

LEGAL MALPRACTICE IN INDIANA

I. ATTORNEY-CLIENT RELATIONSHIP

No particular formality is necessary to establish an attorney-client relationship in Indiana. The relationship need not be express; it may be implied from the conduct of the parties. An attorney-client relationship exists when an attorney advises others as to their legal rights, a method to be pursued, the forum to be selected, and the practice to be followed for the enforcement of their rights. The rendering of legal advice and legal services by an attorney and the client's subsequent reliance on the advice and services are therefore the benchmarks of an attorney-client relationship.



In Indiana, a plaintiff in a legal malpractice action must prove: (1) employment of an attorney (duty); (2) failure by the attorney to exercise ordinary skill and knowledge (breach); (3) proximate cause (causation); and, (4) loss to client (damages). *Worth v. Tamarack American, a Division of Great American Ins. Co.*, 47 F. Supp.2d 1087 (S.D. Ind. 1999). Generally, a party outside the direct attorney-client relationship lacks standing to complain of conflicts that arise from that relationship. An attorney is immune from liability to third persons arising from his performance as an attorney unless the third party is an intended beneficiary of the attorney's services and the attorney is aware of the beneficiary's existence.

II. STANDARD OF CARE AND BREACH

A cause of action in Indiana for professional malpractice against an attorney arises out of the implied understanding in the engagement that the attorney will employ that degree of skill ordinarily exercised by the profession generally. *Rice v. Strunk*, 670 N.E.2d 1280, 1283-84 (Ind. 1986). In addition to the requirement that a lawyer is obliged to represent his or her client zealously within the framework of the law, an attorney is required to exercise the knowledge, skill, and ability ordinarily possessed and exercised by similarly situated members of the legal profession.

Usually, expert testimony is critical in legal malpractice cases to establish the failure to exercise the knowledge, skill and ability ordinarily exercised by members of the legal profession similarly situated. However, there is no need for expert testimony when the question is one within the common knowledge of the community as a whole or when an attorney's negligence is so grossly apparent that a layperson would have no difficulty identifying it.

III. PROXIMATE CAUSE

To be successful in a legal malpractice action, an Indiana plaintiff must prove that the attorney's negligence was the proximate cause of damage to the plaintiff. "Proximate cause requires that there be a reasonable connection between the defendant's allegedly negligent conduct and the plaintiff's damages. Proximate cause requires, at a minimum, that the harm would not have occurred but for the defendant's conduct." *Gates v. Riley ex rel. Riley*, 723 N.E.2d 946, 950 (Ind. Ct. App. 2000) (citations omitted). Proximate cause is primarily a question of fact to be determined by the jury.

IV. DAMAGES

In Indiana, the client is entitled to be restored to the position he or she would have been in had the professional negligence not occurred. Consequently, the measure of damages in a legal malpractice case is the value of the plaintiff's lost claim. However, a plaintiff cannot receive a windfall and collect more compensatory damages from her attorney for legal malpractice than she would have been able to collect in the underlying claim. Compensatory damages for mental distress or emotional trauma are generally recoverable only when the distress is accompanied by and results from a physical injury caused by an impact to the person seeking recovery. However, Indiana courts recognize an exception to this general rule and award compensatory damages for mental anguish unaccompanied by physical injury in tort actions involving intentional conduct. For example, proof of an intentional fraud will support an award of emotional distress damages. *Knauf Fiber Glass, GmbH v. Stein*, 615 N.E.2d 115, 127 (Ind. Ct. App. 1993). In Indiana, attorney's fees are recoverable only when authorized by statute or contract. They are not recoverable in common law tort claims such as malpractice. Punitive damages may be awarded in a minority of legal malpractice cases in which there is evidence of intentional misconduct, or cases that involve fraud or malice. Additionally, Indiana has a special statute awarding treble damages for cases involving attorney "deceit." "An attorney who is guilty of deceit or collusion, or consents to deceit or collusion, with intent to deceive a court, judge, or party to an action or judicial proceeding" may be liable in a civil action for damages. Ind. Code § 33-43-1-8.

V. AFFIRMATIVE DEFENSES

A. Statute of Limitations

Legal malpractice claims in Indiana are subject to a two-year statute of limitations. Indiana's legal malpractice statute of limitations is an accrual statute, which requires that the court compute the period of time for commencing an action under the specific circumstances of each case. See 22A INDIANA PRACTICE SERIES § 39.1 (2007). A cause of action for legal malpractice generally accrues when a wrongfully inflicted injury causes damage. However, legal malpractice actions are subject to the "discovery rule," which provides that the statute of limitations does not begin to run until such time as the plaintiff knows, or in the exercise of ordinary diligence could have discovered, that he had sustained an injury as the result of the tortious act of another. For a cause of action to accrue, it is not necessary that the full extent of damage be known or even ascertainable, but only that some ascertainable damage has occurred. Courts consider both statutory exceptions to the discovery rule and common law tolling. Thus, the judicially created doctrine of continuous representation provides that the statute of limitations does not commence until the end of an attorney's representation of a client in the same matter in which the alleged malpractice occurred. Indiana's legal malpractice statute of limitations can also be tolled due to fraudulent concealment. See Ind. Code 34-11-5-1 (statutorily created tolling).

B. Comparative Negligence

An attorney malpractice action is a negligence action and, as such, the defenses available in other negligence actions are largely available in malpractice actions, including contributory negligence. In appropriate cases, the jury is instructed to evaluate the negligence of both parties and assign fault accordingly. However, contributory negligence must be the proximate cause of the plaintiff's injury in order to constitute a complete bar to recovery. If the client's negligence is less than the combined negligence of all of the defendants, the client is entitled to recover for the full extent of the injury minus his share of responsibility. If the percentage of the client's negligence exceeds the total percentages of negligence of all defendants, the client recovers nothing.

VI. CLAIMS OTHER THAN MALPRACTICE

In Indiana, legal malpractice claims are governed by tort principles regardless of whether they are brought as a tort or a breach of contract, so breach of contract does not provide an alternative theory of recovery if based upon the same conduct giving rise to the claim of malpractice. See, e.g., *Shideler v. Dwyer*, 417 N.E.2d 281, 285-88 (Ind. 1981). Nevertheless, other theories of tort recovery remain independently viable.

A. Fraud

A claim for fraud consists of the following elements: (1) a material representation by the defendant to the plaintiff of past or existing facts, (2) which representation is false, (3) was made with knowledge, or reckless ignorance, of the falsity by the defendant, (4) reliance by the plaintiff upon the representation, and (5) damages to the plaintiff. The hallmark of any fraud claim is the false representation. An attorney "may be held liable for actual fraud committed within the context of the attorney-client relationship, or generally." *Sanders v. Townsend*, 582 N.E.2d 355, 358 (Ind. 1991).

B. Breach of Fiduciary Duty

The breach of a fiduciary duty can constitute malpractice. Additionally, Indiana case law recognizes that transactions entered into during the existence of a fiduciary relationship are presumptively invalid as the product of undue influence. Transactions between an attorney and client are presumed to be fraudulent, so that the attorney has the burden of proving the fairness and honesty thereof.

C. Malicious Prosecution

"The essence of malicious prosecution rests on the notion that the plaintiff has been improperly subjected to legal process." *Crosson v. Berry*, 829 N.E.2d 184, 189 (Ind. Ct. App. 2005). Although traditionally intended to provide recourse to criminal defendants who have been wrongfully charged, malicious prosecution is also available to those who allege that civil proceedings have been maliciously initiated against them. The crux of attorney liability for malicious prosecution is premised upon a finding that the attorney acted for some purpose other than aiding his client in securing a proper adjudication of his claim.

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