

## LEGAL MALPRACTICE LAW

### STATE OF MICHIGAN

**John R. Oostema**<sup>1</sup>

Smith Haughey Rice & Roegge  
250 Monroe Avenue, NW, Suite 200  
Grand Rapids, MI 49503  
(616) 774-8000  
www.shrr.com  
[joostema@shrr.com](mailto:joostema@shrr.com)

(Last Revised – January 19, 2012)

**A. Nature Of Claim**<sup>2</sup>. In Michigan, legal malpractice claims sound in tort. *Aldred v. O’Hara-Bruce*, 184 Mich. App. 488, 490; 458 N.W.2d 671, 672 (1990); *Barnard v. Dilley*, 134 Mich. App. 375, 379; 350 N.W.2d 887 (1984)(where the “alleged duty arises out of [an attorney-client] relationship, the tort claim is one for malpractice and malpractice only”). There are four elements to a legal malpractice claim – “(1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was the proximate cause of an injury, and (4) the fact and extent of the injury alleged”, *Kloian v. Schwartz*, 272 Mich. App. 232, 240; 725 N.W.2d 671 (2006). *See also, Coble v. Russell Green*, 271 Mich. App. 382, 386 ; 722 N.W.2d 898, 902 (2006); *Simko v. Blake*, 448 Mich. 648, 655; 532 N.W.2d 842, 846 (1995)<sup>3</sup>.

---

<sup>1</sup> For over 25 years, John Oostema’s practice has focused (i) on representing lawyers in malpractice actions and (ii) on coverage matters related to professional liability insurance. He has represented attorneys, law firms and insurance carriers nationwide. He has served as National Coverage Counsel for a prominent professional liability carrier that writes coverage for lawyers in over 40 states. He is Martindale-Hubbell AV Peer Review rated and has been recognized for his achievements in the legal malpractice field in *Best Lawyers in America* and for his coverage work in *Michigan Super Lawyers*. In addition to regularly representing many of the largest firms in the state, he has also represented the State Bar of Michigan in connection with litigation matters, including suits challenging the constitutionality of the Character and Fitness review process. For more information about Mr. Oostema and the other resources of the Firm, please visit the Firm’s web site.

<sup>2</sup> The author wishes to acknowledge and thank Mark A. Gilchrist and Tawanna D. Wright for their assistance in connection with the preparation of the original version of this submission.

<sup>3</sup> To date, the Michigan Supreme Court has not considered or resolved all of the issues discussed in this Chapter. Yet, given the number of Opinions by the Court of Appeals which have addressed these issues, there is a fairly well developed body of Michigan legal malpractice law. Many of the Opinions issued by the Court of Appeals in this area are published – but many more are unpublished. Absent published authority by the Supreme Court, a published Opinion of the Court of Appeals carries “precedential effect under the rule of stare decisis”, MCR 7.215(C)(2) – unpublished decisions do not, MCR 7.215(C)(1). In addition, any Opinion published by the Court of Appeals after November 1, 1990 is binding on any other subsequent panel of the Court.

## **B. Elements Of Legal Malpractice Claim.**

**(1) The Attorney-Client Relationship.** To successfully pursue a claim for legal malpractice, the plaintiff must first establish the existence of an attorney-client relationship. *Coleman v. Gurwin*, 443 Mich. 59, 63; 503 N.W.2d 435, 436 (Mich. 1993). As a general rule, absent “special” or “unique” circumstances, *Mieras v. DeBona*, 452 Mich. 278, 297; 550 N.W.2d 202 (1996), “a legal malpractice action may be brought only by a client”. *Beaty v. Hertzberg & Golden, P.C.*, 456 Mich. 247, 253; 571 N.W.2d 716, 719 (1997).<sup>4</sup> It is a rare circumstance that will permit an attorney’s actions affecting a non-client to give rise to a legitimate suit by a third party, *Id.* at 253-254. This rule “exists to ensure the inviolability of the attorney’s duty of loyal to the client”.<sup>5</sup> It “prevent[s] conflicts from derailing the attorney’s unswerving duty of loyalty of representation to the client” since any other approach would necessarily “detract from the attorney’s duty to represent a client diligently and without reservation”.<sup>6</sup> Because of the importance of the attorney-client relationship requirement, Michigan courts have been consistently “reluctan[t] to permit an attorney’s actions that affect a non-client to be a predicate to liability because of the potential for conflicts of interest that could seriously undermine counsel’s duty of loyal to the client”.<sup>7</sup> Whether a duty exists, of course, is a question of law for the court to decide, *Meyer & Anna Prentis Family Foundation, Inc. v. Barbara Ann Karmanos Cancer Institute*, 266 Mich. App. 39, 43; 698 N.W.2d 900 (2005).

To date, there are two limited “special” or “unique” circumstances in which Michigan courts have relaxed the privity requirement. In the absence of privity, non-clients may sue attorneys under a tort-based, legal malpractice claim (i) if the non-client can establish the elements of an equitable subrogation claim<sup>8</sup> or (ii) in the event that the non-client plaintiff is a named beneficiary in estate

---

MCR 7.215(J)(1). Although unpublished Opinions are not “precedentially binding”, they do suggest patterns and trends which trial courts have, in my experience, often found helpful. To that extent, the discussion which follows will include reference to unpublished decisions where appropriate. Care should always be taken, of course, in connection with the consideration and use of unpublished decisions.

<sup>4</sup> See generally, *Atlanta Int’l Ins. Co. v. Bell*, 438 Mich 512, 518; 475 N.W.2d 294, 296 (1991) (“The general rule of law ... dictates that ‘an attorney may be held liable for ... negligence only to his client, and cannot, in the absence of special circumstances, be held liable to anyone else.’”).

<sup>5</sup> *Atlanta Int’l Ins. Co. v. Bell*, 438 Mich. at 518-19.

<sup>6</sup> *Id.*

<sup>7</sup> *Beaty v. Hertzberg & Golden, P.C.*, 456 Mich. at 254; *Iron Workers Local 25 Pension Fund v. Watson Wyatt and Company*, No. 04-cv-40243, 2009 WL 3698562 (E.D. Mich. Nov. 4, 2009).

<sup>8</sup> *Atlanta Int’l Ins. Co. v. Bell*, *supra*; *Beaty v. Hertzberg & Golden, P.C.*, *supra*. Equitable subrogation is the “legal fiction through which a person who pays a debt for which another is primarily responsible is substituted to all the rights and remedies of the other”, *Auto-Owners Ins. Co. v. Amoco Prod. Co.*, 468 Mich. 53, 59; 658; N.W.2d 460 (2003). There are three prerequisites to its use – “(1) a special relationship must exist between the client and the third party in which the potential for conflicts of interest is eliminated because the interests of the two are merged . . . , (2) the third party must lack any other available legal remedy; and (3) the third party must not be a ‘mere volunteer’”. *Beaty v. Hertzberg & Golden, P.C.*, 456 Mich. at 254.

planning documents drafted by the attorney and that beneficiary's interests were adversely impacted because of defects that appear on the face of the estate planning documents (i.e., the estate planning documents on their face demonstrate that the estate planning client's intent was frustrated by a drafter's error)<sup>9</sup>. However, neither of those exceptions to the privity requirement apply if their application and use would create a conflict of interest for the attorney and thus jeopardize the attorney's duty of loyalty to his or her client.<sup>10</sup>

The creation of an attorney-client relationship, of course, is generally governed by principles of contract law. *Fletcher v. Bd. of Education*, 323 Mich. 343, 348; 35 N.W.2d 177, 180 (1948); *Garey v. Kelvinator Corp.*, 279 Mich. 174; 271 N.W. 723 (1939); *Iron Workers Local 25 Pension Fund v. Watson Wyatt and Company*, No. 04-cv-40243, 2009 WL 3698562 (E.D. Mich. Nov. 4, 2009); *Kopulos v. Scott*, Case No. 295766, 2011 WL 566848 (Mich. Ct. App. Feb. 17, 2011). The contract of representation can be express or implied. *Anderson v. Buckman, MacDonald & Bauer*, Case No. 300459, 2011 WL 6268195 (Mich. Ct. App. Dec. 15, 2011)(wife of husband client had no attorney-client relationship with husband's attorney). Its existence is not dependent on either payment of a fee or a formal contract. *Kopulos v. Scott, supra*. And retention for one legal matter does not, without more, imply retention for any other legal matter that might be brought to the attorneys attention during the attorney-client relationship. *Id.* But, in all events, the relationship cannot be created absent a mutual agreement to create it. The relationship cannot be created unilaterally by the putative client. Unless an attorney does something by words or actions that corroborates the existence of the relationship, the putative client's unilateral or subjective "belief" or "assumption" that the attorney is acting on his or her behalf is not enough to create an attorney-client relationship. *Scott v. Green*, 140 Mich. App. 384, 400; 364 N.W.2d 709 (1985).

Once created, the duration of the attorney-client relationship depends on the type of legal services the attorney was retained to provide. As a general proposition, the attorney-client relationship terminates (i) when the attorney is discharged by the client, *Hooper v. Hill Lewis*, 191 Mich. App. 312; 477; N.W.2d 114 (1991); *Stroud v. Ward*, 169 Mich. App. 1; 425 N.W.2d 490 (Mich. Ct. App. 1988), (ii) when the attorney is discharged by a Court, *Stroud v. Ward, supra*, (iii) when the work the attorney is retained to perform is completed, *Chapman v. Sullivan*, 161 Mich. App. 558; 425 N.W.2d 138 (1987); *K-73 Corp. v. Stancati*, 174 Mich. App. 225; 411 N.W.2d 754 (1988), (iv) when the client hires another lawyer to assume responsibility for the representation, *Stroud v. Ward, supra*; *Maddox v. Burlingame*, 205 Mich. App. 446; 517 N.W.2d 816 (1995), or (v) as to a law firm, when the lawyer leaves that firm for another or to set up his or her own practice, *Mitchell v. Dougherty*, 249 Mich. App. 668; 644 N.W.2d 391 (2002).

---

This theory has been used primarily by insurance companies as a vehicle for suing the lawyers they retain to represent their insureds when the insured's case does not turn out as the carrier had hoped. *Atlanta Int'l Ins. Co. v. Bell, supra*; *AAA Mortgage Corp. v. Legghio*, No. 239016, 240066, 2003 WL 22439665 (Mich. Ct. App. Oct. 28, 2003).

<sup>9</sup> *Mieras v. DeBona*, 452 Mich. 278; 550 N.W.2d 202 (1996); *Bullis v. Downes*, 240 Mich.App. 462; 612 N.W.2d 435 (2000); *Karam v. Kilber*, 253 Mich. App. 410; 655 N.W.2d 614 (2002); *Charfoos v. Schultz*, No. 283155, 2009 WL 3683314 (Mich. Ct. App. Nov. 5, 2009).

<sup>10</sup> *Beaty v. Hertzberg & Golden, P.C.*, 456 Mich. at 253-254 (equitable subrogation); *Mieras v. DeBona, supra* (the estate planning context).

(2) **Liability.** In addition to an attorney-client relationship, a legal malpractice plaintiff must also establish a breach of the applicable standard of care. Attorneys, of course, are “obligated to use reasonable skill, care, discretion and judgment in representing a client”, *Simko v. Blake*, 448 Mich. 648, 656; 532 N.W.2d 842 (1995). See also, *Mitchell v. Dougherty*, 249 Mich. App. 668; 644 N.W.2d 391 (2002); *Peterson v. Simasko, Simasko & Simasko, P.C.*, 228 Mich. App. 707, 709; 579 N.W.2d 469 (1998). But, that obligation of due care is not without limits. It does not make an attorney an insurer or guarantor of the “most favorable outcome possible”, *Simko v. Blake*, 448 Mich. at 656. Nor does it require an attorney to “exercise extraordinary diligence, or act beyond the knowledge, skill and ability ordinarily possessed by members of the legal profession”. *Id.* at 656. An attorney’s obligation is to meet the standard of an “average practitioner of the law”. *Id.* A breach of that standard is malpractice.

(3) **Causation.**

(i) **Proximate Cause Defined.** To establish the proximate cause component of a legal malpractice cause of action, a plaintiff bears the burden of establishing that the defendant’s breach of the applicable standard of care caused the plaintiff’s claimed damages. There are two component parts to the proximate cause analysis – legal cause (i.e., foreseeability) and cause in fact (i.e., but for). *Radtke v. Miller Canfield Paddock & Stone*, 209 Mich. App. 606; 532 N.W.2d 547 (1995), *reversed on other grounds*, 453 Mich. 413; 551 N.W.2d 698 (1996); *Pontiac School District v. Miller Canfield & Stone*, 221 Mich. App. 601, 613; 561 N.W.2d 875 (1997); *Roosenberg v Zerrenner*, No. 280235, 2009 WL 1221268 (Mich. Ct. App. May 5, 2009). Factual causation is established by showing that, “but for the attorney’s alleged malpractice [, the plaintiff] would have been successful”. *Charles Reinhart Co. v. Winiemko*, 444 Mich. 579, 586-87; 513 N.W.2d 773 (1994); *Colbert v. Conybeare Law Office*, 239 Mich. App. 608, 620; 609 N.W.2d 208 (2000); *Manzo v. Petrella & Petrella & Assoc., P.C.*, 261 Mich. App. 705, 712; 683 N.W.2d 699 (2004). Factual causation, however, is only one aspect of causation, a requirement which is distinct from legal causation. Legal causation is a concept rooted in notions of foreseeability. *Radtke v. Miller Canfield Paddock & Stone*, 209 Mich. App. 606; 532 N.W.2d 547 (1995); *Pontiac School District v. Miller Canfield Paddock & Stone*, 221 Mich. App. 602; 563 N.W.2d 693 (1997). To establish legal cause, the plaintiff must establish that the claimed injury was a foreseeable consequence of the attorneys error or omission. *Rhem v. Horn*, Case No. 10-10050-BC, 2010 WL 4792175 (E.D. Mich. Nov. 18, 2010).

Proximate cause proofs, however, cannot be based on either speculation or conjecture. *Pontiac School District v. Miller Canfield Paddock & Stone, supra; Roosenberg v Zerrenner, supra; Dumas v. Miller*, Case No. 286343, 2010 WL 1223940 (Mich. Ct. App. March 30, 2010)(plaintiffs claimed that, but for the defendants inadequate representation in negotiating an unfavorable settlement, the plaintiffs would have received more money in a better settlement or at trial); *Bednarski v. Smith*, Case No. 296979, 2011 WL 2694634 (Mich. Ct. App. July 12, 2011)(plaintiff could not show that, but for the alleged malpractice, he would have received an ownership interest in a business venturer). Proving causation as a “mere possibility” is not enough. *Chopra v. Gorman*, Case No. 289275, 2010 WL 2076940 (Mich. Ct. App. May 25, 2010); *Bednarski v. Smith, supra*. If the attorneys alleged malpractice did not cause the plaintiff’s predicament, there can be no actionable malpractice claim. *Avolio v. Hogan*, No. 287684, 2009 WL 3757437 (Mich. Ct. App. Nov. 10, 2009)(execution of unambiguous and

broadly-worded release of claims by client precluded malpractice claim against attorney for failing to explain scope of release); *Balcom Marine Centres, Inc. v. Hoeksema*, Case No. 288292, 2010 WL 334563 (Mich. App. January 28, 2010)(if case within case had no merit, attorney cannot be sued for malpractice in failing to prevail in client's underlying case); *Whitwood, Inc. v. Hall*, Case No. 286521, 2010 WL 673293 (Mich. App. February 25, 2010)(statute expired on client's underlying claim before defendant retained). That is, if the client's position in the underlying litigation had no merit, then the client's malpractice claim against the attorney that handled the underlying litigation fails for lack of proximate cause -- the client cannot, under such circumstances, establish that, but for the representation, he would have prevailed. *Hasen v. Perlos*, Case No. 293741, 2010 WL 4226618 (Mich. Ct. App. October 26, 2010); *Poplar v. Hirsch*, Case No. 296503, 2011 WL 1565471 (Mich. Ct. App. Ap. 26, 2011).

In explaining this "most troublesome element of a legal malpractice" cause of action, the Supreme Court in *Winiemko* said this (444 Mich. at 586-87):

"Often, the most troublesome element of a legal malpractice action is proximate cause. As in any tort action, to prove proximate cause a plaintiff in a legal malpractice action must establish that the defendant's accident was a cause in fact of the claimed injury. Hence, a plaintiff '**must show that but for the attorney's alleged malpractice he would have been successful in the underlying suit.**' ... To hold otherwise would permit a jury to find defendant liable on the basis of speculation and conjecture. (Emphasis supplied).

Michigan courts have addressed the contours and content of the proximate cause element of a legal malpractice case in a variety of different contexts. The burden of establishing proximate cause in the "transactional" legal malpractice case is particularly demanding (i.e., where legal advice is given in connection with a business transaction and the plaintiff claims that the transaction should have been differently structured or worded). These types of claims generally fall into one of two different categories – (i) the "no deal" claim (i.e., that the plaintiff should have been advised not to do the deal) or (ii) the "better deal" claim (i.e., that the transaction should have been differently structured or the transaction documents should have been differently worded). Sometimes both claims are pursued in the alternative in the same case. To establish but-for causation in the "transactional" malpractice context, the plaintiff, without relying on speculation or conjecture, must not only establish (i) that he or she *would have acted differently* if properly advised (i.e., would have chosen a different course of action), but also (ii) must establish what *would have happened* if that different court course of action had been pursued. *Pontiac School District v. Miller Canfield Paddock & Stone, supra* (a better deal case); *Bordener v. Herrington*, Case No. 180757, 2005 WL 3506594 (Mich. App. December 22,, 2005)(a better deal case). See also, *Viner v. Sweet*, 135 Cal. Rptr.2d 629 (Cal. 2003)(a better deal case); *Lamb v. Barbour*, 455 A.2d 1122 (N.J. Super. 1982). In the *Miller Canfield* case, for example, although the plaintiff there submitted detailed proofs on an alternative bond structure that it claimed the defendant attorneys should have recommended, it nonetheless failed to establish a jury-submissible "transactional" legal malpractice case because it did not establish that, if properly advised, its board would have adopted that particular alternative bond structure. The Court of Appeals there reversed a multi-million dollar plaintiff's verdict based on that omission in the School District's proximate cause proofs.

Proximate cause is usually – but not always – a fact question. *Teodorescu v. Bushnell Gage Reizen & Byington (On Remand)*, 201 Mich. App. 260, 266; 506 N.W.2d 275 (1993); *Roosenberg v Zerrenner*, No. 280235, 2009 WL 1221268 (Mich. Ct. App. May 5, 2009) (proximate cause can be decided as a matter of law); *Scott v. Frank Haron Weiner & Navarro*, No. 286833, 2009 WL 2515746 (Mich. Ct. App. Aug. 18, 2009)(proximate cause can be decided as a matter of law); *Bednarski v. Smith*, Case No. 296979, 2011 WL 2694634 (Mich. Ct. App. July 12, 2011); *Heikkinen v. Gibbons*, No. 288588, 2009 WL 3757433 (Mich. Ct. App. Nov. 10, 2009)(causation issue one of law if plaintiff cannot establish “but for” causation – that the client’s “bad outcome” was caused by the attorney); *Hall v. Cohen*, Case No. 286336, 2010 WL 571835 (Mich. App. February 18, 2010)(same).

(ii) **The Collectibility Requirement.** As a corollary to the proximate cause and the “actual harm” rule requirements, Michigan cases hold that, where the client was a plaintiff in prior litigation and did not receive what he or she was otherwise entitled to receive because of an attorney’s negligence, that plaintiff’s recovery in the legal malpractice action is “limited to the amount that would have been collectible” in the underlying litigation. *Teodorescu v. Bushnell, Gage, Reizen & Byington (On Remand)*, 201 Mich. App. 260; 506 N.W.2d 275 (1993). Michigan, adopting the minority approach to the issue, places the burden of pleading and proving the collectibility issue on the legal malpractice defendant. To use the language of the *Teodorescu* Court (201 Mich. App. at 268):

“We decline to follow these authorities. Rather, we choose to follow the minority view and hold that collectibility 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 uncollectibility is on the defendant.”

(iii) **Appellate Malpractice Claims.** Although proximate cause is often a fact issue for a jury to resolve, that is not always so. If the proximate cause issue in a legal malpractice case “intrinsically involves issues of law within the exclusive province of the courts”, then the issue is one of law for the Court to decide in the legal malpractice case. *Charles Reinhart Co. v. Winiemko*, 444 Mich. 579, 604; 513 N.W.2d 773 (1994)(whether an appeal, if perfected, would have been successful); *Dean v. Tucker*, 205 Mich. App. 547, 552; 517 N.W.2d 835 (1994), *leave denied*, 447 Mich. 1044; 527 N.W.2d 517 (1994) (whether and to what extent mediation sanctions would have been awarded in the underlying litigation); *Radtke v. Miller Canfield Paddock & Stone*, 209 Mich. App. 606; 532 N.W.2d 547 (1995) (whether an appeal would have been successful); *Williams v. Rusch*, No. 282233, 2009 WL 187796 (Mich. Ct. App. Jan. 27, 2009)(whether legal malpractice plaintiff suffered a serious impairment of body function and would have prevailed in underlying third part action). In performing that review function, trial courts, in some instances, have found against the attorney as a matter of law. *Coble v. Russell Green*, 271 Mich. App. 372; 722 N.W. 898 (2006)(failed appeal); *Williams v. Rusch, supra* (court affirmed liability ruling on summary disposition motion by plaintiff in legal malpractice case).

(iv) **Criminal Cases – The Innocence Requirement.** Where a legal malpractice claim arises out of prior representation in a criminal proceeding, the client plaintiff is

not obligated to plead and prove innocence as a necessary prerequisite to establishing causation in his or her legal malpractice action. *Gebhardt v. O'Rourke*, 444 Mich. 535, 546-52; 510 N.W.2d 900 (1994); *Ayoub v. Berry Hopson & Francis P.C.*, No. 161647, slip op., (Mich. Ct. App. Feb. 15, 1995), *lv. den.*, 450 Mich. 938; 538 N.W.2d 625 (Table, 1995); *Schlumm v. O'Hagan*, 173 Mich. App. 345; 433 N.W.2d 839 (1988). As explained by the *Schlumm* Court (173 Mich. App. at 360):

“Since a plaintiff in a legal malpractice action is not required to show that he would have prevailed completely, the trial court erred in ruling that plaintiff must plead and prove his innocence.”

(v) **Effect of Client's Settlement on Causation.** In Michigan, a settlement in the underlying action by mediation or negotiation does not necessarily preclude a subsequent claim for legal malpractice. An attorney may be held liable if his or her malfeasance or nonfeasance caused the client to settle. *Lowman v. Karp*, 190 Mich. App. 448; 476 N.W.2d 428 (1991) (settlement); *Espinoza v. Thomas*, 189 Mich. App. 110; 472 N.W.2d 16 (1991) (mediation). At the same time, a settlement of the underlying litigation may bar a subsequent legal malpractice action against the attorney who represented the client in that proceeding (i.e., negate the proximate cause element) (i) if the malpractice claim is based on the claim that the client did not understand what was being released in the underlying case, but the language of the settlement agreement in that proceeding was clearly, unambiguously and expansively worded, *Avolio v. Hogan*, No. 287684, 2009 WL 3757437 (Mich. Ct. App. November 10, 2009), (ii) if a plaintiff chooses to settle the underlying case in order to avoid the risks and uncertainties of a trial, *Kauer v. Clark*, No. 175138, 1996 WL 33324098 (Mich. Ct. App. July 9, 1996), or (iii) if the client's participation in and review of the settlement documents warrants application of an estoppel defense, *Viking Corp. v. Van Dyke*, Case No. 290063, 2011 WL 1262143 (Mich. Ct. App. Ap. 5, 2011).

#### (4) **Damages.**

(i) **Actual Damages.** As a general rule, defendants in a legal malpractice case are liable for “all damages directly and proximately caused by the attorney's negligence, *Basic Food Indus., Inc. v. Grant*, 107 Mich. App. 685, 693; 310 N.W.2d 26 (1981); *See also, Dean v. Tucker*, 205 Mich. App. 547, 551; 517 N.W.2d 835 (1994); *Gore v. Rains & Block*, 189 Mich. App. 729, 740; 473 N.W.2d 813 (1991) (“[A] malpractice plaintiff is entitled to recover damages to the extent of the injury ...”). Damages, however, may never be based on speculation or conjecture. *Colbert v. Conybeare Law Offices*, 239 Mich. App. 608; 609 N.W.2d 208 (2000). And, to recover, the malpractice plaintiff must show more than just a potential injury. Michigan, like most states, follows the “actual” harm rule. *Colbert v. Conybeare Law Offices, supra; Keliin v. Petrucelli*, 198 Mich. App. 426, 430; 499 N.W.2d 360 (1993); *Stockler v. Rose*, 174 Mich. App. 14, 49-50; 436 N.W.2d 70 (1989); *McClarty v. Gudenau*, 176 B.R. 788 (E.D. Mich. 1995); *Lomerson v. Bujold*, No. 231505, 2002 WL 1374236 (Mich. Ct. App. June 25, 2002); *Fritz v. Monnich*, No. 235262, 2003 WL 21186652 (Mich. Ct. App. May 20, 2003). If no damage is sustained, “regardless of what specific acts or omissions were alleged and how egregious they may appear to plaintiffs, their malpractice claim must fail”. *McCluskey v. Womack*, 188 Mich. App. 465, 474; 470 N.W.2d 443 (1991). *See also, Bourke v. Warren*, 118 Mich. App. 694; 325 N.W.2d 541 (1982); *Traynor v. McMillan*, Case No. 289284, 2010 WL 3062537 (Mich. Ct. App. August 5, 2010)(full credit bid by creditor precluded subsequent malpractice claim against its attorneys).

(ii) **Emotional Distress/Mental Anguish Damages.** In Michigan, it is, at present, unclear whether mental anguish damages (i.e., mental pain, anxiety, shame, mortification, humiliation, etc.) are recoverable in legal malpractice litigation. It seems likely that they should be allowed given the breadth of the general formulation for the applicable damage computation methodology, but the Supreme Court, to date at least, has side-stepped the issue. *Mieras v. DeBona*, 452 Mich. 278; 550 N.W.2d 202 (1996). So has the Court of Appeals. *Colbert v. Conybeare*, 239 Mich. App. 608, 609 N.W.2d 208 (2000). Hence, the law seems to be unsettled at this point. There is a Court of Appeals Opinion which has sanctioned them, but it did so in a context where such damages would have been permitted in the underlying matter that gave rise to the malpractice claim. *Gore v. Rains & Block*, 189 Mich. App. 729; 473 N.W.2d 813 (1991). As such, *Gore*, in light of *Mieras*, may simply stand for the proposition that mental anguish damages – if factually provable – may be available in legal malpractice litigation if the underlying claim which precipitated the lawsuit for legal malpractice authorizes the imposition of mental anguish damages. In any event, absent an accompanying physical injury, emotional distress damages – to be distinguished from mental anguish damages -- are generally not recoverable. *Gore v. Rains & Block, supra; Easterday v. Secrest Wardle Lynch Hampton Truex and Morley, P.C.*, No. 262650, 2005 WL 3556161 (Mich. Ct. App. Dec. 29, 2005). That said, the Court of Appeals in two 2010 decisions indicated that emotional distress damages may be legally available in legal malpractice litigation if factually supported by the record. See *Traynor v. McMillan*, Case No. 289284, 2010 WL 3062537 (Mich. Ct. App. August 5, 2010); *Dumas v. Miller*, Case No. 286343, 2010 WL 1223940 (Mich. Ct. App. March 30, 2010). In each of those cases, however, the Court found that the legal malpractice plaintiffs’ proofs were legally insufficient to warrant their recovery.

(iii) **Punitive Damages.** Exemplary damages in Michigan compensate injured plaintiffs for mental anguish, humiliation, and outrage suffered as a result of the defendant’s willful, malicious or wanton conduct. *Veselenak v. Smith*, 414 Mich. 567, 575; 327 N.W.2d 261 (1982); *Green v. Evans*, 156 Mich. App. 145, 153 (1985). They represent something qualitatively more than just general emotional injuries. To recover such damages, the plaintiff bears the burden of establishing that the defendant’s conduct (i) was malicious or willful and wanton, (ii) that it “inspire[s] feelings of humiliation, outrage and dignity”, and (iii) “perhaps most importantly, it must be impossible to make the plaintiff whole by compensatory damages alone”. Where plaintiff can establish the elemental prerequisites for their award, a legal malpractice plaintiff may recover exemplary damages. *Sherrard v. Stevens*, 176 Mich. App. 650; 440 N.W.2d 2 (1988); *Green v. Evans*, 156 Mich. App. 145; 401 N.W.2d 250 (1985).

(iv) **Attorneys Fees.** Given the breadth of the general rule governing the appropriate measure for damages in legal malpractice cases, one would think that fees incurred in prior litigation would be recoverable as damages in a legal malpractice case. So far, the Michigan courts have been reluctant to allow that. In Michigan, attorney’s fees incurred in prior litigation are not generally recoverable either (i) as an item of damage or (ii) as an element of costs in legal malpractice litigation. *Mieras v. DeBona*, 204 Mich. App. 703, 709-10; 516 N.W.2d 154 (1994), *rev’d on other grounds*, 452 Mich. 278; 550 N.W.2d 202 (1996); *J.M.S. Assocs., Inc. v. Schwartz*, No. 214765, 2000 WL 33406802 (Mich. Ct. App. Oct. 3, 2000). That is, consistent with the “American Rule”, “attorney fees are not recoverable as an element of costs

or damages unless expressly allowed by statute, court rule, or common-law exception<sup>11</sup> or where provided by a contract of the parties”, *Grace v. Grace*, 253 Mich. App. 357, 370-71; 655 N.W.2d 595 (2002). These principles have been applied routinely in legal malpractice litigation. *Mieras v. DeBona*, 204 Mich. 703, 709-710 (1994), *rev’d on other grounds*, 452 Mich. 278; 550 N.W.2d 202 (1996); *Trierweiler v. Varnum Riddering Schmidt & Howlett, L.L.P.*, No. 256511, 2006 WL 1161546 (Mich. Ct. App. May 2, 2006); *J.M.S. & Assocs., Inc. v. Schwartz*, No. 214765, 2000 WL 33406802 (Mich. Ct. App. Oct. 3, 2000); *Shelton & Assocs., P.C. v. Mayer*, No. 217456, 2001 WL 732397 (Mich. Ct. App. June 12, 2001).

### C. Defenses.

(1) **Statute of Limitations.** To be timely, a legal malpractice claim in Michigan must be filed (i) within two years after the defendant discontinued serving the plaintiff for the matters out of which the claim for malpractice arose (i.e., the two-year rule) or, (ii) within six months after the plaintiff knew or should have known of the claim (i.e., six-month discovery rule), whichever provides the plaintiff with more time. MICH. COMP. LAWS §§ 600.5805(6); 600.5838; *Gebhardt v. O’Rourke*, 444 Mich. 535, 546; 510 N.W.2d 900 (1994); *Kloian v. Schwartz*, 272 Mich. App. 232, 241; 725 N.W.2d 671 (2006). For statute purposes, a case is “filed” when the complaint is filed with the Clerk’s Office, MCR 2.101(B). If the plaintiff is an incarcerated prisoner who cannot afford the filing fee, the case is not technically “filed” until the inmate complies with Orders issued under MICH. COMP. LAWS § 600.2963(1). *Little v. Lorence*, Case No. 294669, 2011 WL 2271310 (Mich. Ct. App. June 9, 2011). Importantly, these rules control any claim against a lawyer – no matter how otherwise labeled by the plaintiff – that challenges the quality of legal services provided.<sup>12</sup> And, where a plaintiff sues a lawyer for malpractice under a third-party-beneficiary theory that challenges the quality of legal services provided to another (for example, claims by beneficiaries in the estate planning context), the accrual of that third-party claim is governed by the analysis that would have applied had the former client filed suit. *Schultz v. Sarow*, Case No. 298125 (Mich. Ct. App. July 14, 2011). The parties, of course, are free to contractually alter the statutory period by entering into Tolling Agreements. If they choose to do that, the terms of the Tolling Agreement will thereafter control the statute of limitations analysis. *HVW Distribution, LLC v. Nemazi*, No. 284261, 2009 WL 3757444 (Mich. Ct. App. Nov. 10, 2009)(shortened period prescribed by Tolling Agreement controlled disposition of statute issue).

---

<sup>11</sup> Under the common-law exception, “a party may recover his damages and costs, including attorneys’ fees, expended in a prior lawsuit he was forced to defend or prosecute because of a third-party’s wrongdoing”, *Mieras v. DeBona*, 204 Mich. App. 703, 710; 516 N.W.2d 154 (1994), *rev’d on other grounds*, 452 Mich. 278; 550 N.W.2d 202 (1996). For that exception to apply, however, the wrongdoer must have been guilty of “malicious, fraudulent or similar wrongful conduct”, *G & D Co. v. Durand Milling Co.*, 67 Mich. App. 253, 260; 240 N.W.2d 765 (1978).

<sup>12</sup> *Seebacher v. Fitzgerald Hodgman Cawthorne & King, P.C.*, 181 Mich. App. 642, 646; 449 N.W.2d 673 (1989); *Brownell v. Garber*, 199 Mich. App. 519, 526; 503 N.W.2d 81 (1993); *Hooper v. Hill Lewis*, 191 Mich. App. 312, 316; 477 N.W.2d 114 (1991); *Stroud v. Ward*, 169 Mich. App. 1, 9; 425 N.W.2d 490 (1988).

(i) **Two-Year Rule.** Under the applicable Michigan accrual statute, to be timely under the two-year rule, the suit must be filed within two years after the attorney “discontinued serving the plaintiff in a professional ... capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim”. MICH. COMP. LAWS § 600.5838(1). There are two separate and distinct components to the analysis under the two-year rule – the legal malpractice plaintiff must file suit within two years of the date (i) the attorney “discontinued serving” the client (ii) regarding those “matters” out of which the claim for malpractice arose.

To evaluate the “discontinued serving” requirement, inquiry focuses on what the lawyer was retained to do, and the basis for the plaintiff’s claim. *Basic Food Indus., Inc. v. Travis, Warren, Hayer & Burgoyne*, 60 Mich. App. 492; 231 N.W.2d 466 (1975). The two-year rule accrues “on the last day of professional service”, *Gebhardt v. O'Rourke*, 444 Mich. at 543, in connection with the matter which forms the predicate for the plaintiff’s claim.<sup>13</sup> To date, Michigan cases have held that attorneys discontinue “serving” a client for statute of limitation purposes (i) when the attorney is discharged by the client<sup>14</sup> (ii) when the attorney is discharged by the court<sup>15</sup> (iii) when the appeal period expires on the litigation the attorney was retained to handle<sup>16</sup>, (iv) when the task the attorney has been retained to perform has been completed<sup>17</sup> (v) when the client files a malpractice claim against the attorney<sup>18</sup> or (vi) when the client retains substitute counsel to assume responsibility for the matter out of which the claim for malpractice arose.

The accrual statute, however, also requires consideration of the matters which form the contextual premise for the malpractice suit. The two-year computation period accrues as soon as the attorney discontinues serving the client “for matters out of which the claim for malpractice arose, even though (i) the attorney may continue to “serve” the client thereafter on an “as needed”<sup>19</sup>

---

<sup>13</sup> See generally, *Fante v. Stepek*, 219 Mich. App. 319, 322; 556 N.W.2d 168 (1996); *Chi-Ming Chow v. O'Keefe*, 217 Mich. App. 102; 550 N.W.2d 833 (1996).

<sup>14</sup> See *Balcom v. Zambon*, 254 Mich. App. 470, 484; 658 N.W.2d 156 (2002); *Basic Food Indus., Inc. v. Travis, Warren, Hayer & Burgoyne*, supra; *Berry v. Zisman*, 70 Mich. App. 376; 245 N.W.2d 758 (1976); *Andrews v. Rollinger*, No. 285913, 2009 WL 2767308 (Mich. Ct. App. Sept. 1, 2009); *Nagle v. Cohen*, Case No. 294727, 2010 WL 5129813 (Mich. Ct. App. Dec. 16, 2010). Importantly, the date of discharge by the client is the critical two-year “trigger” date even though the actual order permitting withdrawal is entered at a later date. *Kloian v. Cunningham*, No. 286924, 2009 WL 3401060 (Mich. Ct. App. Oct. 22, 2009).

<sup>15</sup> *Balcom v. Zambon*, 254 Mich. App. at 484; *Basic Food Indus., Inc. v. Travis, Warren, Hayer & Burgoyne*, supra; *Berry v. Zisman*, supra.

<sup>16</sup> *Traynor v. McMillan*, Case No. 289284, 2010 WL 3062537 (Mich. Ct. App. August 5, 2010)

<sup>17</sup> *Balcom v. Zambon*, 254 Mich. App. at 484; *Bauer v. Ferriby & Houston, PC*, 235 Mich. App. 536, 538; 599 N.W.2d 493 (1999). *Reed v. Davies*, No. 242709, 2004 WL 442860 (Mich. Ct. App. Mar. 11, 2004); *Schubiner v. Sommers, Schwartz, Silver & Schwartz, P.C.*, No. 251935, 2005 WL 1026215 (Mich. Ct. App. May 3, 2005).

<sup>18</sup> *Berry v. Zisman*, supra.

<sup>19</sup> *Chicago-Wyoming Real Estate Corp. v. Litt*, No. 206376, 1999 WL 33353743 (Mich. Ct. App. Nov. 30, 1999); *Hotchkiss v. Mitchell*, No. 270143, 2006 WL 3020942 (Mich. Ct. App. Oct. 24, 2006)

basis with respect to other matters<sup>20</sup>, (ii) the attorney may provide “remedial” services associated with that attorney’s provision of prior legal services<sup>21</sup> or (iii) the attorney may provide legal services for the same client on other matters unrelated to the matter out of which the claim for malpractice arose<sup>22</sup>. An attorney “may represent a client on many matters and end representation as to some matters but not others”. *Dumas v. Miller*, Case No. 279149, 2010 WL 1223940 \*8 (Mich. Ct. App. March 30, 2010). Follow up efforts such as the filing of a motion in an attempt to correct or resolve an issue that evolved from the earlier representation may extend the legal representation for statute of limitations purposes.<sup>23</sup> Importantly, when an attorney is discharged by a client, the two-year accrues when the order terminating the lawyer’s services is entered, not the date that the client picks up the client representation file.<sup>24</sup> Any form of client counselling after the representation has terminated can extend the accrual of the two-year rule, regardless of whether fees are charged.<sup>25</sup> Such an extension of the statutory period, however, does not occur with every follow up contact.

Although the statute issue is most often resolved on motion, the accrual issue can, under certain circumstances, be a question of fact for the fact-finder to resolve at trial. *Kerr Corp. v. Weisman Young Schloss & Ruenenapp, PC*, Case No. 282563, 2010 WL 173606 (Mich. App. January 19, 2010).

(ii) **Six-Month Discovery Rule.** Unlike the two-year, last-date-of-service rule which simply requires a computation of the time frame between the last date of professional services and the date the legal malpractice complaint was filed, the six-month discovery rule instead requires a consideration of the legal malpractice plaintiff’s actual or constructive “knowledge” – whether plaintiff filed suit within “six months after the plaintiff discover[ed] or should have discovered the existence of the claim”. MICH. COMP. LAWS § 600.5838(2).

---

<sup>20</sup> *K 73 Corp. v. Stancati*, 174 Mich. App. 225; 435 N.W.2d 433 (1988); *Mamou v. Cutlip*, No. 275862, 2008 WL 2357670 (Mich. Ct. App. June 10, 2008).

<sup>21</sup> *Bauer v. Ferriby & Houston P.C.*, *supra*. *Ambrose v. Fried*, No. 249482, 2004 WL 2726070 (Mich. Ct. App. Nov. 30, 2004); *Alken-Ziegler v. Bearup*, No. 264513, 2006 WL 572571 (Mich. Ct. App. Mar. 9, 2006).

<sup>22</sup> *Boss v. Loomis Ewert Parsley Davis & Gotting, PC*, Case Nos. 287578, 289438, 2010 WL 935642 (Mich. App. March 16, 2010); *Masterguard Home Security v. Nemes & Anderson, PC*, Case No. 291085, 2010 WL 2977405 (Mich. Ct. App. July 29, 2010); *Schultz v. Sarow*, Case No. 298125, 2011 WL 2732157 (Mich. Ct. App. July 14, 2011)(work for trustee did not “continue” statute for initial work on estate planning documents).

<sup>23</sup> *Tupper v. LeBeuf*, No. 229869, 2002 WL 1803920, (Mich. Ct. App Aug. 6, 2002); *See, however Lededovych v. Hadley*, No. 255797, 2005 WL 3116083 (Mich. Ct. App. Nov. 22, 2005) (tying up “loose ends” does not extend the discharge date); *McAlpine v. Einstandig*, No. 266428, 2007 WL 866216 (Mich. Ct. App. Mar. 22, 2007) (the filing of a motion for relief from judgment on plaintiff’s behalf was merely an effort to preserve a former client’s interests and did not “revive” the statute of limitations).

<sup>24</sup> *Rochlen v. Landao*, No. 232151, 2002 WL 31953824 (Mich. Ct. App. Dec. 13, 2002).

<sup>25</sup> *Orzane v. Taglia*, No. 238098, 2003 WL 21921131 (Mich. Ct. App. Aug. 12, 2003); *Easton v. Miller*, Case No. 298875, 2011 WL 3299921 (Mich. Ct. App. August 2, 2011)(filing of new suit for client, even though not authorized, extended the accrual of the statute).

Application of the discovery rule is measured by an objective standard. *Horne v. Saperstein*, No. 297368, 2011 WL 2464202 (Mich. Ct. App. June 21, 2011).

Importantly, the “standard under the discovery rule is not that the plaintiff knows of a ‘likely’ cause of action. Instead, a plaintiff need only discover a ‘possible’ cause of action”. *Gebhardt v. O’Rourke*, 444 Mich. at 544.<sup>26</sup> Nor does the client have to be specifically told by another lawyer that the client has a potential malpractice claim for the discovery period to begin to run. *Horne v. Saperstein*, No. 297368, 2011 WL 2464202 (Mich. Ct. App. June 21, 2011). Whether the plaintiff should have discovered the claim is measured by an objective standard. *Idid* \*3. This standard “encourages claimants to diligently investigate and pursue causes of action”. *Prentis Family Foundation, Inc. v. Karamanos Cancer Inst.*, 266 Mich. App. at 48. According to *Gebhardt*, a legal malpractice plaintiff “knows” of a “possible” claim under the accrual statute if two elements are present – (i) the plaintiff has suffered some real “identifiable and appreciable loss” and (ii) the plaintiff is aware of “its possible cause”. *Gebhardt v. O’Rourke*, 444 Mich. at 544. Once those two elements coexist, “the plaintiff is aware of a possible cause of action”. *Gebhardt v. O’Rourke*, 444 Mich. at 545.

The Michigan courts have applied the six-month discovery rule in a number of different fact patterns. In doing so, they have held that the following events were legally sufficient, as a matter of law, to “trigger” the six-month discovery rule: (i) the submission of a letter by the client complaining about the quality of an attorney’s representation;<sup>27</sup> (ii) the filing of a motion which raises an issue regarding the quality or adequacy of the attorney’s representation;<sup>28</sup> (iii) the filing of a bankruptcy petition which “on its face was adequate notice [to the client] that he was [an] unsecured” creditor;<sup>29</sup> (iv) the filing of an affirmative defense which should have alerted the client to the fact that a portion of his collection claim was barred—or might be barred by a usurious interest rate utilized in a previous loan transaction;<sup>30</sup> (vi) the receipt of a notice from the IRS alerting the client to the fact that the client might be exposed to additional tax liability because of an attorney’s prior tax advice;<sup>31</sup> (vii) the filing of an attorney grievance complaint or request for investigation;<sup>32</sup> (viii) the filing of an annulment petition;<sup>33</sup> (ix) the filing of a motion

---

<sup>26</sup> See generally, *Prentis Family Foundation v. Karamanos Cancer Inst.*, 266 Mich. App. 39 48; 698 N.W.2d 900 (2005); *Horne v. Saperstein*, No. 297368, 2011 WL 2464202 (Mich. Ct. App. June 21, 2011).

<sup>27</sup> *Comer Family Trust v. Thomas & Jensen*, No. 186676, 1997 WL 33353233 (Mich. Ct. App. April 25, 1997)

<sup>28</sup> *Gebhardt v. O’Rourke*, 444 Mich. 535; 510 N.W.2d 900 (1994).

<sup>29</sup> *K73 Corp. v. Stancotti*, 174 Mich. App. 225; 435 N.W.2d 433 (1998).

<sup>30</sup> *Shaw Inv. Co. v. Rollert.*, 159 Mich. App. 575; 407 N.W.2d 40 (1987).

<sup>31</sup> *Adell v. Sommers, Schwartz, Silver & Schwartz, P.C.*, 170 Mich. App. 196; 428 N.W.2d 26 (1998); *Seebacher v. Fitzgerald, Hodgman, Cawthorne, & King, P.C.*, 181 Mich. App. 642; 449 N.W.2d 673 (1989); *Gambino v. Cardamone*, 163 Mich. App. 574; 414 N.W.2d 896 (1987).

<sup>32</sup> *Stroud v. Ward*, 169 Mich. App. 1; 425 N.W.2d 490 (1988); *Duenaz v. Barnett*, No. 224345, 2001 WL 936744 (Mich. Ct. App. Aug. 17, 2001); *Sarr v. Scott A. Smith, P.C.*, No. 242395, 2004 WL 981162 (Mich. Ct. App. May 6, 2004).

<sup>33</sup> *Burke v. Baumgartner*, No. 204210, 1998 WL 1990362 (Mich. Ct. App. Sept. 4, 1998)

which addressed an error created by an attorney's representation;<sup>34</sup> (x) the entry of a dismissal order in the underlying matter;<sup>35</sup> (xi) the discovery of a conflict of interest;<sup>36</sup> (xii) the submission of a request for a copy of transcripts with which to evaluate an ineffective assistance of counsel defense;<sup>37</sup> (xiii) the hiring of new counsel because of the client's dissatisfaction with the attorneys services;<sup>38</sup> (xiv) when a successor lawyer criticizes the prior attorney's representation<sup>39</sup>; or (xv) the receipt of an adverse appellate ruling<sup>40</sup>. Indeed, the discovery period can even be "triggered" simply by the client's "belief" that he or she got the wrong advice, which precipitated that client's search for other counsel. *Horne v. Saperstein, supra*. Sometimes, application of the discovery rule can be a question of fact. *Bush v. Goren*, Case No. 294779, 2011 WL 3211637 (Mich. Ct. App. Feb. 1, 2011).

**(2) Comparative Fault.** The fact-finder in a legal malpractice action may consider and evaluate the extent to which the client's own comparative conduct caused or contributed to the damages for which recovery is sought in a legal malpractice action. *Pontiac School District v. Miller Canfield Paddock & Stone*, 221 Mich. App. 602, 626; 563 N.W.2d 693 (1997) ("We ... hold that comparative negligence applies in legal malpractice actions based upon negligence".)

**(3) Attorney Judgment Rule.** As a general proposition, attorneys are 'obligated to use reasonable skill, care, discretion and judgment in representing a client', *Simko v. Blake*, 448 Mich 648, 656; 532 N.W.2d 842 (1995). Yet, that obligation of due care is not without limits. It does not make an attorney an insurer or guarantor of the "most favorable outcome possible", *Simko*, 448 Mich. at 656, nor does it require an attorney to "exercise extraordinary diligence, or act beyond the knowledge, skill and ability ordinarily possessed by members of the legal profession". *Id.* at 656. And, importantly, an attorney may not be held liable for "mere errors of judgment". *Id.* at 658. This limitation on an attorney's duty of due care has generally been described as the "attorney judgment rule" defense. See, for example, *Stanke v. Stanke*, No. 263446, 2008 WL 216071 (Mich. Ct. App. Jan. 24, 2008); *Forystek v. Beal*, No. 202816, 1998 WL 2016565 (Mich. Ct. App. Mar. 20, 1998); *Bakshi v. Gold*, No. 220867, 2001 WL 902737 (Mich. Ct. App. Aug. 10, 2001); *Po v. Benefiel*, Nos. 255546, 257084, 2005 WL 2323823 (Mich. Ct. App. Sept. 22, 2005); *Trakhtenberg v. McKelvy*, No. 285247, 2009 WL 3465436 (Mich. Ct. App. Oct. 27, 2009). Under that defense, a

---

<sup>34</sup> See also, *Riddick v. Freatman*, No. 201231, 1999 WL 33444162 (Mich. Ct. App. May 25, 1999).

<sup>35</sup> *Balcom v. Zambon*, 254 Mich. App. 470; 658 N.W.2d 156 (2002); *Burton v. Fowler*, No. 183801, 1996 WL 33359128 (Mich. Ct. App. Sept. 17, 1996); *Stock v. Charter*, No. 224130, 2001 WL 625050 (Mich. Ct. App. May 29, 2001); *Lopez v. Hann*, No. 262659, 2005 WL 2402291 (Mich. Ct. App. Sept. 29, 2005); *White v. Hahn*, Nos. 256178, 265087, 2006 WL 2422589 (Mich. Ct. App. Aug. 22, 2006) (Motion for Directed Verdict); *Schlehuber v. Varga*, No. 264193, 2005 WL 3501584 (Mich. Ct. App. Dec. 22, 2005).

<sup>36</sup> *Shutt v. Florip*, No. 183830, 1996 WL 33358117 (Mich. Ct. App. Sept. 20, 1996).

<sup>37</sup> *Wojnicz v. Jackson*, No. 212929, 1999 WL 33409881 (Mich. Ct. App. Nov. 30, 1999).

<sup>38</sup> *Cedar Springs Tractor & Equip., Inc. v. Kehoe*, No. 226701, 2001 WL 1659441 (Mich. Ct. App. Dec. 18, 2001).

<sup>39</sup> *Shava v. Hertzberg*, No. 249320, 2005 WL 119788 (Mich. Ct. App. Jan. 20, 2005).

<sup>40</sup> *Miller v. Weisberg & Walkon, P.C.*, No. 258952, 2006 WL 1751905 (Mich. Ct. App. June 27, 2006).

attorney is not liable for mere errors in judgment so long as the attorney “acts in good faith and an honest belief that his acts and omissions are well-founded in the law and are in the best interest of his client . . .”, *Simko*, 448 Mich. at 658.

Traditionally, the attorney judgment rule defense has been applied by Michigan Courts in the context of claims arising out of litigation-related errors. In that context, Michigan courts have consistently dismissed claims which focus on decisions regarding (i) what witnesses to call at trial<sup>41</sup>, (ii) whether to object to certain jury instructions<sup>42</sup>, (iii) whether to file suit or, if suit is filed, which parties to join<sup>43</sup>, (iv) whether to dismiss a suit that cannot be proved<sup>44</sup>, (v) whether to pursue certain claims or defenses<sup>45</sup>, (vi) which motions to file and when<sup>46</sup>, (vii) whether a settlement offer is reasonable<sup>47</sup>, (viii) what discovery to conduct<sup>48</sup>, (ix) what issues to raise on appeal<sup>49</sup>, (x) what facts to offer in defense of an attack on personal jurisdiction<sup>50</sup>, (xi) whether to take discovery depositions of opposing experts<sup>51</sup>, or (xii) decisions regarding how best to argue the client’s case at trial<sup>52</sup>. But

---

<sup>41</sup> *McAdoo v. Satawa*, No. 234628, 2002 WL 31955124 (Mich. Ct. App. Dec. 17, 2002); *Schubiner v. Sommers Schwartz Silver & Schwartz*, No. 274775, 2007 WL 1828892 (Mich. Ct. App. June 26, 2007); *Diehl v. Abood*, No. 215793, 2000 WL 33534610 (Mich. Ct. App. Feb. 11, 2000); *Schubiner v. Sommers Schwartz Silver & Schwartz*, *supra*; *Trakhtenberg v. McKelvy*, *supra*; *Harris v. Farmer*, Case No. 288968, 2010 WL 395764 (Mich. App. February 4, 2010).

<sup>42</sup> *Thompson v. Loucks*, No. 188020, 1996 WL 33348183 (Mich. Ct. App. Dec. 3, 1996).

<sup>43</sup> *Mitchell v. Dougherty*, 249 Mich. App. 668; 644 N.W.2d 391 (2002); *Gibbons v. Thomason, O’Neal & VanderVeen*, No. 271628, 2007 WL 914297 (Mich. Ct. App. Mar. 27, 2004); *J.M.S. & Assocs., Inc v. Schwartz*, No. 214765, 2000 WL 33406802 (Mich. Ct. App. Oct. 3, 2000); *Wotring v. Price Heneveld Cooper DeWitt & Litton*, Case No. 1:08-cv-00477, 2011 WL 1150584 (W.D. Mich. March 28, 2011)(which parties to name).

<sup>44</sup> *Taylor v. Kochanowski*, Case No. 2896600, 2010 WL 2696675 (Mich. Ct. App. July 8, 2010)

<sup>45</sup> *Woods v. Gursten*, No. 194523, 1998 WL 1988581(Mich. Ct. App. Dec. 15, 1998); *Badalamenti v. Sheldon L. Miller & Assocs., P.C.*, No. 254790, 2005 WL 3077146 (Mich. Ct. App. Nov. 17, 2005); *White v. Bernacchi*, No. 1:04-cv-43, 2005 WL 2405955 (W.D. Mich. Sept. 29, 2005); *Messenger v. Heos*, No. 279968, 2008 WL 5158901 (Mich. Ct. App. Dec. 9, 2008).

<sup>46</sup> *Beztak Co v. Vlastic*, *supra*; *McAdoo v. Satawa*, *supra*; *Kandalraft v. John M. Peters, P.L.C.*, No. 267471, 2007 WL 1138395 (Mich. Ct. App. Apr. 17, 2007); *Berryman Prop v. O’Dea*, No. 248718, 2004 WL 2125682 (Mich. Ct. App. Sept. 23, 2004); *Po v. Benefiel*, *supra*; *Badalamenti v Sheldon L. Miller & Assocs., P.C.*, No. 254790, 2005 WL 3077146 (Mich. Ct. App. Nov. 17, 2005); *Kandalraft v. John M. Peters, P.L.C.*, No. 267471, 2007 WL 1138395 (Mich. Ct. App. Apr. 17, 2007); *Trakhtenberg v. McKelvy*, *supra*.

<sup>47</sup> *Heller v. Donaldson*, No. 194219, 1998 WL 2016612 (Mich. Ct. App. Mar. 23, 1998); *Woods v. Gursten*, *supra*.

<sup>48</sup> *Beztak Co. v. Vlastic*, *supra*.

<sup>49</sup> *Flanigan v. Herschfus*, No. 226997, 2002 WL 181061 (Mich. Ct. App. Feb. 1, 2002); *Evans v. Dickestein*, No. 252791, 2005 WL 1160621 (Mich. Ct. App. May 17, 2005); *Kandalraft v. John M. Peters, P.L.C.*, *supra*; *Taylor v. Monroe County Senior Legal Services, Inc.*, Case No. 292266, 2010 WL 4774272 (Mich. Ct. App. Nov. 23, 2010).

<sup>50</sup> *Bakshi v. Gold*, No. 220867, 2001 WL 902737 (Mich. Ct. App. Aug. 10, 2001).

<sup>51</sup> *Beztak, Co. v. Vlastic*, *supra*.

the attorney judgment rule defense has also been successfully used to defeat malpractice claims in other contexts as well.<sup>53</sup> Regardless of the context, so long as the attorney acts in good faith and with the informed belief that his acts are well-founded in the law, then the attorney judgment rule acts as a complete bar to claims premised on mere errors in judgment. *Simko*, 448 Mich. at 658. *But see, Shannon v. Foster Swift Collins & Smith, P.C.*, No. 275991, 2009 WL 127662 (Mich. Ct. App. Jan. 20, 2009)(issue can be question of fact).

Although usually a legal issue for the court to resolve, recent unpublished Court of Appeals decisions suggest that, in certain contexts, the application of the defense may not be one for the court to resolve on motion. *Kerr Corp. v. Weisman Young Schloss & Ruenenapp, PC*, Case No. 282563, 2010 WL 173606 (Mich. App. January 19, 2010); *Williamson v. Bratt*, Case No. 285682, 2010 WL 4102999 (Mich. Ct. App. October 19, 2010); *Bush v. Goren*, Case No. 294779, 2011 WL 321637 \*5 (Mich. Ct. App. Feb. 1, 2011)(deciding which statute of limitations to include in a rejection letter may not be protected by the attorney judgment rule because that rule does not “automatically shield an attorney who provides his client with a partial legal analysis”).

**(4) Collateral Estoppel.** Collateral estoppel, frequently referred to as “issue preclusion”<sup>54</sup>, is a judicially created rule of law which “precludes re-litigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid and final judgment and the issue was actually litigated and necessarily determined”. *Williams v. Logan*, 184 Mich. App. 472, 477-78; 459 N.W.2d 62 (1990). The doctrine is “intended to relieve parties of multiple litigation, conserve judicial resources and, by preventing inconsistent decisions, encourage reliance on adjudication.” *Dearborn Heights School District No. 7 v. Wayne County MEA/NEA*, 233 Mich. App. 120, 130; 592 N.W.2d 408 (1998). In short, the doctrine prevents a “second bite at the apple”. *Dearborn Heights School District*, 233 Mich. App. at 130.

To obtain the preclusive effect of the doctrine, two successive proceedings must involve (i) a different cause of action, (ii) between the same parties or their privies, where there is (iii) an identity of issues, and where (iv) the prior proceeding resulted in an actual determination of an adjudicated issue.<sup>55</sup> Similar considerations apply in the context of the res judicata defense. *Anderson v. Buckman, MacDonald & Bauer*, Case No. 300459, 2011 WL 6268195 (Mich. Ct. App. Dec. 15, 2011).

---

<sup>52</sup> *Grace v. Leitman*, No. 257896, 2006 WL 664228 (Mich. Ct. App. Mar. 16, 2006); *Trahktenberg v. McKelvy*, *supra*.

<sup>53</sup> *Persinger v. Holst*, 248 Mich. App. 499; 639 N.W.2d 594 (2001) (applying the attorney judgment rule in the estate planning context); *Stanke v. Stanke*, No. 263446, 2007 WL 838934 (Mich. Ct. App. Mar. 20, 2007)(applying the attorney judgment rule for decisions involving drafting a trust and appointing a trustee).

<sup>54</sup> *Howell v. Vito's Trucking and Excavating Co.*, 386 Mich. 37, 41; 191 N.W.2d 313 n.1 (1971).

<sup>55</sup> *Alterman v. Provizer, Eisenberg, Lichtenstein & Pearlman, P.C.*, 195 Mich. App. 422; 491 N.W.2d 868 (1992); *Williams v. Logan*, *supra*; *Schlumm v. O'Hagan*, 173 Mich. App. 345; 433 N.W.2d 839 (1988); *Knoblauch v. Kenyon*, 163 Mich. App. 712; 415 N.W.2d 286 (1987). But, underlying judgments that are later set aside no longer have preclusive effect for collateral estoppel purposes. *Beggs v. Vitori*, Case No. 295768 (Mich. Ct. App. May 5, 2011).

Michigan law makes a significant distinction between attempts to utilize collateral estoppel “offensively” (i.e., as a sword to impose liability) and application of collateral estoppel “defensively” (i.e., as a shield to prevent the imposition of liability). Where the doctrine is used offensively as a “sword” to impose liability, all of the technical requirements of the doctrine must be met. *Williams v. Logan*, 184 Mich. App. at 472; *Howell v. Vito’s Trucking and Excavating Co.*, 386 Mich. at 37. In contrast, where the doctrine is asserted defensively as a “shield” to prevent the imposition of liability, Michigan courts have formally abandoned the “identity of the parties” and the related “mutuality” requirements. *Monat v. State Farm Ins. Co.*, 469 Mich. 679; 677 N.W.2d 843 (2004); *Marroquin v. McHugh*, No. 248229, 2004 WL 1103995 (Mich. Ct. App. May 18, 2004). Michigan courts have specifically sanctioned the use of the collateral estoppel defense in the context of claims against attorneys so long as the elements for its application are satisfied. See *Schlumm v. O’Hagan*, *supra*. (cross-over collateral estoppel between criminal and civil proceedings); *Barrow v. Pritchard*, 235 Mich. App. 478; 597 N.W.2d 853 (1999)(same); *Keywell & Rosenfeld v. Bithell*, 254 Mich. App. 300, 347; 657 N.W.2d 759 (2002)(same); *Landrum v. Finn*, Case No. 294528, 2010 WL 5184656 (Mich. Ct. App. Dec. 21, 2010)(same); *Taylor v. Kochanowski*, Case No. 289660, 2010 WL 2696675 (Mich. Ct. App. July 8, 2010)(rulings on patent issues adverse to plaintiff in underlying case precluded re-litigation of those issues in malpractice case). If, on the other hand, the elements are not present, the defense does not apply. *Zerbo Mullin & Ass’ts., PC v. Richard Alef L.L.M., PC*, Case No. 286725, 2010 WL 376775 (Mich. App. February 2, 2010)(collateral estoppel not apply because issues not identical nor actually determined in prior proceeding); *Bunday v. Haehnel*, Case No. 288994, 2010 WL 446099 (Mich. App. February 9, 2010)(same).

**(5) Judicial Estoppel.** Under the doctrine of judicial estoppel – sometimes referred to as the “doctrine against the assertion of inconsistent positions”, *Paschke v. Re-Tool Indus.*, 445 Mich. 502, 509; 519 N.W.2d 441 (1994) – “a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding”, *Lichon v. American Universal Ins. Co.*, 435 Mich. 408, 416; 459 N.W.2d 288 (1990). The doctrine’s purpose is simple and straightforward – to protect the sanctity of oaths and the integrity of the judicial process.<sup>56</sup> It is “widely viewed as a tool to be used by courts in impeding those litigants who would otherwise play ‘fast and loose’ with the legal system”. *Paschke v. Re-Tool Indus.*, 445 Mich. at 509.

To successfully assert the doctrine, three prerequisites must be met – (i) the position previously asserted must be inconsistent with the position subsequently asserted<sup>57</sup>, (ii) the prior proceeding must have been a judicial proceeding, or, if not a judicial proceeding, at least a “contested” administrative proceeding<sup>58</sup>, and (iii) the inconsistent position previously asserted

---

<sup>56</sup> See *Horn v. Dep’t of Corrections*, 216 Mich. App. 58, 63; 548 N.W.2d 660 (1996); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982).

<sup>57</sup> See *Edwards v. Aetna Life Ins. Co.*, 690 F.2d at 598; *Paschke v. Re-Tool Indus.*, 445 Mich. at 510.

<sup>58</sup> See *Edwards v. Aetna Life Ins. Co.*, 690 F.2d at 598-600.

must have been accepted by the court or tribunal in the prior proceeding<sup>59</sup>. This defense has been applied to claims against attorneys. *Bessman v. Weiss*, 11 Mich. App. 528; 161 N.W.2d 599 (1968) (party could not take position inconsistent with verified Answer filed in previous lawsuit), *cert. denied*, 396 U.S. 1008 (1990); *Snyder v. Finn*, No. 194648, 1998 WL 2016579 (Mich. Ct. App. Mar. 17, 1998) (party to divorce action could not take position inconsistent with prior testimony in divorce proceeding); *Strong v. Vestevich*, No. 240687, 2003 WL 22514550 (Mich. Ct. App. Nov. 6, 2003)(applied to prior divorce proceeding testimony); *Brian M. Kelly Trust v Adkison, Need, Green & Allan, P.L.L.C.*, No. 268550, 2007 WL 708598 (Mich. Ct. App. Mar. 8, 2007)(petitioners who filed an account that was approved by probate court were estopped from taking different position regarding the value of certain assets in a subsequent legal malpractice proceeding); *Stanke v. Stanke*, No. 263446, 2008 WL 216071 (Mich. Ct. App. Jan. 24, 2008) (plaintiff who waived allocation of fault in prior trial by representing that one defendant was 100% responsible, and who received a default judgment from the court, was estopped from taking inconsistent position in subsequent litigation). The doctrine, it should be noted, works both ways – it also prevents an attorney from taking a position in a later case which is different from one taken in a prior proceeding. *Laethem Equip. Co. v. Currie Kendall, P.L.C.*, No. 272170, 2007 WL 4125340 (Mich. Ct. App. Nov. 20, 2007).

(6) **Estoppel**. Under appropriate circumstances, a client’s malpractice claim may be barred as a matter of law by an estoppel defense. *Viking Corp. v. Van Dyke*, Case No. 290063, 2011 WL 1262143 (Mich. Ct. App. Ap. 5, 2011). In *Viking Corp.*, for example, plaintiff asserted that its patent lawyers negligently allowed it to sign a patent infringement settlement agreement that failed to include all of the necessary parties and that, because of that omission, it was subjected to further infringement litigation that could have been avoided. Because the plaintiff’s principals reviewed all of the various drafts of the settlement documents before they were signed and because, in doing that, they were aware (or should have been aware) that the “other parties” were not willing to be included, Viking was estopped as a matter of law from asserting its malpractice claim.

#### D. **Other Issues.**

(1) **Michigan Tort Reform**. As part of its 1995 tort reform efforts, the Michigan Legislature, except in very limited circumstances, abolished joint and several liability<sup>60</sup> and substituted in its place a statutory mechanism insuring that each defendant is only held legally responsible for his or her own percentage of fault in causing or contributing to a tort plaintiff’s damages. To use the nomenclature used by Michigan courts interpreting the Act, the Michigan

---

<sup>59</sup> *Michigan Gas Util v. Public Service Comm’n*, 200 Mich. App. 576; 505 N.W.2d 27 (1993); *Paschke v. Re-Tool Indus.*, 445 Mich. at 510.

<sup>60</sup> See MICH. COMP LAWS §§ 600.2956; 600.29567; 600.6304. *Kokx v. Bylenga*, 241 Mich. App. 655, 662-63; 617 N.W.2d 368 (2000); *Smiley v. Corrigan*, 248 Mich. App. 51, 53-4; 638 N.W.2d 151 (2001); *Rinke v. Potrzebowski*, 254 Mich. App. 411, 415; 657 N.W.2d 169 (2003) (“Except in certain limited circumstances, the Legislature abolished joint liability in tort actions.”); *Jones v. Enertel, Inc.*, 254 Mich. App. 432, 435; 656 N.W.2d 870 (2003); *Holton v. A+ Ins. Assoc, Inc.*, 255 Mich. App. 318, 322; 661 N.W.2d 248 (2003) (“Tort Reform ‘eliminated joint liability in tort actions’ ....”).

Legislature intended to replace the rule of joint and several liability with a doctrine of “several liability” – sometimes referred to as “fair share liability”<sup>61</sup>.

Under the plain language of these statutory provisions, in any action (i) “based on tort” or (ii) “another legal theory seeking damages for personal injury, property damage or wrongful death”, the fact finder must allocate the “fault of each person [i.e., potentially responsible person] regardless of whether the person is, or could have been, named as a party to the action”. MICH. COMP. LAWS § 600.2957. Indeed, the Court is obligated to “instruct the jury to answer special interrogatories . . . indicating” both (i) the total amount of each plaintiff’s damages, and (ii) “the percentage of total fault of all persons [including non-parties] that contributed to” plaintiff’s damages. MICH. COMP. LAWS § 600.6304(1). Where the Act applies, no defendant may be compelled to “pay damages in an amount greater than his or her percentage of fault”. MICH. COMP. LAWS § 600.6304(4). For purposes of the Act, the term “fault” has an expansive meaning – it includes any “act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party”. MICH. COMP. LAWS § 600.6304(8). Because of this seismic shift in the allocation of liability between multiple tortfeasors, contribution from other tortfeasors is generally no longer available to a settling tortfeasor who, for whatever reason, overpays his or her “fair share” of the liability.<sup>62</sup>

Since the Act applies to any action “based on tort”, Michigan courts and federal courts interpreting and applying Michigan law have routinely and consistently applied the Act in a wide variety of tort contexts, including cases in which plaintiff’s seek recovery based on such tort theories as (i) premises liability<sup>63</sup>, (ii) legal malpractice<sup>64</sup>, (iii) negligence<sup>65</sup>, (iv) fraud<sup>66</sup>, (v) unjust enrichment<sup>67</sup>, (vi) civil conspiracy<sup>68</sup>, (vii) tortious interference with business relations<sup>69</sup>, (viii) trespass<sup>70</sup>, (ix) conversion<sup>71</sup> and (x) misappropriation of trade secrets.<sup>72</sup>

---

<sup>61</sup> *Smiley v. Corrigan*, *supra*, at 53; *Jones v. Enertel, Inc.*, 254 Mich. App. 432, 435; 656 N.W.2d 870 (2002); *Fournier v. Morett*, No. 267625, 2006 WL 1867702 (Mich. Ct. App. July 6, 2006).

<sup>62</sup> The prior common law and statutory law relating to joint and several liability, contribution and setoff still applies in those cases which are not governed by the Tort Reform Act. *Gerling Konzern Allgemeine Versicherungs AG v. Lawson*, 472 Mich. 44, 51; 693 N.W.2d 149 (2005); *Markley .v Oak Health Care Investors of Coldwater, Inc.*, 255 Mich. App. 245, 253; 660 N.W.2d 344 (2003). However, where the Act does apply, the non-settling defendants do not get an offset for settlements by other tortfeasors. *Kaiser v. Allen*, No. 264600, 2006 WL 3077635 (Mich. Ct. App. Oct. 31, 2006).

<sup>63</sup> *Kopp v. Zigich*, 268 Mich. App. 258, 707 N.W.2d 601 (2005); *Geer v. Nikolic Indus., Inc.*, No. 256572, 2006 WL 1237249 (Mich. Ct. App. May 9, 2006).

<sup>64</sup> *Kokx v. Bylenga*, *supra*; *AAA Mortgage Corp .v Legghio*, *supra*.

<sup>65</sup> *Smiley v. Corrigan*, *supra*; *Rinke v. Potrzebowski*, *supra*; *Holton v. A+ Ins Assoc, Inc*, *supra*; *Rihani v. Greeley and Hansen of Michigan, L.LC.*, Nos. 256921, 256941, 2005 WL 2759210 (Mich. Ct. App. Oct. 25, 2005)..

<sup>66</sup> *K-Mart v. Logan*, *supra*.

<sup>67</sup> *K-Mart v. Logan*, *supra*.

<sup>68</sup> *K-Mart v. Logan*, *supra*.

Since the statutes enacted as part of the 1995 Tort Reform legislation do not allow a person to be held legally responsible beyond his or her pro rata share of the responsibility for the plaintiff's damages, claims for contribution under Mich. Comp. Laws § 600.2925(a) are, except in very limited circumstances, all but eliminated. *Kokx v. Bylenga*, 241 Mich. App. 655; 617 N.W.2d 368 (2000).

(2) **Special Pleading Requirements.** In Michigan, there are no special pleading requirements, there is no verification obligation and, prior to filing suit, there is no obligation on the part of the plaintiff to file any type of certification or affidavit of merit. Yet, the Complaint must articulate with sufficient particularity the nature of the error alleged in order to properly put the attorney on notice regarding those claims that need to be defended – the same rule which applies in any professional liability case in Michigan. *Craig ex rel. Craig v. Silverman*, No. 265155, 2006 WL 1044297 (Mich. Ct. App. April 20, 2006).. Mere conclusory allegations are insufficient to state a claim for malpractice. *Kloian v. Schwatz*, 272 Mich. App. 232, 241; 725 N.W.2d 671 (2006); *Underwood v. Bullard*, Nos. 279457, 280528, 2009 WL 127658 (Mich. Ct. App. Jan. 20, 2009).

(3) **Burden of Proof.** As in other negligence claims, the plaintiff in a legal malpractice action must prove the elements of the action by a preponderance of the evidence. *M Civ J I 8.01*.

(4) **Admissibility and Use of Ethics Rules.** Ethical rules – like those contained within the Rules of Professional Conduct – are designed to regulate lawyers' ethical conduct in order to protect society and the integrity of the profession. Generally, the remedy for a violation of the ethical rules is a disciplinary action – not civil litigation. MALLEN & SMITH, LEGAL MALPRACTICE § 20:7 (2009 Ed.). Before adoption of the new Rules, the Michigan Court of Appeals generally held that the ethical rules contained within the former Code of Professional Responsibility were (i) relevant to the standard of care in legal malpractice litigation<sup>73</sup> and that (ii) a violation of the standards established by those ethical rules created a rebuttable presumption of negligence.<sup>74</sup> Following the adoption of the Michigan Rules of Professional

---

<sup>69</sup> *True Worship Church of God in Christ v. Anderson*, No. 253294, 2005 WL 927142 (Mich. Ct. App. April 21, 2005)..

<sup>70</sup> *True Worship Church of God in Christ v. Anderson*, *supra*.

<sup>71</sup> *True Worship Church of God in Christ v. Anderson*, *supra*.

<sup>72</sup> *Mike's Train House, Inc .v. Lionel, L.L.C.*, *supra*.

<sup>73</sup> *Lipton v. Boesky*, 110 Mich. App. 589, 597; 313 N.W.2d 163 (1981); *Beattie v. Firnschild*, 152 Mich. App. 785, 790-91; 394 N.W.2d 107 (1986); *Hooper v. Hill Lewis*, 191 Mich. App. 312, 316; 477 N.W.2d 114 (1991).

<sup>74</sup> See *Lipton*, *supra*, *Beattie*, *supra*, *Hooper*, *supra*; *Azzar v. Tolley*, No. 249879, 20064 WL 2451938 (Mich. Ct. App. Nov. 2, 2004); *Czyzyk v. Irons*, No. 253126, 2005 WL 562825 (Mich. Ct. App. Mar. 10, 2005); *Evans v. Dickstein*, No. 252791, 2005 WL 1160621 (Mich. Ct. App. May 17, 2005). Some recent decisions, relying on *Beattie*, have used this same approach in the context of the new Michigan Rules of Professional Conduct, but usually without an analysis of

Conduct, however, Michigan courts have often – but not uniformly so -- treated the Rules differently. Because of the language found in MRPC 1.0(b)<sup>75</sup> and the comments which follow, the Rules (i) may not be used to support a malpractice claim<sup>76</sup>, (ii) may not be used to support a negligent supervision claim against a lawyer<sup>77</sup>, and (iii) may not be used to support a separate claim for money damages<sup>78</sup> since “a potential breach of the [MRPC] gives rise only to an initiation of the discipline process and does not provide plaintiffs with a basis for enforcement”. *McClure v. Vogt*, No. 202186, 1999 WL 33437885 (Mich. Ct. App. Aug. 10, 1999); *Lear Corp. v. Butzel Long, P.C.*, No. 258669, 2006 WL 1360286 (Mich. Ct. App. May 18, 2006); *Hamilton v. Rubin*, No. 258917, 2006 WL 1751901 (Mich. Ct. App. June 27, 2006); *Biedul v. Siefman*, No. 263736, 2006 WL 3375317 (Mich. Ct. App. Nov. 21, 2006). The most direct treatment of the issue in a published Michigan decision is *Watts v. Polaczyk*, 242 Mich. App. 600, 607; 619 N.W.2d 714 n.1 (2000). There, the Court said this:

“[T]hrough failure to comply with requirements of [the] MRPC ... may provide a basis for invoking the disciplinary process, such failure does not give rise to a cause of action for enforcement of the rule wherefore damages caused by the failure to comply with the rule[s].”

As such, in the evolution of the treatment of such Rules in lawsuits against attorneys, this much can be said at this point – (i) the Rules do not create a private cause of action for money damages, (ii) a malpractice claim may not be predicated solely on the violation of an ethical rule, but, (iii) under limited circumstances, to the extent that the Rules articulate standards of care, are

---

the differences between the old and new ethical rules. *Bednarski v. Smith*, Case No. 296979, 2011 WL 2694634 \* 6 (Mich. Ct. App. July 12, 2011).

<sup>75</sup> MRPC 1.0(b) provides:

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules do not, however, give rise to a cause of action for enforcement of rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule. In a civil or criminal action, the admissibility of the Rules of Professional Conduct is governed by the Michigan Rules of Evidence and other provisions of law.

<sup>76</sup> *Metro Commc'n v. Kemp, Klein, Umphrey & Edelman*, No. 189793, 1997 WL 33345053 (Mich. Ct. App. June 17, 1997); *Starks v. Ramey*, No. 218717, 2001 WL 564190 (Mich. Ct. App. Apr. 20, 2001); *DeBoer v. Larky*, No. 234283, 2002 WL 31955239 (Mich. Ct. App. Dec. 17, 2002); *Lusader v. Law Firm of John F. Schaefer, P.L.L.C.*, No. 249683, 2004 WL 2952592 (Mich. Ct. App. Dec. 21, 2004); *Ansari v. Schaefer*, No. 260744, 2005 WL 1787881 (Mich. Ct. App. July 28, 2005); *Trierweiler v. Varnum Riddering Schmidt & Howlett*, No. 261865, 2006 WL 1161546 (Mich. Ct. App. May 2, 2006); *Ansari v. Gold*, No. 263920, 2006 WL 335827 (Mich. Ct. App. Feb. 14, 2006); *Underwood v. Bullard*, Nos. 279457, 280528, 2009 WL 127658 (Mich. Ct. App. Jan. 20, 2009).

<sup>77</sup> *Grossman v. Liss & Assocs, P.C.*, No. 234322, 2003 WL 328039 (Mich. Ct. App. Feb. 11, 2003).

<sup>78</sup> *CenTra, Inc. v. Estrin*, 538 F.3d 402 (6<sup>th</sup> Cir. 2008); *Kettler v. Fleming*, No. 212736, 2000 WL 33529641 (Mich. Ct. App. Mar. 3, 2000); *Triad Mechanical, Inc. v. Daniel M. Rhodes*, No. 276616, 2008 WL 942267 (Mich. Ct. App. Apr. 8, 2008).

relevant to the plaintiff's claim and if the probative value of their use would not be outweighed by their prejudicial effect, the Rules may be used to establish a standard of practice within the confines of an otherwise actionable claim for legal malpractice. *ConTra, Inc. v. Estrin*, 538 F.3d 402 (6<sup>th</sup> Cir. 2008).<sup>79</sup> But even then, a violation of an ethical rule does not create a presumption (rebuttable or otherwise) of negligence and, to support a claim for a violation of an ethics rule, the plaintiff must be able to establish that the alleged violation itself proximately caused the plaintiff's alleged damages. *Radtke v. Miller Canfield Paddock & Stone*, 209 Mich. App. 606, 621; 532 N.W.2d 547 (1995), *rev'd on other grounds*, 453 Mich. 413 (1996); *Rhem v. Horn*, Case No. 10-10050, 2010 WL 4792175 (E.D. Mich. Nov. 18 2010). And, if relevant and appropriate under the circumstances, a violation may only be used as evidence of negligence – but nothing more.

**(5) The Expert Testimony Requirement.** Expert testimony is generally necessary to establish (i) the standard of conduct, (ii) breach of that standard and (iii) causation, *Stockler v. Rose*, 174 Mich. App. 14; 436 N.W.2d 70 (1989), *lv. den.* (Jan. 23, 1990); *Dean v. Tucker*, 205 Mich. App. 547; 517 N.W.2d 835 (1994); *Joos v Auto-Owners Ins. Co.*, 94 Mich. App. 419; 288 N.W.2d 443 (1979), *Zaharie v. Zaharie*, No. 256862, 2005 WL 3440478 (Mich. Ct. App. Dec. 15, 2005); *Reesor v. Norman Yatooma & Ass'ts., PC*, Case No. 289400, 2010 WL 1924838 \* 4-5 (Mich. Ct. App. May 13, 2010), unless the “absence of professional care is so manifest that within the common knowledge and experience of ordinary laymen it can be said that the defendant was careless”, *Stockler v. Rose*, 174 Mich. App. at 48. Where the plaintiff's allegations challenge the legal strategy of his or her attorney, expert testimony is generally required. This is particularly so in the context of litigation-related decisions, and even where the malpractice plaintiff claims that the lawyer violated the Michigan Rules of Professional Conduct or the Michigan Court Rules. *Jacobson v. Lloyd*, Case No. 294929, 2011 WL 1376312 (Mich. Ct. App. Ap. 12, 2011). Whether the expert is qualified is for the court to decide. *Dean v. Tucker*, 205 Mich. App. at 550.

**(6) Assignment of Malpractice Claims.** Because of the “personal” nature of the attorney-client relationship, a claim for legal malpractice may not be assigned. *Weston v. Douty*, 163 Mich. App. 238; 414 N.W.2d 116 (1987); *Moorhouse v. Ambassador Ins. Co.*, 147 Mich. App. 412; 383 N.W.2d 219 (1985) *leave denied* (Apr. 28, 1986); *Joos v. Drillock*, 127 Mich. App. 99; 338 N.W.2d 736 (1983). But, the proceeds of a legal malpractice action are assignable in Michigan. *Weston v. Douty, supra*.

## **E. Alternative Causes Of Action.**

**(1) No-Duplication Rule.** In Michigan, when a plaintiff challenges the quality of legal services, the claim is limited to one in tort for legal malpractice. *Aldred v. O'Hara-Bruce*, 184 Mich. App. 488, 490; 458 N.W.2d 671 (1990); *Hooper v. Hill, Lewis*, 191 Mich. App. 312; 477 N.W.2d 114 (1991); *Barnard v. Dilley*, 134 Mich. App. 375, 379; 350 N.W.2d 887 (1984)(Where the “alleged duty arises out of [an attorney-client] relationship, the tort claim is one for malpractice and malpractice only”). Michigan courts have consistently dismissed as duplicative “other-labeled claims against lawyers which challenge the quality of the same legal services as those at issue in the

---

<sup>79</sup> See also, *Trierweiler v. Varnum Riddering Schmidt & Howlett*, No. 261865, 2006 WL 1161546 (Mich. Ct. App. May 2, 2006)).

malpractice count.” *Brownell v. Garber*, 199 Mich. App. 519, 526; 503 N.W.2d 81 (1993); *Boyle v. Odette*, 168 Mich. App. 737; 425 N.W.2d 472 (1988); *Sarr v. Scott A. Smith, P.C.*, No. 242395, 2004 WL 981162 (Mich. Ct. App. May 6, 2004). Such efforts are fatally defective because such other claims are necessarily subsumed under the malpractice claim.

Applying that rule, Michigan courts, where appropriate, have consistently dismissed other types of claims which seek to challenge the same services and therefore merely duplicate the focus of the malpractice claim -- such as claims for (i) breach of contract;<sup>80</sup> (ii) breach of fiduciary duty;<sup>81</sup> (iii) fraud;<sup>82</sup> and (iv) ordinary negligence.<sup>83</sup>

**(2) Michigan Consumer Protection Act.** The Michigan Consumer Protection Act provides that “[u]nfair, unconscionable or deceptive methods, acts or practices in the conduct of trade or commerce are unlawful”. MICH. COMP. LAWS § 445.903(1). By definition, the terms “trade or commerce” refer to the conduct of any business “providing goods, property or service primarily for personal, family or household purposes . . . .” MICH. COMP. LAWS § 445.902(d). The Act contains a civil enforcement provision which specifically authorizes those who suffer a loss as a result of a violation of the Act to bring an action to recover actual damages. MICH. COMP. LAWS § 445.911. The statute, however, specifically exempts certain “transactions” or “conduct”. MICH. COMP. LAWS § 445.904. Michigan courts have consistently dismissed claims against attorneys and other professionals on the theory that the provision of professional services by lawyers does not constitute “trade or commerce” within the meaning of the Act. *Nelson v. Ho*, 222 Mich. App. 74; 564 N.W.2d 482 (1997); *Comer Family Trust v. Thomas & Jensen*, No. 186676, 1997 WL 33353233 (Mich. Ct. App. Apr. 25, 1997); *White v. Bernacchi*, No. 1:04-cv-43, 2005 WL 2405955 (W.D. Mich. Mar. 28, 2005).

**(3) Breach of Contract.** Because of the no-duplication rule, attorneys may only be held liable to a client under a breach of contract theory if the attorney breaches a “special agreement” for services. *Brownell v. Garber*, 199 Mich. App. 519, 524-26; 503 N.W.2d 81

---

<sup>80</sup> *Brownell v. Garber*, 199 Mich. App. 519, 526; N.W.2d (1993); *Boyle v. Odette*, 168 Mich. App. 737; N.W.2d (1988); *Underwood v. Bullard*, Nos. 279457, 280528, 2009 WL 127658 (Mich. Ct. App. Jan. 20, 2009); *Zorza v. Kotzian*, No. 208147, 1999 WL 33435076 (Mich. Ct. App. Oct. 12, 1999); *Melody Farms, Inc. v. Carson Fischer, P.L.C.*, No. 215883, 2001 WL 740575 (Mich. Ct. App. Feb. 16, 2001); *Sharma v. Giomarco*, No. 248840, 2004 WL 2176786 (Mich. Ct. App. Sept. 28, 2004); *Lededovych v. Hadley*, No. 255797, 2005 WL 3116083 (Mich. Ct. App. Nov. 22, 2005); *Alken-Ziegler v. Bearup*, No. 264513, 2006 WL 572571 (Mich. Ct. App. Mar. 9, 2006); *Wilcoxon v. Teicher*, No. 279160, 2008 WL 4684154 (Mich. Ct. App. Oct. 23, 2008).

<sup>81</sup> *Melody Farms, Inc. v. Carson Fischer, P.L.C.*, *supra*; *Sharma v. Giomarco*, *supra*; *Danou v. Cummins, McClorey, Davis & Acho, P.L.C.*, No. 262871, 2006 WL 120369 (Mich. Ct. App. Jan. 17, 2006); *Alken-Ziegler v. Bearup*, *supra*; *Pukke v. Hyman Lippitt, P.C.*, No. 265477, 2006 WL 1540781 (Mich. Ct. App. June 6, 2006).

<sup>82</sup> *Vora v. Prather & Assocs., P.C.*, No. 214558, 2001 WL 1585046 (Mich. Ct. App. Dec. 11, 2001); *Jones v. Keene*, *supra*; *Dreilich v Nocoletti & Assocs, P.C.*, No. 258945, 2006 WL 1628203 (Mich. Ct. App. June 13, 2006).

<sup>83</sup> *Sharma v. Giomarco*, *supra*.

(1993). See also, *Underwood v. Bullard*, Nos. 279457, 280528, 2009 WL 127658 (Mich. Ct. App. Jan. 20, 2009). A “special agreement” is a “contract to perform a specific act”, as opposed to a general agreement “to exercise appropriate legal skill in providing representation in a lawsuit”. *Barnard v. Dilley*, 134 Mich. App. 375, 378; 350 N.W.2d 887 (1984). Because agreements concerning legal services rarely include specific promises to perform in a particular way or to guarantee a particular result, as a practical matter, very few of these types of claims survive summary disposition.

**(4) Breach of Fiduciary Duty.** If a legal malpractice plaintiff’s breach of fiduciary claim merely challenges the quality of the legal services provided and therefore duplicates what is at issue in that plaintiff’s malpractice claim, it is likely a candidate for dismissal. *Kraniak v. Cox, Hodgman & Giarmarco, P.C.*, No. 230028, 2002 WL 1308783 (Mich. Ct. App. June 11, 2002); *Fritz v. Monnich*, No. 235262, 2003 WL 21186652 (Mich. Ct. App. May 20, 2003); *Taylor v. Kochanowski*, Case No. 289660, 2010 WL 2696675 (Mich. Ct. App. July 8, 2010). Having said that, as a general proposition, a fiduciary duty can attach (i) to an attorney-client relationship<sup>84</sup> or (ii) to any relationship in which one reposes “faith, confidence and trust and . . . rel[ies] upon the judgment and advice of another”<sup>85</sup>. Although the existence of such a relationship can be a question of fact<sup>86</sup>, often it is not.<sup>87</sup> An attorney’s fiduciary obligation, of course, extends to both current and former clients. *Alpha Capital Management, Inc. v. Retenbach*, 287 Mich. App. 589; 792 N.W.2d 344 (2010). It obligates the attorney to “represent the client with undivided loyalty, to preserve client confidences and to disclose material matters infringing upon these obligations”. MALLEEN & SMITH, LEGAL MALPRACTICE § 15:1 (2009 Ed.). See also, *Alpha Capital Management, Inc. v. Retenbach*, *supra*. Where it applies, the fiduciary obligation is “two-fold: undivided loyalty and confidentiality”, *Id.* at § 15:1. An action for a breach of fiduciary duty will only lie when “such a position of influence has been acquired and abused, or when confidence has been reposed and betrayed”. *Vincencio v. Jaime Ramirez, M.D., P.C.*, 211 Mich. App. 501, 508; 536 N.W.2d 280 (1995); *Smith v. Saginaw Savings & Loan Ass’n*, 94 Mich. App. 263, 274; 288 N.W.2d 613 (1979).

**(5) Aiding and Abetting Client’s Breach of Fiduciary Duty.** Although one earlier unpublished decision stated that Michigan does not recognize such a cause of action, *Kraniak v. Cox, Hodgman & Giarmarco, P.C.*, Case No. 230028, 2002 WL 1308783 (Mich. Ct. App. June 11, 2002), an “aiding and abetting” theory – without argument or comment about its viability as

---

<sup>84</sup> *Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*, 107 Mich. App. 509, 514-15; 309 N.W.2d 645 (1981) (“the existence of an attorney-client relationship . . . establishes a per se rule that a lawyer owes fiduciary duties to the client”); *Brownell v. Garber*, 199 Mich. App. 519, 528; 503 N.W.2d 81 (1993); *Lipton v. Boesky*, 110 Mich. App. 589, 595; 313 N.W.2d 163 (1981); *Kukla v. Perry*, 361 Mich. 311, 316; 105 N.W.2d 176 (1960).

<sup>85</sup> *Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*, 107 Mich. App. at 515; *Glidden Co. v. Jandernoa*, 173 F.R.D. 459, 475 (W.D. Mich. 1997).

<sup>86</sup> *Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*, 107 Mich. App. at 515; *In Re D.C. Equip., Inc.*, 112 B.R. 855, 857 (W.D. Mich. 1990).

<sup>87</sup> *Beaty v. Hertzberg & Golden, P.C.*, 456 Mich. 247; 571 N.W.2d 716 (1997); *Ulrich v. Federal Land Bank & St. Paul*, 192 Mich. App. 194; 480 N.W.2d 910 (1991).

a cause of action in Michigan -- was submitted to a jury in *Alpha Capital Management, Inc. v. Rentenbach*, 287 Mich. App. 589, 631-632; 792 N.W.2d 344 (2010).

**(6) Malicious Prosecution/Abuse of Process.** Actions for malicious prosecution have historically been limited by restrictions that make them difficult to maintain. *Matthews v. Blue Cross & Blue Shield of Mich.*, 456 Mich. 365, 377; 572 N.W.2d 603 (1998); *Renda v. Int'l Union, U.A.W.*, 366 Mich. 58, 75; 114 N.W.2d 343 (1962). The Michigan Supreme Court has observed that the cause of action has “been hedged about by limitations more stringent than those in the case of almost any other act causing damage to another and the courts have allowed recovery only when the requirements limiting it have been fully complied with.” *Renda*, 366 Mich. at 75 (internal quotation omitted).<sup>88</sup>

The elements of a cause of action for malicious prosecution are (1) a civil proceeding instituted or continued by the defendant against the plaintiff, (2) prior proceedings terminated in favor of the present plaintiff, (3) absence of probable cause for those proceedings, (4) malice, defined as a purpose other than that of securing the proper adjudication of the claim, and (5) a special injury that flows directly from the prior proceedings *Kauffman v. Shefman*, 169 Mich. App. 829, 834; 426 N.W.2d 819 (1988); *see also, Friedman v. Dozorc*, 412 Mich 1, 48; 312 N.W.2d 585 (1981). The “special injury requirement” is particularly important in connection with malicious prosecution claims against attorneys. *Id.* It has been described as a fundamental and inflexible restriction on the cause of action, one designed to “limit the circumstances in which an action for malicious prosecution . . . can be maintained”. *Id.* at 46. The “special injury” requirement can only be met if the injury concerns one’s (i) fame, (ii) person or liberty or (iii) property, *id.* at 33-34 – and then only if the injury is of the nature or type that “would not necessarily [otherwise] occur in all suits prosecuted for similar causes of action”, *Barnard v. Hartman*, 130 Mich. App. 692, 695; 344 N.W.2d 53 (1983). It is “not enough that the prosecution entails greater hardship than that which would flow from an ordinary civil action[,] [t]he hardship must also be greater than that which ordinarily results from the prosecution of similar causes”. *Id.* at 696.

To recover for abuse of process, “a plaintiff must plead and prove (1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding.” *Bonner v. Chicago Title Ins. Co.*, 194 Mich. App. 462, 472; 487 N.W.2d 807 (1992). The plaintiff is required to show that the ulterior purpose alleged is more than harassment, defamation, or exposure to excessive litigation costs. *Early Detection Ctr., P.C. v. N. Y. Life Ins. Co.*, 157 Mich. App. 618, 629-30; 403 N.W.2d 830 (1986). Moreover, plaintiff must identify a corroborating act which shows the defendant’s improper ulterior purpose. *Bonner*, 194 Mich. App. at 472. In other words, simply showing that a defendant’s actions were innervated by a bad motive -- even a malicious one -- does not necessarily establish an ulterior purpose. *Id.*

---

<sup>88</sup> This same sentiment was echoed by Justice Markman 42 years after the *Renda* decision, in his dissent from an order denying leave to appeal, where he stated that the cause of action for malicious prosecution has never been favored, and has been upheld only where its elements, complete with their strict limitations, have been satisfied. *Radzinski v. Doe*, 469 Mich. 1037; 677 N.W.2d 796, 799 (2004)(Markman, J., dissenting) (citing fifty Michigan cases).

The Michigan Supreme Court, in *Friedman v. Dozorc*, *supra*, emphasized that for purposes of the cause of action, “abuse of process” does not mean abuse of “process” in the sense of abuse of the summons used to begin the case, but rather the subsequent misuse of the proceedings “for any purpose other than that which it was designed to accomplish.” *Id.* at 30 n18 (*quoting* Restatement (Third) of Torts, Comments a, p. 474). The action “lies for the improper use of the process after it had been issued, not for maliciously causing it to issue.” *Id.* at 31.

(7) **Conspiracy** “A civil conspiracy is a [i] combination of two or more persons, [ii] by some concerted action, [iii] to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.” *Abno Ins. Co. v. Columbia Cas. Ins. Co.*, 194 Mich. App. 300, 313; 486 N.W.2d 351 (1992). It is parasitic to other claims. It cannot “exist in the air; rather, it is necessary to prove a separate, actionable tort”. *Early Detection Center, P.C. v. N. Y. Life Ins. Co.*, 157 Mich. App. 618, 632; 403 N.W.2d 830 (1986). Where the claim is asserted based on an alleged conspiracy between an attorney and his or her client, such claims generally fail because agents (i.e., attorneys) cannot “conspire” with their principals (i.e., clients). *Uniprop, Inc. v. Morganroth*, 260 Mich. App. 442, 447; 678 N.W.2d 638 (2004)(“[a]n attorney often acts as his client’s agent. . .”). In the principal - agency context, the “agent . . . cannot be considered a separate entity from his principal . . . as ‘long as the agent . . . acts only within the scope of his agency . . .’”. *Blair v. Checker Cab Co.*, 219 Mich. App. 667, 674; 558 N.W.2d 439 (1996). As such, when an attorney acts within the scope of his or her authority in providing legal services to a client and both are accused of being involved in a conspiracy, that attorney cannot be sued for civil conspiracy – as a matter of law, the plaintiff cannot establish the two or more persons element of a civil conspiracy claim. *A.F.S.C.M.E. v. Livingston County Rd. Comm’n*, No. 274665, 2006 WL 3357398 (Mich. Ct. App. Nov. 13, 2007).