal Ethics of the West Virginia State Bar v. Simmons*, 184 W. Va. 183, 186, 399 S.E.2d 894, 897, 1990 W. Va. LEXIS 210, ***8-9 (1990).

9 *Nace*, 232 W. Va. at 671, 753 S.E.2d at 628, 2013 W. Va. LEXIS 260, ***27; *Mazzone*, 226 W. Va. at 159, 697 S.E.2d at 751, 2010 W. Va. LEXIS 85, ***32; *Simmons*, 184 W. Va. at 186, 399 S.E.2d at 897, 1990 W. Va. LEXIS 210, ***9; *Keenan*, 64 W. Va. at 142, 143-144, 61 S.E. at 809, 1908 W. Va. LEXIS 24, ***10, 13.

10 *Calvert*, 217 W. Va. at 694, 619 S.E.2d at 207, 2005 W. Va. LEXIS 77, ***32.

11 *Nace*, 232 W. Va. at 671, 753 S.E.2d at 628, 2013 W. Va. LEXIS 260, ***27 (citations omitted).

12 *Calvert*, 217 W. Va. at 690, 619 S.E.2d at 203, 2005 W. Va. LEXIS 77, ***17 ("Standing is defined as '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'").

13 *State ex rel. DeFrances v. Bedell*, 191 W. Va. 513, 517, 446 S.E.2d 906, 910, 1994 W. Va. LEXIS 113, ***10 (1994).

14 *Id.* at 686-688, 694, 619 S.E.2d at 199-201, 207, 2005 W. Va. LEXIS 77, ***4-11, 32.

15 *Nace*, 232 W. Va. at 665-666, 671, 753 S.E.2d at 622-623, 628, 2013 W. Va. LEXIS 260, ***6-13, 26. Such an agreement is only valid if (1) the client is independently represented in making the agreement or (2) the attorney advised the client, in writing, that representation was appropriate in connection with the matter. *Cometti*, 189 W. Va. at 270, 430 S.E.2d at 328, 1993 W. Va. LEXIS 44, ***24; West Virginia Rules of Professional Conduct (WVRPC) Rule 1.8(h).

16 *Nace*, 232 W. Va. at 671, 753 S.E.2d at 628, 2013 W. Va. LEXIS 260, ***28-29 ("*Keenan* [64 W. Va. 137, 61 S.E. 809] requires two actions for the formation of an attorney-client relationship: (1) that the client express a desire to employ the attorney and (2) that there be a corresponding consent on the part of the attorney to act for him in a professional matter.").

17 WVRPC Rule 1.2(c) states: "A lawyer may limit the objectives of the representation if the client consents after consultation."

18 *Armor*, 207 W. Va. at 682-683, 535 S.E.2d at 747-748, 2000 W. Va. LEXIS 97, ***32; *See also State v. Layton*, 189 W. Va. 470, 486, S.E.2d 740, 756, 1993 W. Va. LEXIS 58, ***49-50 (1993) ("To prevail on a claim that counsel acting in an advisory or other limited capacity has rendered ineffective assistance, a self-represented defendant must show that counsel failed to perform competently within the limited scope of the duties assigned to or assumed by counsel.") (emphasis in original) (citations omitted). WVRPC Rule 1.8(h) states: A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith. *See also Cometti*, 189 W. Va. at 270, 430 S.E.2d at 328, 1993 W. Va. LEXIS 44, ***24-25.

19 West Virginia Rules for Admission to the Practice of Law (WVRAPL) Rule 8.0(c)(8) states: In order to appear pro hac vice as counsel in any matter pending before a tribunal in the State of West Virginia, an out-of-state lawyer shall deliver to local counsel to file with the tribunal — and The West Virginia State Bar — a verified application listing… (8) local counsel's agreement to participate in the matter evidenced by the local attorney's endorsement upon the verified statement of application, or by written statement of the local attorney attached to the application…

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20 *Armor*, 207 W. Va. at 684, 535 S.E.2d at 749, 2000 W. Va. LEXIS 97, ***38-39. Per WVRAPL Rule 8.0(b): Local counsel shall personally appear and participate in pretrial conferences, hearings, trials, or other proceedings actually conducted before the tribunal. Local counsel shall further attend the taking of depositions and other events that occur in proceedings that are not actually conducted before the judge, tribunal or other body of the State of West Virginia, unless the presiding judge permits local counsel to appear by telephone or other electronic means. Local counsel associating with an out-of-state lawyer in a particular case shall accept joint responsibility with the out-of-state lawyer to the client, other parties, witnesses, other counsel and to the tribunal in that particular case. Any pleading or other paper required to be served (whether relating to discovery or otherwise) shall be invalid unless it is physically or electronically signed by local counsel. The tribunal in which such case is pending shall have full authority to deal with local counsel exclusively in all matters connected with the pending case. If it becomes necessary to serve notice or process in the case, any notice or process served upon local counsel shall be deemed valid as if served on the out-of-state lawyer.

21 *Sheetz, Inc.*, 209 W. Va. at 333, 547 S.E.2d at 271, 2001 W. Va. LEXIS 36, ***33.

22 *Rexroad*, 191 W. Va. at 212, 444 S.E.2d at 569, 1994 W. Va. LEXIS 52, ***9, *citing* WVRPC Rule 1.7.

23 *Clark v. Druckman*, 218 W. Va. 427, 432, 624 S.E.2d 864, 869, 2005 W. Va. LEXIS 151, ***14 (2005).

24 *Clark*, 218 W. Va. at 434, 624 S.E.2d at 871, 2005 W. Va. LEXIS 151, ***20.

25 *Id.* at 435, 624 S.E.2d at 872, 2005 W. Va. LEXIS 151, ***26.

26 *CSX Transp. Inc. v. Gilkison*, 2007 U.S. Dist. LEXIS 18875, *14 (2007).

27 *Martin*, 213 W. Va. at 623, 584 S.E.2d at 479, 2003 W. Va. LEXIS 59, ***20.

28 *See, supra*, footnotes 1 and 4.

29 *Sells*, 220 W.Va. at 137-138, 640 S.E.2d at 200-210, 2006 W. Va. LEXIS 99, ***3-5.

30 *Id.* at 140, 640 S.E.2d at 203, 2006 W. Va. LEXIS 99, ***14.

31 *Rexroad*, 191 W. Va. at 210-211, 444 S.E.2d at 567-568, 1994 W. Va. LEXIS 52, ***3-4.

32 *Id.* at 210-211, 444 S.E.2d at 568, 1994 W. Va. LEXIS 52, ***5-6.

33 *Id.* at 210-211, 444 S.E.2d at 568, 1994 W. Va. LEXIS 52, ***8.

34 *Sheetz, Inc.*, 209 W. Va. at 334, 547 S.E.2d at 272, 2001 W. Va. LEXIS 36, ***34, *citing West Virginia Rule of Evidence*, Rule 702.

35 *Id.* at 333 n.13, 547 S.E.2d at 271 n.13, 2001 W. Va. LEXIS 36, ***33 n.13.

36 *Keister*, 182 W. Va. at 749, 391 S.E.2d at 899, 1990 W. Va. LEXIS 42, ***10-11 (citations omitted); Sells, 220 W.Va. at 140, 640 S.E.2d at 203, 2006 W. Va. LEXIS 99, ***13; Calvert, 217 W. Va. at 694-695, 619 S.E.2d at 2007-208, 2005 W. Va. LEXIS 77, ***33-34; *Rexroad*, 191 W. Va. at 212 n.4 & 5, 444 S.E.2d at 568 n.4 & 5, 1994 W. Va. LEXIS 52, ***6 n.4 & 5.

37 *Keister*, 182 W. Va. at 750, 391 S.E.2d at 900, 1990 W. Va. LEXIS 42, ***15. In a case which is cited in Keister and originated in the United States Court for the Eastern District of Virginia, the Fourth Circuit noted: To prevail in a malpractice action based on an attorney's alleged negligence in connection with litigation, the general rule is that the negligence is actionable only if the claimed damages were proximately caused by the negligence. *Maryland Casualty Co. v. Price*, 231 F. 397 (4th Cir. 1916)… Thus, in making the determination that an attorney's negligence proximately caused a client's damages, the trier of the malpractice action must find that the result in the underlying action would have been different but for the attorney's negligent performance. *Stewart v. Hall*, 770 F.2d 1267, 1269, 1985 U.S. App. LEXIS 22609, **7 (4th Cir. 1985).

38 *Keister*, 182 W. Va. at 750, 391 S.E.2d at 900, 1990 W. Va. LEXIS 42, ***15-16.

39 *Casto*, 165 W. Va. at 787-788, 271 S.E.2d at 774, 1980 W. Va. LEXIS 597, ***1-3.

40 *Id.* at 790, 271 S.E.2d at 776, 1980 W. Va. LEXIS 597, ***6.

41 *Calvert*, 217 W. Va. at 687-688, 619 S.E.2d at 200-201, 2005 W. Va. LEXIS 77, ***9-10.

42 *Id.* at 695, 619 S.E.2d at 208, 2005 W. Va. LEXIS 77, ***34.

43 *Id.* at 696, 619 S.E.2d at 209, 2005 W. Va. LEXIS 77, ***38-39.

44 *Humphries*, 227 W. Va. at 633, 712 S.E.2d at 801, 2011 W. Va. Lexis 52, ***17.

45 *Id.* at 638, 712 S.E.2d at 806, 2011 W. Va. Lexis 52, ***39.

46 *Maryland Casualty*, 231 F. at 402-403, 1916 U.S. App. LEXIS 1658, **9 (emphasis added).

47 *Keister*, 182 W. Va. at 749, 391 S.E.2d at 899, 1990 W. Va. LEXIS 42, ***10-11 (citations omitted); *Sells*, 220 W.Va. at 140, 640 S.E.2d at 203, 2006 W. Va. LEXIS 99, ***13; *Calvert*, 217 W. Va. at 694-695, 619 S.E.2d at 2007-208, 2005 W. Va. LEXIS 77, ***33-34; *Rexroad*, 191 W. Va. at 212 n.4 & 5, 444 S.E.2d at 568 n.4 & 5, 1994 W. Va. LEXIS 52, ***6 n.4 & 5.

48 *Stewart*, 770 F.2d at 1269, 1985 U.S. App. LEXIS 22609, **7.

49 *Keister*, 182 W. Va. at 750, 391 S.E.2d at 900, 1990 W. Va. LEXIS 42, ***13.

50 *Id.* at 751, 391 S.E.2d at 901, 1990 W. Va. LEXIS 42, ***19-20.

51 *Better Homes, Inc. v. Rodgers*, 195 F. Supp. 93, 97, 1961 U.S. Dist. LEXIS 2782, **12-13 (N.D. W.Va. 1961). If it should be the law that the necessity of undertaking the functions of the Supreme Court of Appeals, in the limited sense hereinbefore outlined, renders the proof of damages *too remote, speculative and uncertain* to receive cognizance, it is apparent that no lawyer can ever be held financially responsible for admitted negligence in failing to perfect an appeal from a judgment adverse to his client. I do not believe that that is or should be the law. The integrity of the Bar as an essential part of our judicial system is too important to permit its reputation to be impugned by a justifiable charge that its members are free of an obligation to respond in damages for breach of the ordinary standards of due care, simply because the damages are difficult of ascertainment. *Id.* at 96, 1961 U.S. Dist. LEXIS 2782, **9-10 (emphasis added).

52 *Keister*, 182 W. Va. at 751, 391 S.E.2d at 901, 1990 W. Va. LEXIS 42, ***17-18.

53 W.Va. Code §30-2-11, Liability of attorney to client for neglect of duty, states: Every attorney at law shall be liable to his client for any damages sustained by the client by the neglect of his duty as such attorney.

54 W.Va. Code §30-2-12, Liability of attorney or agent for loss of debt or money, states: If any attorney at law or agent shall, by his negligence or improper conduct, lose any debt or other money of his client, he shall be charged with the principal of what is so lost, and interest thereon, in like manner as if he had received such principal, and it may be recovered from him by suit or motion.

55 W.Va. Code §30-2-13, Liability of attorney for failure to pay over moneys collected; penalty, states: If any attorney receive money for his client as such attorney and fail to pay the same on demand, or within six months after receipt thereof, without good and sufficient reason for such failure, it may be recovered from him by suit or motion; and damages in lieu of interest, not exceeding fifteen percent per annum until paid, may be awarded against him, and he shall be deemed guilty of a misdemeanor and be fined not less than twenty nor more than five hundred dollars.

56 *Casto*, 165 W. Va. at 790, 271 S.E.2d at 776, 1980 W. Va. LEXIS 597, ***5-6; *Smith*, 198 W.Va. at 502-503, 482 S.E.2d at 119-120, 1996 W. Va. LEXIS 255, ***15-16.

57 West Virginia Code §55-2-6 states: Every action to recover money, which is founded upon an award, or on any contract other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have accrued, that is to say: If the case be upon an indemnifying bond taken under any statute, or upon a bond of an executor, administrator or guardian, curator, committee, sheriff or deputy sheriff, clerk or deputy clerk, or any other fiduciary or public officer, within ten years; if it be upon any other contract in writing under seal, within ten years; if it be upon an award, or upon a contract in writing, signed by the party to be charged thereby, or by his agent, but not under seal, within ten years; and if it be upon any other contract, express or implied, within five years, unless it be an action by one party against his copartner for a settlement of the partnership accounts, or upon accounts concerning the trade or merchandise between merchant and merchant, their factors or servants, where the action of account would lie, in either of which cases the action may be brought until the expiration of five years from a cessation of the dealings in which they are interested together, but not after.

58 West Virginia Code §55-2-12 (1931) states: Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damage s for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

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59 *Clark v. Milam*, 192 W. Va. 398, 402, 452 S.E.2d 714, 718, 1994 W. Va. LEXIS 224, ***11 (1994) (citations omitted); *Dunn v. Rockwell*, 225 W. Va. 43, 51; 689 S.E.2d 255, 263; 2009 W. Va. LEXIS 127, ***18 (2009). To formally clarify our case law, we now hold that the "discovery rule" is generally applicable to all torts, unless there is a clear statutory prohibition to its application. "In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury." Syllabus Point 4, *Gaither v. City Hosp., Inc., 199 W.Va. 706, 487 S.E.2d 901 (1997)*. In most cases, the typical plaintiff will "discover" the existence of a cause of action, and the statute of limitation will begin to run, at the same time that the actionable conduct occurs. We further hold that under the discovery rule set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc., supra*, whether a plaintiff "knows of" or "discovered" a cause of action is an objective test. The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action. This objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action. Finally, a five-step analysis should be applied to determine whether a cause of action is time-barred. First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if material questions of fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc., supra*. Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact. *Dunn*, 225 W. Va. at 52-53 689 S.E.2d at 264-265, 2009 W. Va. LEXIS 127, ***24-27.

60 *VanSickle v. Kohout*, 215 W. Va. 433, 437, 599 S.E.2d 856, 860, 2004 W. Va. LEXIS 65, ***11-12 (2004); *see also Syl. Pt. 3, Hall*, 184 W. Va. at 466, 400 S.E.2d at 901, 1990 W. Va. LEXIS 255, ***2, *Syl. Pt.2, Family Sav. & Loan v. Ciccarello*, 157 W. Va. 983, 983, 207 S.E.2d 157, 157, 1974 W. Va. LEXIS 246, ***1 (1974): Where, in a civil action against an attorney, the plaintiff alleges that he suffered damages by reason of the defendant's negligence in certifying as good and marketable the title to certain real property, the period of the applicable statute of limitations does not commence to run against the plaintiff's cause of action until he learns, or by the exercise of reasonable diligence should have learned, of the defect in the title.

61 *VanSickle*, 215 W. Va. at 437-438, 599 S.E.2d at 860-861, 2004 W. Va. LEXIS 65, ***11-12.

60 *Smith*, 198 W. Va. at 506, 482 S.E.2d at 123, 1996 W. Va. LEXIS 255, ***28-29.

63 *Id.* at 503, 482 S.E.2d at 12o, 1996 W. Va. LEXIS 255, ***17-19.

64 *Smith*, 198 W. Va. at 507, 482 S.E.2d at 124, 1996 W. Va. LEXIS 255, ***29.

65 *Smith*, 198 W. Va. at 504, 482 S.E.2d at 121, 1996 W. Va. LEXIS 255, ***19-20.

66 *Smith*, 198 W. Va. at 505, 482 S.E.2d at 122, 1996 W. Va. LEXIS 255, ***23-24, citing Syl. Pt. 2, Clark v. Milam, 192 W. Va. at 399, 452 S.E.2d at 715, 1994 W. Va. LEXIS 224, ***1.

67 *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 342, 256 S.E.2d 879, 885, 1979 W. Va. LEXIS 403, ***17 (1979). Our present judicial rule of contributory negligence is therefore modified to provide that a party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident.

68 *Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp.*, 249 Va. 426, 432, 457 S.E.2d 28, 32, 1995 Va. LEXIS 46, ***10 (1995). With respect to contributory negligence, we discern no logical reason for treating differently legal malpractice and medical malpractice actions. Both are negligence claims, and actions against attorneys for negligence are governed by the same principles applicable to other negligence actions.

69 *Mooney v. Frazier*, 225 W. Va. 358, 370 n.12, 693 S.E.2d 333, 345 n.12, 2010 W. Va. LEXIS 21, ***39-40 n.12 (2010) (citations omitted).

70 W.Va. Code §29-21-20. Appointed counsel immune from liability, states: Any attorney who provides legal representation under the provisions of this article under appointment by a circuit court, family court or by the Supreme Court of Appeals, and whose only compensation therefor is paid under the provisions of this article, shall be immune from liability arising from that representation in the same manner and to the same extent that prosecuting attorneys are immune from liability.

71 *Powell v. Wood County Commission*, 209 W. Va. 639, 643, 550 S.E.2d 617, 621, 2001 W. Va. LEXIS 59, ***10-11 (2001).

72 *Id.* at 644, 550 S.E.2d at 622, 2001 W. Va. LEXIS 59, ***14.

73 *Mooney*, 225 W. Va. at 370 & 370 n.12, 693 S.E.2d at 345 & 345 n.12, 2010 W. Va. LEXIS 21, ***36 & 39 n.12.

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Malpractice is negligence, and negligence is determined objectively.[1] To establish a legal malpractice claim under Wisconsin law, a plaintiff is generally required to allege and prove four elements: (1) existence of an attorney-client relationship; (2) acts or omissions constituting negligence; (3) proximate cause; and (4) injury.[2] Alleged malpractice often deprives the client of the opportunity to successfully prosecute or defend an action.[3] To prevail on a malpractice claim, the plaintiff typically must prove the alleged negligence caused the plaintiff's inability to pursue or defend the claim successfully. Accordingly, a legal malpractice plaintiff is usually obligated to prove two cases in a single proceeding.[4] This is commonly referred to as the "suit-within-a-suit" requirement.[5] The causation element dictates that the merits of the malpractice claim rest upon the merits of the original or underlying claim.[6]

Attorney-Client Relationship

The plaintiff must establish the existence of an attorney-client relationship with the defendant.[7] Generally, the formation of an attorney-client relationship rests upon principles of agency and contract law, and contract law determines whether such a relationship is created.[8] In the absence of an express written contract, an attorney-client relationship may be implied by the words and actions of the parties.[9] However, where no written contract exists, the existence of an attorney-client relationship presents a fact question.[10]

Negligence/Breach

Because malpractice is founded on principles of negligence, a malpractice plaintiff must prove the attorney's conduct breached a duty owed to the plaintiff. Generally, a lawyer's duty in rendering legal services to a client is to exercise the degree of care, skill, and judgment which is usually exercised under like or similar circumstances.[11] A lawyer is not held to a standard of perfection or infallibility of judgment, but must exercise their best judgment in light of their education and experience.[12]

An attorney will generally not be held accountable for an error in judgment if the attorney acts in good faith and their acts are well-founded and in the best interest of their

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client.[13] "Judgment involves a reasoned process under the presumption that the attorney as accumulated all available pertinent facts to arrive at the judgment."[14] However, an attorney's failure to exercise diligence in obtaining pertinent facts can constitute a breach of the duty of care towards a client.[15]

Typically, expert testimony is required to establish the parameters of acceptable professional conduct. However, where an attorney's breach of duty is so obvious the court may determine it as a matter of law or where the standard of care is within the ordinary knowledge and experiences of a lay juror, expert testimony is not required.[16]

Proximate Cause/But For

To establish, causation, a legal malpractice plaintiff usually must prove the merits of the underlying action.[17] For example, in *Lewandowski v. Continental Cas. Co.*, 88 Wis. 2d 271, 276 N.W.2d 284 (1979), the plaintiff was barred from pursuing a malpractice claim based upon a failure to comply with the applicable statute of limitations involved with the plaintiff's personal injury claim.[18] To resolve the causation and damages elements of the plaintiff's malpractice claim, the court proceeded with a trial of the underlying negligence action between the drivers of the involved vehicles.[19] The purpose of this "suit-within-a-suit" process is to determine what the outcome *should* have been had the issue been properly presented in the first instance.[20] If the plaintiff fails to prove the "suit-within-a-suit", the attorney's alleged negligence was not the proximate cause of the plaintiff's damages, because the underlying case would have failed even in the absence of the claimed negligence.

In other cases, the claim may arise from a less-than-favorable settlement or outcome. For example, the claim in *Helmbrecht v. St. Paul Insurance Co.*, 122 Wis. 2d 94, 362 N.W.2d 118 (1985) arose out of a settlement in a divorce proceeding. The plaintiff alleged the attorney's failure to adequately investigate marital assets resulted in a less favorable settlement than if the attorney had conducted a diligent investigation.[21] Thus, the claim was not for the total loss of an action, as in *Lewandowski*, but for **damages resulting from** the handling of an action.

Damages

In malpractice cases involving the total loss of an action, as in *Lewandowski*, the measure of damages is the amount that would have been recovered by the client absent the attorney's negligence.[22] In cases involving damages resulting from the handling of an action, such as Helmbrecht, the measure of damages is the difference between the amount actually recovered and the amount that would have been recovered if not for the attorney's negligence.[23] Wisconsin law also allows for an award of punitive damages where there is evidence the attorney acted in intentional disregard of the plaintiff's rights.[24]

Defenses and Other Considerations

The most common defense in legal malpractice claims arises in connection with the "suit-within-a-suit" requirement. Specifically, a defendant often attempts to prevail by showing the plaintiff would not have been successful in the underlying case irrespective of the conduct complained of *i.e.* the defendant's claimed negligence was not the cause of the plaintiff's damages. However, unlike in an ordinary negligence case, a malpractice plaintiff's failure to mitigate damages is not always a viable defense.[25]

Contributory negligence is an available defense to a malpractice claim, but is waived if not pleaded.[26] The statute of limitations applicable to legal malpractice claims is six years from the date the cause of action accrues.[27] A claim does not accrue and the limitations period does not begin to run under Wisconsin law until the plaintiff discovers, or by exercise of reasonable diligence, should have discovered the injury.[28] Under this "discovery rule," the action accrues when the client discovers the essential facts constituting a cause of action.[29] If a claim is not asserted within six years of its accrual, it is time-barred.

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1 *Helmbrecht v. St. Paul Ins. Co.*, 362 N.W.2d 118, 125, 122 Wis.2d 94, 105 (1985).
2 *See Lewandowski v. Continental Casualty Co.*, 276 N.W.2d 284, 287, 88 Wis.2d 271, 277 (1979).
3 *See Glamann v. St. Paul Fire & Marine Ins. Co.*, 424 N.W.2d 924, 926, 144 Wis.2d 865, 870 (1988).
4 *See Acharya v. Carroll*, 448 N.W.2d 275, 279-80 n.6, 152 Wis.2d 330, 339 n.6 (Ct. App. 1989).
5 *See Glamann*, 424 N.W.2d at 926, 144 Wis.2d at 870.
6 *See Acharya*, 448 N.W.2d at 279-80 n.6, 152 Wis.2d at 339 n.6.
7 *Lewandowski*, 276 N.W.2d at 287, 88 Wis.2d at 277.
8 *Security Bank v. Klicker*, 418 N.W.2d 27, 30, 142 Wis.2d 289, 295 (Ct. App. 1987).
9 *Id.*
10 *Security Bank*, 418 N.W.2d at 30-33, 142 Wis.2d at 294-99 (declining to find, as a matter of law, attorney for general partnership was also attorney for each individual partner).
11 *Helmbrecht*, 362 N.W.2d at 128, 122 Wis.2d at 111.
12 *Id.*
13 *Helmbrecht*, 326 N.W.2d at 130-31, 122 Wis.2d at 117.
14 *Helmbrecht*, 326 N.W.2d at 131, 122 Wis.2d at 117 (quoting *Glenna v. Sullivan*, 245 N.W.2d 869, 873 (Minn. 1976) (Todd, J., concurring specially)).
15 *See Helmbrecht*, 362 N.W.2d at 130-131, 122 Wis.2d at 117.
16 *Helmbrecht*, 362 N.W.2d at 128, 122 Wis.2d at 111; *see also Olfe v. Gordon*, 286 N.W.2d 573, 576-77, 93 Wis.2d 173, 181-83 (1980).
17 *See Helmbrecht*, 362 N.W.2d at 124, 122 Wis.2d at 103.
18 *Lewandowski*, 276 N.W.2d at 285, 88 Wis.2d at 272.
19 *Id.*
20 *Lewandowski*, 276 N.W.2d at 289, 88 Wis.2d at 281.
21 *Helmbrecht*, 362 N.W.2d at 128-29, 122 Wis.2d at 111-13.
22 *Lewandowski*, 276 N.W.2d at 287, 88 Wis.2d at 277-78.
23 *Helmbrecht*, 362 N.W.2d at 126, 122 Wis.2d at 108.
24 WIS. STAT. § 895.043(3); *Berner Cheese Corp. v. Krug*, 752 N.W.2d 800, 814, 312 Wis.2d 251, 279 (2008).
25 *See Langreck v. Wisconsin Lawyers Mut. Ins. Co.*, 594 N.W.2d 818, 821, 226 Wis.2d 520, 526 (Ct. App. 1999) (failure to contest foreclosure action was reasonable when attorney advised that it would be futile).
26 *Gustavson v. O'Brien*, 274 N.W.2d 627, 633, 87 Wis.2d 193, 204 (1979); *Musil v. Barron Electrical Co-operative*, 108 N.W.2d 652, 661, 13 Wis.2d 342, 359 (1961).
27 WIS. STAT. § 893.53; Acharya, 448 N.W.2d at 279, 152 Wis.2d at 337.
28 *Hansen v. A.H. Robins, Inc.*, 335 N.W.2d 578, 583, 113 Wis.2d 550, 560 (1983); *Hennekens v. Hoerl*, 465 N.W.2d 812, 819, 160 Wis.2d 144, 160 (1991).
29 *See Hennekens*, 465 N.W.2d at 822, 160 Wis.2d at 167-68 (client's receipt of demand letter was sufficient notice of injury and claim against attorney who had represented client in connection with associated land transaction).

Wyoming

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To prevail in an action for legal malpractice under Wyoming law, a plaintiff client must plead and prove the following elements: (1) the existence of a duty arising from the attorney/client relationship; (2) the accepted standard of legal care; and (3) the departure by the attorney from the standard of care which causes harm to the client.[1]

The standard of care to which an attorney must adhere in Wyoming is "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction."[2] A party seeking to establish the standard adhered to by a "reasonable, careful and prudent" lawyer and that same was or was not breached must typically use expert testimony.[3] Expert testimony is likewise necessary to prove proximate cause.[4] However, an exception exists "when a lay person's common sense and experience are sufficient to establish the standard of care."[5]

Proving Causation

The Supreme Court of Wyoming has stated that, as in all negligence actions, the plaintiff in a legal malpractice action "must prove that the breach of the standard of care was both the cause in fact and the proximate cause of the injury."[6] The Court defined the required causation as follows:

> [I]f the conduct is "that cause which in natural and continuous sequence, unbroken by a sufficient intervening cause produces the injury, without which the result would not have occurred," it must be identified as a substantial factor in bringing about the harm. If, however, it created only a condition or occasion for the harm to occur then it would be regarded as a remote, not a proximate, cause, and would not be a substantial factor in bringing about the harm.[7]

In order to prevail in a malpractice case in which the attorney represented the former client in a lawsuit, the client must prove the "case within a case", i.e. that the underlying action would have been successful but for the attorney's negligence.[8]

Wyoming

Damages

Wyoming recognizes the hybrid nature of a legal malpractice claim.[9] Although the standard of care element reflects the law of torts, Wyoming has held that the legal relationship between an attorney and his client is contractual in nature.[10] Therefore, "[e]ven though legal malpractice may be attributable to negligence on the part of the attorney, ... the right to recompense is based upon the breach of the contract with the client."[11] Accordingly, an aggrieved client generally may not recover extra-contractual damages, "except in those rare cases where the breach is accompanied by an independent tort."[12] In order to recover for an independent tort, the attorney's conduct must have been willful.[13]

Consequently, the damages recoverable for legal malpractice in Wyoming are those typically available for breach of contract, which are designed to put the plaintiff in the same position as if the contract had been performed.[14] Compensatory damages are calculated as if the attorney had not been negligent and the underlying action was successful.[15] Proper deductions from a breach of contract damages award include expenses the plaintiff would have incurred if the defendant had fully performed the contract.[16] Therefore, "an aggrieved client should be entitled to recover from the negligent attorney the amount he would have expected to recoup if his underlying action had been successful."[17] Consequently, it is appropriate to deduct the attorney's contingency fee from the amount the jury determines the underlying judgment would have been had the attorney not been negligent.[18]

Defenses

In Wyoming, defenses to attorney malpractice actions include: plaintiff's inability to demonstrate he would have prevailed in the underlying action; failure to prove actual damages; failure to establish an attorney-client relationship; failure to proffer expert testimony establishing the standard of care; failure to proffer expert testimony establishing the attorney departed from the standard of care; waiver of alleged conflict; and failure to file the action within the applicable statute of limitations period.

The statute of limitations for attorney malpractice claims is two years.[19] Wyoming is a discovery state and, therefore, the statute of limitations period begins to run when the plaintiff knows or has reason to know that a cause of action exists.[20]

Wyoming recognizes a client's waiver of a potential conflict of interest as a complete defense against related malpractice claims. The Wyoming Supreme Court has held that a former client waived the right to allege a conflict of interest where the former client failed to seek disqualification of an attorney representing a conflicting interest. The attorney asserting the defense must meet the burden of showing that the client had the requisite knowledge of the conflict and decided to relinquish the right to object.[21]

Notably, the Supreme Court of Wyoming has interpreted the Wyoming Comparative Negligence Statute (Wyo. Stat. Ann. § 1-1-109) to be limited to those actions based in negligence only and, therefore, has refused to extend the statute to legal malpractice actions, which are based on claims for breach of contract and breach of fiduciary duty.[22] Accordingly, the Court held that that the statute does not bar recovery by a negligent plaintiff in a legal malpractice action.[23]

Additional Considerations

Wyoming has expressly declined to adopt the continuous representation doctrine, which tolls the running of the statute of limitations until the attorney ceases to represent the client.[24]

There is no indication that Wyoming requires a plaintiff to file an Affidavit of Merit or Certificate Review as a prerequisite to a legal malpractice claim.

Wyoming

1 *Rivers v. Moore, Myers & Garland, LLC*, 236 P.3d 284, 290-91 (Wyo. 2010) (citing *Horn v. Wooster*, 165 P.3d 69, 72 (Wyo. 2007); Rino v. Mead, 55 P.3d 13, 19 (Wyo.2002)).
2 *Moore v. Lubnau*, 855 P.2d 1245, 1248 (Wyo.1993).
3 *Bevan v. Fix*, 42 P.3d 1013, 1026 (Wyo. 2002).
4 *Bevan v. Fix*, 42 P.3d 1013, 1026-27 (Wyo. 2002); *Meyer v. Mulligan*, 889 P.2d 509, 516-17 (Wyo. 1995).
5 *Bevan v. Fix*, 42 P.3d 1013, 1026 (Wyo. 2002) (citing *Moore v. Lubnau*, 855 P.2d 1245, 1249 (Wyo.1993)).
6 *Meyer v. Mulligan*, 889 P.2d 509, 516 (Wyo. 1995).
7 *Anderson v. Duncan*, 968 P.2d 440, 442 (Wyo. 1998) (quoting *Buckley v. Bell*, 703 P.2d 1089, 1092 (Wyo. 1985)).
8 *Horn v. Wooster*, 165 P.3d 69, 72 (Wyo. 2007).
9 *Horn v. Wooster*, 165 P.3d 69, 72 (Wyo. 2007) (citing *Long–Russell v. Hampe*, 39 P.3d 1015, 1019 (Wyo.2002)).
10 *Horn v. Wooster*, 165 P.3d 69, 72 (Wyo. 2007) (citing *Jackson State Bank v. King*, 844 P.2d 1093, 1095 (Wyo.1993).
11 *Horn v. Wooster*, 165 P.3d 69, 72 (Wyo. 2007) (citing *Jackson State Bank v. King*, 844 P.2d 1093, 1096 (Wyo.1993).
12 *Horn v. Wooster*, 165 P.3d 69, 73 (Wyo. 2007) (citing *Long–Russell v. Hampe*, 39 P.3d 1015, 1019 (Wyo.2002)).
13 *Horn v. Wooster*, 165 P.3d 69, 73 (Wyo. 2007) (citing *Long–Russell v. Hampe*, 39 P.3d 1015, 1020 (Wyo.2002)).
14 *Horn v. Wooster*, 165 P.3d 69, 73 (Wyo. 2007) (citing *JBC of Wyo. Corp. v. City of Cheyenne*, 843 P.2d 1190, 1195 (Wyo.1992); *Ruby Drilling Co. v. Duncan Oil Co.*, 47 P.3d 964, 973 (Wyo.2002)).
15 *Horn v. Wooster*, 165 P.3d 69, 74 (Wyo. 2007).
16 *Horn v. Wooster*, 165 P.3d 69, 73 (Wyo. 2007).
17 *Horn v. Wooster*, 165 P.3d 69, 73 (Wyo. 2007).
18 *Horn v. Wooster*, 165 P.3d 69, 73 (Wyo. 2007).
19 Wyo. Stat. Ann. § 1-3-107; *Ballinger v. Thompson*, 118 P.3d 429 (WY 2005).
20 *Connell v. Barrett*, 949 P.2d 871, 874 (Wyo. 1997) (citing *Bredthauer v. Christian, Spring, Seilbach and Associates*, 824 P.2d 560, 562 (Wyo.1992); *Mills v. Garlow*, 768 P.2d 554, 555 (Wyo.1989)).
21 *Bevan v. Fix*, 42 P.3d 1013, 1026 (Wyo. 2002).
22 *Jackson State Bank v. King*, 844 P.2d 1093, 1096 (Wyo. 1993)
23 *Jackson State Bank v. King*, 844 P.2d 1093, 1096 (Wyo. 1993)
24 *Connell v. Barrett*, 949 P.2d 871, 874 (Wyo. 1997) (citing *Hiltz v. Robert W. Horn*, P.C., 910 P.2d 566, 571 (Wyo. 1996)).

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