CHAPTER 16: PROFESSIONAL LIABILITY

ELEMENTS OF MALPRACTICE

The elements of legal malpractice are: (1) an attorney-client relationship; (2) negligence; (3) proximate cause; and (4) damages. *See* ***Glaze v. Larsen***, 207 Ariz. 26 (2004).

ATTORNEY-CLIENT RELATIONSHIP

First-Party Claims: Liability to Clients

The relationship of attorney and client can be express or implied from circumstances constituting a request for an agreement to render legal assistance or advice by the attorney. ***Franko v. Mitchell***, 158 Ariz. 391 (App. 1988). An attorney-client relationship may exist even when the attorney renders services gratuitously. *Id*. The burden of establishing that an attorney-client relationship exists rests on the claimant. *See* ***Solomon v. Aberman***, 196 Conn. 359, 493 A.2d 193 (1985).

Because attorneys owe duties to their clients, clients are entitled to bring direct causes of action for breaches of that duty. Whether an attorney-client relationship exists is usually an issue of fact. *Franko.*

An attorney hired by an insurance company to defend an insured is not the insurance company's "agent," and the insurance company is generally not vicariously liable for the attorney's negligence. *See* ***Barmat v. John & Jane Doe Partners A-D***, 155 Ariz. 519 (App 1987); ***Country Mut. Ins. Co. v. Martinez***, 2019 WL 1787313 (D. Ariz. 2019) ("[O]nce an insurer hires competent counsel and allows that counsel to perform as he deems appropriate, and insurer has discharged its duty to defend and cannot be liable for counsel's failures. Such failures must be attributed to counsel, not the insurer."). Exceptions to the rule against imposing vicarious liability on an insurer for defense counsel's negligence include when (i) the insurer retains counsel it knows, or should know, is not qualified, or (ii) the insurer directs or controls counsel's actions with respect to the negligent act. *Id*.; Restatement of the Law of Liability Insurance, § 12 (2019). But an insurance company can bring a malpractice suit against a lawyer it hired to defend its insured where the law firm provides legal services to both insurer and insured, even absent express agreement between insurer and law firm. ***Paradigm Ins. Co. v. Langerman Law Offices, P.A.***, 200 Ariz. 146 (2001).

Third-Party Claims: Liability to Non-Clients

Over 20% of all claims against attorneys are brought by non-clients. But the general rule is that attorneys do not owe a duty of care to non-clients. As a result, most lawsuits brought by non-clients are not brought under the theory of negligence, but rather as intentional torts such as aiding and abetting insurance bad faith, fraud, malicious prosecution, abuse of process, intentional infliction of emotional distress, invasion of privacy and defamation. There are, however, limited circumstances under which a non-client may sue a lawyer for negligence. Any duty owed by an attorney to a third

party is derivative of the duty owed by the attorney to the client. However, an allegation of attorney malpractice toward a client is not necessary to a third person's claim against the attorney. ***Paradigm Ins. Co. v. Langerman Law Offices, P.A.,*** 200 Ariz. 146 (2001) (expressly disapproving *Franko*'s language limiting a third-party claim against an attorney absent an allegation of malpractice to the client).

In ***Fickett v. Superior Court***, 27 Ariz. App. 793 (1976), the court addressed whether the attorney for a guardian owed a duty to the ward, and said yes; 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. In so holding, the court said the question of whether an attorney "is liable to" a non-client for negligent conduct involves the balancing of various factors, including: (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 an injury; (4) the closeness of connection between the defendant's conduct and the injuries suffered by the non-client; (5) the moral blame attached to the attorney's conduct; and (6) the policy of preventing future harm. Assuming the term "is liable to" referred to whether the attorney owed a duty to the ward (as opposed to breached his duty), the *Fickett* factors in determining duty are probably no longer viable in light of ***Gipson v. Kasey***, 214 Ariz. 141, 144 (2007). *Gipson* held that foreseeability is not a factor the court should consider when making determinations of duty; and that whether a defendant acted reasonably under the circumstances or proximately caused injury to a particular plaintiff are factual inquiries reserved for the jury when assessing breach and proximate cause. Whether a duty exists is a legal question for the court. Duties of care may arise from special relationships based on contract, family relations, or conduct undertaken by the defendant. ***Gipson v. Kasey***, 214 Ariz. at 145. Given the current "special relationships" test, *Fickett* would probably come out the same way today, but not because of the case-specific factors on which it relied. *See, e.g.,* ***Cal-Am Props. Inc. v. Edais Eng'g Inc***., 253 Ariz. 78 (2022).

> Today we revisit our holding in ***Donnelly Construction Company v. Oberg/Hunt/Gilleland***, 139 Ariz. 184, 187, 677 P.2d 1292, 1295 (1984), which held that a design professional's duty to use ordinary skill, care, and diligence in rendering professional services extends both to persons in privity with the professional and to persons foreseeably affected by a breach of that duty. We hold that under Arizona's post-*Gipson* framework, which repudiated foreseeability as a basis for duty, design professionals lacking privity of contract with project owners do not owe a duty to those owners to reimburse them for purely economic damages.

An attorney might be liable to a non-client if the non-client was a third-party beneficiary of an attorney-client relationship. For a non-client to qualify as a third-party beneficiary, (1) there must be a clear intention to benefit the third party, (2) the intention to benefit must be both intentional and direct, and (3) it must clearly appear that the attorney and client intended to recognize the third-party as the primary party in interest (e.g., the beneficiary of a will). *See Franko v. Mitchell*, *supra*.

NEGLIGENCE/BREACH OF DUTY

Standard of Care

An attorney is required to perform his or her professional services with that degree of care, skill, diligence and knowledge commonly exercised by members of the profession. An attorney is required to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of tasks which they undertake. ***Commercial Union Ins. Co. v. Lewis & Roca***, 183 Ariz. 250 (App. 1995). The standard of care applicable to attorneys usually needs to be established by expert testimony. ***Baird v. Pace***, 156 Ariz. 418 (App. 1987). But where an attorney's negligence is so grossly apparent that a lay person would have no difficulty recognizing it, or whether an attorney admits that he or she was negligent, expert testimony is not required. *See* ***Asphalt Engineers v. Galusha***, 160 Ariz. 134 (App. 1989). An attorney undertaking a task in a specialized area of the law must exercise the level of skill and knowledge possessed by those attorneys who practice in that specialty. ***Day v. Rosenthal***, 170 Cal.App.3d 1125, 217 Cal.Rptr. 89 (1985).

A lawyer is also a fiduciary with a duty of loyalty, confidentiality, and obedience to the client. ***Cecala v. Newman***, 532 F.Supp.2d 1118 (D. Ariz. 2007). As a result, *Cecala*, ostensibly applying Arizona law, held that the "duties of care and loyalty, though coextensive, create two independent bases of tort liability in Arizona." *Id*. The standard of care relates to the manner in which the attorney carries out the representation of the client (and is founded on principles of negligence), whereas the fiduciary obligations focus on the attorney's conduct with respect to his/her adherence to duties of loyalty and confidentiality. *Id*.

Breach of Duty

The law does not presume that an attorney is guilty of malpractice merely because their client is dissatisfied with the results; rather the law presumes that an attorney has discharged their duty. ***Molever v. Roush***, 152 Ariz. 367 (App. 1986). Whether an attorney has fallen below the standard of care is generally an issue of fact for the jury***. Baird v. Pace***, 156 Ariz. 418 (App. 1987).

As noted above, expert testimony is not necessary to establish a breach of duty where the negligence is so grossly apparent that even a lay person would have no difficulty recognizing it. ***Asphalt Eng'rs, Inc. v. Galusha***, 160 Ariz. 134 (App. 1989). Mere errors in judgment or mistakes on unsettled points of law are insufficient to establish a breach of the standard of care. ***Martin v. Burns***, 102 Ariz. 341 (1967). A violation of the rules of professional conduct does not, in and of itself, constitute malpractice. The rules are, however, evidence of the standard of care, and the requirements of the rules, along with expert testimony regarding whether the defendant attorney complied with those rules, is generally admissible. ***Elliott v. Videan***, 164 Ariz. 113 (App. 1989).

Where an attorney represents clients with conflicting interests, and the dual representation works to the detriment of one client, the conflict of interest may constitute legal malpractice. ***Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn***, 184 Ariz. 120 (1995).

Proximate Cause: "Case Within a Case"

Finding an expert to opine that an attorney breached his or her duty is usually the easy part of a legal malpractice claim. The difficult part is establishing that the alleged negligence adversely affected the client. For a plaintiff to prevail on a malpractice case, he or she must prove a proximate relationship between the alleged breach of duty and the plaintiff's damage. A legal malpractice action involves a "case within a case," i.e., a plaintiff must prove that but for the attorney's negligence, the result would have been different. *See* ***Hyatt Regency Phoenix Hotel v. Winston & Strawn***, 184 Ariz. 120 (App. 1995). The trier of fact in the legal malpractice action views the underlying case from the standpoint of what a reasonable judge or jury would have decided but for the attorney's negligence. ***Phillips v. Clancy***, 152 Ariz. 415 (App. 1986).

Damages

An attorney is liable in damages to his or her client for injuries sustained as a proximate consequence of the attorney's negligence or malpractice. ***Arizona Mgmt. Corp. v. Kallof***, 142 Ariz. 64 (App. 1984). Plaintiff may recover direct damages (actual monetary loss, attorney's fees and expenses), consequential damages (related economic losses, pain and suffering, injured reputation, etc.) and punitive damages. Negligence alone is insufficient to support a legal malpractice claim. The plaintiff must prove actual injury or damage. ***Amfac Distribution Corp. v. Miller***, 138 Ariz. 152 (1983). An attorney is not liable for any damages that are remote or speculative. ***Monthofer Invs. Ltd. P'ship v. Allen***, 189 Ariz. 422 (App. 1997). The proper measure of damages is the difference between what the plaintiff's pecuniary position is and what it would have been had the attorney not erred. ***Kohn v. Schiappa***, 281 N.J.Super. 235, 656 A.2d 1322 (1995). The proper measure of damages for an attorney's negligence causing dismissal of an underlying claim is the compensatory and punitive damages awarded by the jury in trial of case within a case. ***Elliott v. Videan***, 164 Ariz. 113 (App. 1989). Generally, although annoyance is a foreseeable result of an attorney's error, the emotional distress associated with the annoyance is not compensable in a legal malpractice action***. Pleasant v. Celli***, 18 Cal.App.4th 841, 22 Cal.Rptr.2d 663 (1993), *disapproved on other grounds*, ***Adams v. Paul***, 46 Cal.Rptr.2d 594 (1995). A defense attorney can be held liable for an increase in the cost of liability insurance where the lawyer's malpractice results in a judgment against the client. ***Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark***, 39 F.3d 812 (7th Cir. 1994).

As discussed in Chapter 4, in personal injury actions the collateral source rule applies to preclude evidence that health insurance paid a plaintiff's medical bills, that the provider adjusted/reduced the billed amount for medical expenses, etc. Although Arizona has not expressly addressed the issue, many courts have held that in a legal malpractice claim involving an underlying claim for personal injuries, the collateral source rule is inapplicable, and evidence can be introduced showing a plaintiff's medical bills were paid by third parties (such as health insurance).

Attorney's fees are generally not recoverable in legal malpractice actions. *See* ***Barmat v. John & Jane Doe Partners A-D***, 155 Ariz. 519, 520 (1987).

Where the injury sustained by the client is an adverse judgment, the judgment sets the measure of direct damages. If the injury is claimed to be an excessive judgment, the proper measure of damages is the amount of the judgment, not the amount the client paid pursuant to the judgment. *Monthofer Investments*, *supra*. The damages are the difference between the judgment and what the judgment would have been had the attorney properly defended the case. ***Gruse v. Belline***, 138 Ill.App.3d 689, 486 N.E.2d 398 (1985).

Punitive damages may be recoverable against an attorney where the attorney makes false representations with the intent to deceive the client, or where an attorney makes such statements with reckless or conscious disregard of the truth. ***Fiedler v. Adams***, 466 N.W.2d 39 (Minn. Ct. App. 1991). A punitive damage award of $3 million in a malpractice action against a law firm arising from an undisclosed conflict of interest did not violate due process; the award was proportionate to the firm's financial position (approximately 3.1% of firm's gross revenues for the year) and less than three times the amount of compensatory damages. ***Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn***, 184 Ariz. 120 (1995).

As a general rule, a plaintiff in a legal malpractice case cannot recover damages for emotional distress if there is a monetary loss. ***Reed v. Mitchell Timbanard, P.C.***, 183 Ariz. 313 (App. 1995). Cases from other jurisdictions, however, hold that where the only injury suffered by the plaintiff is emotional distress (i.e., where the lawyer's malpractice results in the loss of liberty or a family relationship, etc.) recovery for distress is permissible. *See e.g.,* ***Wagenmann v. Adams***, 829 F.2d. 196 (1st Cir. 1987).

VICARIOUS LIABILITY

Attorneys are usually liable for the acts and omissions of their partners, and, under the rules of respondeat superior, for the torts of their employees and agents.

A partner in a law firm must make reasonable efforts to ensure that the firm is utilizing measures that ensure all lawyers in the firm conform to the rules of professional conduct. A lawyer having direct supervisory authority over another lawyer must make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct. Rule 5.1, Arizona Rules of Professional Conduct. A partner in a legal partnership is jointly and severally liable for the tortious acts of other partners, employees or agents of the partnership if the acts in question were done in the ordinary course of the partnership's business. A.R.S. §§ 29-1021, 29-1026. Where a partner in a law partnership is aware of an impermissible conflict of interest but fails to resolve the conflict, both the individual lawyer and the partnership may be liable for punitive damages. ***Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn***, 184 Ariz. 120 (1995).

A shareholder of a professional corporation, or a member of a professional limited liability company, is personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by the shareholder or member, or by any person under the shareholder's direct supervision and control, while rendering professional services on behalf of the professional corporation or the professional limited liability company. A.R.S. § 10-2234. *See* ***Standage v. Jaburg & Wilk, P.C.***, 177 Ariz. 221 (App. 1993).

When lawyers engage in business transactions for their own benefit and without being assisted by the law firm, vicarious liability generally does not exist. ***Sheinkopf v. Stone***, 927 F.2d 1259 (1st Cir. 1991).

A legal malpractice claim probably survives the death of a defendant attorney and can be brought against the attorney's estate. Rule 25(a), Arizona Rules of Civil Procedure.

LEGAL ACTIONS

Claims

The most common causes of action against attorneys are negligence and breach of contract. Other potential causes of action include breach of fiduciary duty, racketeering, misrepresentation, fraud, conversion, malicious prosecution, abuse of process and indemnity.

Generally, a malpractice claim does not "arise out of contract" for purposes of the statute permitting an award of attorney's fees in contract actions. A.R.S. § 12-341.01; ***Barmat v. John & Jane Doe Partners A-D***, 155 Ariz. 519, 520 (1987). However, a malpractice claim may arise out of contract for purposes of an award of attorney's fees if the client hired the attorney to provide specifically identified services, and the attorney simply failed to perform (as opposed to performed below the standard of care) the requested services. ***Towns v. Frey***, 149 Ariz. 599 (App. 1986); ***Asphalt Eng'rs Inc., v. Galusha***, 160 Ariz. 134 (App. 1989).

Defenses

The following defenses may apply depending upon the theory asserted and the facts of the case: (1) statute of limitations; (2) comparative negligence; (3) prematurity; (4) waiver; (5) failure to mitigate; and (6) superseding cause.

Statute of Limitations

Actions for legal malpractice are tort claims subject to a two-year statute of limitations, and the action must therefore be brought within two years after the action accrues. ***Long v. Buckley***, 129 Ariz. 141 (App. 1981). For purposes of the statute of limitations, a cause of action for legal malpractice "accrues" when the client both (1) has sustained appreciable, non- speculative harm or damage as a result of such malpractice, and (2) knows, or in the exercise of reasonable diligence should now, that the harm or damage was a direct result of the attorney's negligence. ***Commercial Union Ins. Co. v. Lewis & Roca***, 183 Ariz. 250 (App. 1995). In the litigation context, accrual does not occur until the plaintiff's damages are certain and not contingent upon the outcome of an appeal. ***Amfac Distribution Corp. v. Miller***, 138 Ariz. 152 (1983). "Litigation" for these purposes means adversary proceedings that have opposing parties and are contested – not an *ex parte* hearing or proceeding. ***Cannon v. Hirsch Law Office, P.C.***, 222 Ariz. 171, 177 (App. 2009) (bankruptcy proceeding in which creditor fails to file a complaint objecting to debtor's discharge does not have the adversarial characteristics of "litigation;" but once a

creditor has filed a complaint objecting to the debtor's discharge, the proceedings take on an adversarial nature and thus constitutes "litigation" for the purposes of determining when a legal malpractice cause of action accrues); ***Hayenga v. Gilbert*****,** 236 Ariz. 539 (App. 2015) (the failure to name or join a defendant in an action arises "during the course of litigation," and so does the failure to anticipate a named defendant's defense).

A cause of action for legal malpractice in a criminal case accrues, and the statute of limitations began to run, when criminal proceedings terminate favorably to the client. ***Glaze v. Larsen*****,** 207 Ariz. 26 (2004).

A third-party bad faith failure-to-settle claim accrues at the time the underlying action becomes final and non-appealable. ***Taylor v. State Farm Mut. Auto. Ins. Co*****.** 185 Ariz. 174, 179 (1996).

In the transactional context, the harm from an attorney's drafting of a deed occurred at the moment the client executed the deed, which diminished her interest in the property to less than the undivided 75 percent she had intended, even if damages may not have been fully ascertainable at that time. ***Keonjian v. Olcott***, 216 Ariz. 563 (App. 2007); *see also* ***Best Choice Fund, LLC v. Low & Childers***, P.C., 228 Ariz. 502 (App. 2012) (malpractice claim by mutual risk insurance company against law firm that provided legal services in connection with its formation accrued, and two-year statute of limitations began to run, when Department of Insurance (DOI) suspended insurer's certificate of authority).

Malpractice actions can be subject to the three-year statute of limitations applicable to claims based on oral contracts (or six-year limitations if in writing), rather than two year tort limitations period, where the client hired the attorney to perform a specifically identified service, and the attorney failed to perform (as opposed to perform below the standard of care) the requested service. ***Towns v. Frey***, 149 Ariz. 599 (App. 1986)

Prematurity

Actual injury or damages must be sustained before a cause of action accrues. ***Amfac Distribution Corp. v. Miller***, 138 Ariz. 152 (1983). In the litigation context, attorney negligence is not actionable until the underlying case in which the malpractice arose is finally resolved. ***Commercial Union Ins. Co. v. Lewis & Roca***, 183 Ariz. 250 (App. 1995).

Comparative Negligence

A client may be assessed a percentage of responsibility in a legal malpractice action if the client failed to follow the attorney's advice or instructions or otherwise interfered with the representation. ***Theobald v. Byers***, 193 Cal.App.2d 147, 150, 13 Cal.Rptr. 864, 866 (1961); ***Hansen v. Wightman***, 14 Wash. App. 78, 538 P.2d 1238 (1975).

Waiver

Waiver can be a defense if a client consents to a lawyer's conflict of interest. ***Yaklin v. Glusing, Sharpe & Krueger***, 875 S.W.2d 380 (Tex. Ct. App. 1994). Additionally, a client who voluntarily elects not to appeal the underlying case, and thereby forecloses the resolution of whether there was judicial error or attorney malpractice, may be deemed to have waived his malpractice claim. ***Segall v. Segall***, 632 So.2d 76 (Fla. Ct. App. 1993).

In ***Grubaugh v. Blomo ex rel. Cty. of Maricopa***, 238 Ariz. 264 (App. 2015), a client sued a lawyer for alleged malpractice occurring during the course of a mediation. A.R.S.§ 12-2238 provides that mediation proceedings are confidential, except for specifically-defined exceptions. Lawyer argued that the client waived this confidentiality by suing her, just as a client waives the attorney-client privilege by filing suit. *See, e.g.,* ***State Farm Mut. Auto. Ins. Co. v. Lee***, 199 Ariz. 52, 56 (2000). The court disagreed, finding mediation different from the attorney-client privilege context. The court did hold, though, that the client's claims based on the mediation process should be stricken. To hold otherwise, said the court, "would allow a plaintiff to proceed with a claim, largely upon the strength of confidential communications, while denying the defendant the ability to fully discover and present evidence crucial to the defense of that claim." *Id*. at 270.

Failure to Mitigate

If a client has a reasonable opportunity to mitigate, or perhaps even eliminate, the consequences of an attorney's malpractice, the client might be denied recovery for those consequences that could have been mitigated or avoided. ***Wimsatt v. Haydon Oil Co***., 414 S.W.2d 908 (Ky. 1967).

Superseding Cause

An attorney, even though negligent, is not liable for damages where the damages are caused by a superseding cause. A cause is considered to be a "superseding cause" if (1) it occurred after the original negligence, (2) it was caused by the original negligence, (3) it actively caused a result which would not otherwise have been caused by the original negligence, and (4) it was not reasonably foreseeable by the originally negligent attorney. ***Wartnick v. Moss & Barnett***, 490 N.W.2d 108 (Minn. 1992).

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