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I. Legal Malpractice

A. Nature of Claim

An attorney malpractice action in Indiana is based on negligence. Although in some circumstances a plaintiff may allege other causes of action against an attorney, it is well established that a traditional legal malpractice claim sounds in tort.

B. Elements

A plaintiff bringing a legal malpractice claim must show: (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).

1. Standing/Duty

a. Privity Rule and Exceptions

In Indiana, an attorney's duty extends only to his or her client, with a narrow exception for intended third party beneficiaries. *See, e.g., Hacker v. Holland*, 570 N.E.2d 951, 955 (Ind. Ct. App. 1991) ("Attorneys do not owe a duty of care to non-clients except in the context of third party beneficiaries"). *See also Rice v. Strunk*, 670 N.E.2d 1280 (Ind. 1996) (finding attorney had no duty to former client).

Even as to third party beneficiaries, Indiana courts have held that an attorney's duty extends only to beneficiaries that are both known and intended by the attorney's client to be beneficiaries of the attorney's legal work for the client. For example, in *Walker v. Lawson*, 514 N.E.2d 629 (Ind. Ct. App. 1987), *adopted in part by* 514 N.E.2d 629 (Ind. 1988), the Indiana Court of Appeals addressed the then-open issue of whether a beneficiary under a will could maintain a malpractice action against the lawyer who drafted the will for the testator. The court adopted a third party beneficiary contract theory to analyze the attorney's liability to the third party:

> Our agreement with the majority of jurisdictions allowing an *intended* beneficiary to maintain a cause of action against a negligent lawyer does not mean a lawyer is liable to the entire world for professional incompetence, but it does mean that *in the narrow circumstances of this case, ordinary principles of negligence apply to create a cause of action for malpractice for the known intended beneficiaries of a testamentary scheme*.

Walker, 514 N.E.2d at 634 (emphasis added). The Indiana Supreme Court affirmed this holding, stating in pertinent part:

> We agree with the Court of Appeals that an action will lie by a beneficiary under a will against the attorney who drafted that will *on the basis that the beneficiary is a known third party*.

Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988) (emphasis added).

Thus, as a general rule, a plaintiff may recover against a negligent professional "only if there is privity of contract or if the negligent professional had actual knowledge that the plaintiff would be affected by the representations made." *Keybank National Association v. Shipley*, 846 N.E.2d 290, 297 (Ind. Ct. App. 2006), *trans. denied* (quoting *Walker v. Lawson*, 514 N.E.2d 629, 632 (Ind. Ct. App. 1987), *adopted in part by* 526 N.E.2d 968 (Ind. 1988)). Indiana has recognized a single exception to the general rule, allowing a beneficiary under a will to pursue a malpractice claim against the drafter of the will despite lack of privity because "the attorney and testator-client enter[ed] into an agreement with the intent to confer a direct benefit on the beneficiary under the will, allowing the third party to sue on the contract . . . ." *Id.* In *Keybank*, 846 N.E.2d 290, the Indiana Court of Appeals reiterated the general rule and noted the narrowness of the exception, concluding that the secured creditor of a failed business could not maintain a legal malpractice suit against the attorney who had represented a receiver in the business' receivership. *Id.* at 299-300. The Court of Appeals emphasized that there are important public policy reasons to keep the privity requirement intact because, when "lawyers must be conce[r]ned about their potential liability to third parties, the resultant self-protective tendencies may deter vigorous representation of the client. Attention to third-party risk might cause the attorney improperly to consider 'personal interests' or 'the desires of third parties' above the client's interests. This would contravene the lawyer's duty of loyalty to the client." *Id.* at 300 (quoting Jack I. Samet et al., *The Attack on the Citadel of Privity*, 20 A.B.A. Winter Brief 9, 40 (1991) (footnotes omitted)).

Not only are non-clients prohibited from pursuing attorneys for professional misfeasance (except in will-drafting cases such as *Walker*), but the client in an attorney-client relationship is prohibited from assigning his legal malpractice claim to a third party. *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991). In *Picadilly*, plaintiff lost a jury trial to an individual named Colvin who had been injured by one of plaintiff's drunken patrons. In subsequent bankruptcy proceedings, pursuant to Picadilly's plan of reorganization, Picadilly discharged Colvin's punitive damage award, in part, through the assignment of Picadilly's malpractice claims against its trial counsel. The Indiana Supreme Court granted a petition to transfer stating:

> Because the assignability of legal malpractice claims is a new question of law, we grant the petition to transfer. We answer this important question in the negative – legal malpractice claims are not assignable.

Id. at 339 (citations omitted). The Court's conclusion was based upon the public policy issues involved, and a particular concern about two issues: (1) the "need to preserve the sanctity of the client-lawyer relationship," and (2) "the disreputable public role reversal that would result during the trial of assigned malpractice claims …." *Id.* at 342.

2. Liability

a. General Standard of Care

In Indiana, an attorney is generally required "to exercise ordinary skill and knowledge." *Rice v. Strunk*, 670 N.E.2d 1280, 1283-84 (Ind. 1996). In order to succeed in a legal malpractice claim, the plaintiff must prove, among other things, that the attorney breached the standard of care. *Id.* "[E]xpert testimony is normally required to demonstrate the standard of care by which an attorney's conduct is measured." *Indianapolis Podiatry, P.C., v. Efroymson*, 720 N.E.2d 376, 383 (Ind. Ct. App.1999). 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 lay person would have no difficulty in appraising it." *Hacker v. Holland*, 570 N.E.2d 951, 953 n.2 (Ind. Ct. App. 1991).

Indiana does not recognize any "locality rule," *i.e.*, courts do not require that the attorney's conduct be judged against a "local" standard of care.

b. Specialization

There are no Indiana cases that discuss whether a lawyer claiming to specialize in a particular area of law is held to an increased standard of care.[1] However, a number of cases

[1] Rule of Professional Conduct 7.4(d) provides that an attorney cannot state or imply that he or she is specialist unless the attorney has been certified as such by an "Independent Certifying Organization" that has been accredited by the Indiana Commission for Continuing Legal Education:

> A lawyer shall not state or imply that the lawyer is a specialist in a particular field of law, unless:
>
> (1) The lawyer has been certified as a specialist by an Independent Certifying Organization accredited by the Indiana Commission for Continuing Legal Education pursuant to Admission and Discipline Rule 30; and,
>
> (2) The certifying organization is identified in the communication.

Pursuant to its authority under Admission and Discipline Rule 30, the Commission for Continuing Legal Education has accredited five different Independent Certifying Organizations in five different practice areas: the American Board of Certification in the area of bankruptcy and creditors' rights; the National Board of Trial Advocacy in the areas of civil and criminal trial advocacy; the National Elder Law Foundation in the area of elder law; the Family Law Section of the Indiana State Bar Association in the (Footnote continued on next page.)

across the country provide that a lawyer undertaking a task in a specialized area is required to exercise that degree of skill and knowledge possessed by lawyers who practice in the specialized area. *See, e.g., Sparks v. NLRB*, 835 F.2d 705, 707 (7th Cir. 1987) (stating that a legal specialist may be held to an even higher standard of care than a generalist); *Duffey Law Office, S.C. v. Tank Transport, Inc.*, 535 N.W.2d 91, 95 (Wis. Ct. App. 1995) ("[A] lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field"). *See also Wright v. Williams*, 47 Cal.App.3d 802, 810-11 (1975) ("Where ... the malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against him is related to his expertise as such, then only a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met").

3. Causation

a. "But for"

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. *Rice v. Strunk*, 670 N.E.2d 1280, 1283-84 (Ind. 1996). "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." *Vernon v. Kroger Co.*, 712 N.E.2d 976, 981 (Ind. 1999); *Godby v. Whitehead*, 837 N.E.2d 146, 151 (Ind. Ct. App. 2005) (quoting *Peters v. Forster*, 804 N.E.2d 736, 743 (Ind. 2004)).

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area of family law; and, the Probate, Trust, and Real Property Section of the Indiana State Bar Association in the area of trust and estate planning. *See* www.in.gov/judiciary/cle/2361.htm.

The Indiana Supreme Court has disciplined attorneys for claiming that they specialize in certain practice areas when they have not been certified as specialists under Admission and Discipline Rule 30. *See, e.g., Matter of Parilman*, 947 N.E.2d 915 (Ind. 2011) (Arizona attorney disciplined for radio advertisement in Indiana claiming that his firm "specializes in automobile accidents" when neither Indiana nor Arizona offers such certification); *Matter of Anonymous*, 689 N.E.2d 434 (Ind. 1997) (attorney disciplined for advertisement claiming that he was a "specialist in personal injury law" when Indiana offers no such certification); *Matter of Anonymous*, 783 N.E.2d 1130 (Ind. 2003) (attorneys disciplined for advertisement claiming that they were "elder law specialists," when they had not obtained the necessary certification from an accredited Independent Certifying Organization).

b. Appellate Malpractice

When analyzing the merits of an appellate malpractice claim, a court must determine what the outcome of the appeal would have been had the client not missed her chance to appeal because of her attorney's negligence in perfecting the appeal. *Hill v. Bolinger*, 881 N.E.2d 92, 94 (Ind. Ct. App. 2008) (citing *Jones v. Psimos*, 882 F.2d 1277, 1281 (7th Cir. 1989) (applying Indiana law)). The loss of a right to appeal is insufficient to impose liability on an attorney. *Id.* Rather, a party must establish that she had a valid claim in the underlying action that was allegedly mishandled by the defendant attorney. *Id.* In other words, the client must show that the attorney's negligence proximately caused the injury. *Id.*

c. Innocence Requirement in Criminal Cases

A criminal defendant does not have to prove her innocence before she files a legal malpractice claim. *Godby v. Whitehead*, 837 N.E.2d 146, 151 (Ind. Ct. App. 2005). Likewise, a criminal defendant does not have to exhaust her post-conviction remedies before she commences a legal malpractice action. *Id*. Nevertheless, criminal defendants remain obliged to file claims of legal malpractice within two years of discovery. *Id.* Additionally, a criminal client bears responsibility for pleading guilty. In *Hockett v. Breunig*, 526 N.E.2d 995 (Ind. Ct. App. 1988), the client – a criminal defendant charged with serious offenses – was advised by his two attorneys to plead guilty in exchange for the State not seeking the death penalty. The defendant claimed that his counsel had advised him that they had seen a shoe with the victim's blood on it; once he acquired the lab report, the defendant discovered that there "was insufficient staining present to confirm the presence of blood." *Id*. at 996. Having pled guilty, the defendant filed a legal malpractice action. Noting that a claimant must prove proximate cause, the Court found that the defendant had failed to prove that he would not have been incarcerated but for his attorneys' negligent advice. This is because "the decision to plead guilty rests with the defendant … Attorneys cannot enter guilty pleas for their clients and a defendant must satisfy the court that his plea was made knowingly, intelligently, and voluntarily." *Id*. at 998-99. The defendant's petition for post-conviction relief had been rejected; and, this was binding on the question of whether the defendant had entered his guilty plea knowingly, intelligently, and voluntarily. The negligent advice the defendant received from his attorneys did not reduce the legitimacy of his guilty plea, and the defendant was therefore unable to prove causation. Summary judgment in favor of the attorneys was entered.

4. Damages

A legal malpractice plaintiff normally need not exhaust all possible remedies as a condition precedent to bringing the malpractice suit. *Hacker v. Holland*, 570 N.E.2d 951, 953 (Ind. Ct. App. 1991). The malpractice damages, however, are mitigated by monies received, or which could be received, whether as a result of a judgment, settlement, or other disposition of the underlying claim. *Id*.

a. Actual Damages

i. Monetary

Indiana law generally provides that the measure of damages in a legal malpractice case is the value of the plaintiff's lost claim. *Schneider v. Wilson*, 521 N.E.2d 1341, 1343 (Ind. Ct. App. 1988). The general rule is that an attorney is not liable for a damage claim that is remote or speculative. *See Pirchio v. Noecker*, 82 N.E.2d 838 (Ind. Ct. App. 1948) (holding that because plaintiffs' damages were speculative and too remote, their contract claim failed); *Iriving v. Ort*, 146 N.E.2d 107 (Ind. Ct. App. 1957) (same). An estimation of damages is speculative where the evidence affords no basis for calculating or determining a party's damages with reasonable certainty. *Hopple v. Star City Elevator Co.*, 173 N.E.2d 76 (Ind. Ct. App. 1961) (same) (citations omitted).

ii. Emotional Distress/Mental Anguish

Generally, a plaintiff cannot recover compensatory damages for mental anguish or emotional distress in a legal malpractice action absent outrageous or malicious conduct by the attorney. *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991). [2] However, Indiana courts have recognized an exception to the general rule when the distress is accompanied by and results from a physical injury caused by an impact to the person seeking recovery. *Id.* In *Groves v. Taylor*, 729 N.E.2d 569, 573 (Ind. 2000), the Indiana Supreme Court expanded this doctrine by holding, "where the direct impact test is not met, a bystander may nevertheless establish 'direct involvement' by proving that the plaintiff actually witnessed or came on the scene soon after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant's negligent or otherwise tortuous conduct." This exception, however, appears to be limited to instances of mental anguish grounded in observing a violent injury, and would likely have no application in the context of legal malpractice.

[2] Indiana has not adopted the exception to the general rule disallowing recovery of mental anguish damages that appears to be developing in other jurisdictions where the legal malpractice was likely to foreseeably result in loss of liberty. *See, e.g., Dombrowski v. Bulson*, 79 A.D.3d 1587 (N.Y. 2010) (holding that when an attorney's negligence causes a client's loss of liberty, courts have been willing to step away from the general rule barring damages for emotional distress); *Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987) (attorney's malpractice resulted in his client's civil commitment to a mental hospital); *Snyder v. Baumecker*, 708 F. Supp. 1451, 1464 (D.N.J. 1989) (stating that emotional distress damages from loss of liberty were recoverable).

Indiana courts recognize an exception to the direct impact general rule and award compensatory damages for mental anguish unaccompanied by physical injury in tort actions involving intentional conduct. *Id.* The intentional conduct exception applies where the tort involves the invasion of a legal right which by its very nature is likely to provoke an emotional disturbance. *Arlington State Bank v. Colvin*, 545 N.E.2d 572, 576-77 (Ind. Ct. App. 1989). For example, proof of an intentional fraud will support an award of emotional distress damages. *Munsell v. Hambright*, 776 N.E.2d 1272, 1281 (Ind. Ct. App. 2002) ("Proof of an intentional fraud will support an award of emotional distress damages"). Whether in a particular case the fraud is such that it is likely to provoke an emotional disturbance is a question of fact for the jury. *Baker v. American States Ins. Co.*, 428 N.E.2d 1342, 1349 (Ind. Ct. App. 1981).

iii. Recovery for "Lost Punitive Damages"

There are no Indiana cases that address whether a plaintiff may recover "lost punitive damages," *i.e.*, an amount equal to the punitive damages that would have been awarded in the underlying case but for the plaintiff's attorney's negligence.

iv. Contingent Fee Offset

An attorney who is discharged by a client with or without cause may recover the reasonable value of the services rendered before his or her discharge on the basis of quantum meruit. *Kelly v. Smith*, 611 N.E.2d 118, 121 (Ind. 1993). An attorney who renders services for a client and is thereafter sued for malpractice is entitled to a deduction in the malpractice award equal to the reasonable value of his or her services on a theory of quantum meruit. According to the Indiana Supreme Court, this approach will avoid a windfall to the client where the attorney has provided services beneficial to the client. Conversely, a client will not be forced to pay twice for the same services because counsel in the legal malpractice action presumably will prove only those portions of the underlying case that were not already completed by the negligent attorney. Nor will the negligent attorney be rewarded for his or her shoddy work, as fees will be deducted only for legal services which actually benefited the client. *Schultheis v. Franke*, 658 N.E.2d 932, 941 (Ind. Ct. App. 1995).

b. Punitive Damages

In Indiana, punitive damages are not a right. *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 983 (Ind. 1993). Rather, they are "designed to punish the wrongdoer and to dissuade him and others from similar conduct in the future." *Id.* (quoting *Orkin Exterminating Co., Inc. v. Traina*, 486 N.E.2d 1019, 1021 (Ind. 1986)). The policy and purpose behind punitive damages "is to serve the public interest by deterring wrongful conduct in the future by the wrongdoer and others similarly situated." *Miller*, 608 N.E.2d at 983 (quoting *Carroll v. Statesmen Ins. Co.*, 493 N.E.2d 1289, 1292 (Ind. Ct. App. 1986)). This means there must be "a finding that the public interest would be served by the award of punitive damages."

Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 358 (Ind. 1982). Because of this stringent policy, "punitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness." *Id*. at 362. Rather, the court must require some evidence "that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noniniquitous human failing." *Id*. Therefore, "a requirement of proof by clear and convincing evidence furthers the public interest when punitive damages are sought." *Id*. The burden of such proof rests with the party seeking punitive damages. *Id*. at 363.

c. Treble Damages – Attorney Deceit & Collusion

Indiana's Attorney Deceit and Collusion statute provides:

> An attorney who is guilty of deceit or collusion, or consents to deceit or collusion, with intent to deceive a court, judge, or party to an action or judicial proceeding commits a Class B misdemeanor. (b) A person who is injured by a violation of subsection (a) may bring a civil action for treble damages.

Ind. Code § 33-43-1-8. "[T]he attorney deceit statute does not create a new cause of action but, instead, trebles the damages recoverable in an action for deceit." *Shepherd v. Truex*, 823 N.E.2d 320, 327 (Ind. Ct. App 2005) (quoting *Loomis v. Ameritech Corp*., 764 N.E.2d 658, 666-67 (Ind. Ct. App. 2002), *trans. denied* (internal quotes omitted)). Although a new cause of action is not created, the statute permits the person injured by the deceit or collusion to bring a civil action for treble damages. Ind. Code § 33-43-1-8. "[T]he injured party is required to allege and prove deceit rising to the level of a Class B misdemeanor and damages stemming therefrom." *Pfenninger v. Great Lakes Drilling, Inc.*, 2008 WL 5103194 (Ind. Ct. App. 2008) (not for publication). *See also Finney v. Relphorde*, 612 N.E.2d 191, 192 (Ind. Ct. App. 1993).

d. Attorneys Fees

In Indiana, attorney fees are only recoverable only when authorized by statute or contract. They are not recoverable in common law tort claims such as malpractice.

C. Defenses

1. Statute of Limitations

Legal malpractice claims in Indiana are subject to a two-year statute of limitations. *Estate of Spry v. Batey*, 804 N.E.2d 250, 252 (Ind. Ct. App. 2004), *trans. denied*; Ind. Code §§

34-11-2-3, 34-11-2-4.[3] 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 §§ 39.2, 39.3 (2007). A cause of action for legal malpractice generally accrues when a wrongfully inflicted injury causes damage. *Keep v. Noble County Dept. of Public Welfare*, 696 N.E.2d 422, 425 (Ind. Ct. App. 1998), *trans. denied*. 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." *Silvers v. Brodeur*, 682 N.E.2d 811, 813 (Ind. Ct. App. 1997). "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." *Id*. at 813-14. In determining when a claim accrues under Indiana's legal malpractice statute of limitations, courts consider both statutory exceptions to the discovery rule and common law tolling.

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." *Biomet, Inc. v. Barnes & Thornburg*, 791 N.E.2d 760, 765 (Ind. Ct. App. 2003), *trans. denied*. In *Biomet*, the court adopted the rationale of other "discovery rule" jurisdictions, noting that the purpose of the continuous representation rule is to avoid disrupting the attorney-client relationship unnecessarily and to counteract the "illogical requirement of the occurrence rule, which compels clients to sue their attorneys though the relationship continues, and there has not been and may never be any injury." *Id.* Despite the court's adoption of this rationale, it is important to note that the court's holding limits the doctrine's application – the doctrine does not apply to a client who retains new counsel on appeal, nor does it delay the commencement of the statute of limitations until the end of the attorney-client relationship. *Id.* at 766 n.2. Rather, the exception only applies during the

[3] Neither statute speaks directly to legal malpractice actions. I.C. § 34-11-2-3 applies to actions "based upon professional services … against physicians, dentists, surgeons, hospitals, sanitariums, or others …" A few cases have cited this statute as the applicable limitation in legal malpractice cases, reasoning that attorneys fall under the "other" professionals not specifically enumerated in the list. *See, e.g., Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*, 868 N.E.2d 4, 20 (Ind. Ct. App. 2007). However, most cases cite to I.C. § 34-11-2-4 as the applicable statute of limitations for legal malpractice claims. Section 34-11-2-4 applies to all actions for, *inter alia*, "injury to personal property." A client's cause of action has been construed as "personal property." *See* 18 IND. LAW ENCY. § 11 (noting that "a cause of action is properly characterized as personal property"). *See also Whitehouse v. Quinn*, 477 N.E.2d 270 (Ind. 1985); *Biomet, Inc. v. Barnes & Thornburg*, 791 N.E.2d 760 (Ind. Ct. App. 2003). Both statutes impose a two-year limitation, so there is no difference as a practical matter as to which statute an attorney or firm may invoke in their defense. Nevertheless, section 34-11-2-4 is probably to be preferred.

attorney's representation of the client in the same matter from which the malpractice claim arose. *Id.*

Indiana's legal malpractice statute of limitations can also be tolled due to fraudulent concealment. In Indiana, the doctrine of fraudulent concealment is recognized both statutorily and as common law, and both authorities have been applied in legal malpractice cases. *See* Ind. Code § 34-11-5-1; *Basinger v. Sullivan*, 540 N.E.2d 91, 94-95 (Ind. Ct. App. 1989) (recognizing that equity could toll the limitations period for legal malpractice plaintiffs); *Lambert v. Stark*, 484 N.E.2d 630, 632 n.1 (Ind. Ct. App. 1985) (noting that the parties' reliance upon the equitable doctrine of fraudulent concealment was unnecessary in light of the statutory exception). *See also Keesling v. Baker & Daniels*, 571 N.E.2d 562, 565-66 (Ind. Ct. App. 1991) (applying equitable doctrine of fraudulent concealment without any reference to statute). While the concealment contemplated by Indiana Code § 34-11-5-1 generally must be active and intentional, *Lambert v. Stark*, 484 N.E.2d at 632, fraudulent concealment – under both the statute and equitable doctrine of concealment – can arise from a failure to disclose material information when a fiduciary or confidential relationship exists. *Id. See also Keesling v. Baker & Daniels*, 571 N.E.2d at 565.[4]

Although Indiana courts have not recognized a distinction between the basis for statutory tolling and equitable tolling for purposes of concealment, practitioners should be aware of the different tolling periods under each. Under the statute, a party has two years from the date the cause of action was discovered. *Kaken Pharmaceutical Co., Ltd. v. Eli Lilly and Co.*, 737 F. Supp. 510, 515 (S.D. Ind. 1989) (applying Indiana law) (citing *Adams v. Luros*, 406 N.E.2d 1199, 1203 (Ind. Ct. App. 1980)). Under the common law doctrine, a plaintiff does not have the full statutory period from the discovery of the alleged malpractice in which to file a claim, and must file the action within a "reasonable time" after discovery of the alleged malpractice. *Keesling v. Baker & Daniels*, 571 N.E.2d at 566.[5]

2. Judgmental Immunity

Many jurisdictions recognize the doctrine of judgmental immunity as a defense to legal malpractice claims. Under this doctrine, an attorney's "mere errors in judgment" cannot support a legal malpractice claim. *Clary v. Lite Machines Corp.*, 850 N.E.2d 423, 431 (Ind. Ct. App. 2006). The Indiana Supreme Court has not addressed the application of this doctrine, and the Indiana Court of Appeals has been reluctant to adopt the rule. *Id.* at 433 ("In sum, because the

[4] However, at least one Indiana Court of Appeals case seems to suggest that the basis for statutory tolling and equitable tolling is different. *See Basinger v. Sullivan*, 540 N.E.2d at 94-95.

[5] In addition to statutory and equitable tolling, Indiana's statute of limitations in legal malpractice actions can be extended pursuant to a tolling agreement between the parties. *See, e.g., Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*, 872 N.E.2d 626 (Ind. Ct. App. 2007), *superseded, in part, on unrelated grounds*, 895 N.E.2d 1191 (Ind. 2008).

attorney judgment rule would not relieve BB&C from its liability in this particular case, we need not consider actually adopting the rule."). In fact, at least one Court of Appeals case has rejected the argument outright. *Oxley v. Lenn*, 819 N.E.2d 851, 857 (Ind. Ct. App. 2004) ("We cannot agree with the trial court's conclusion that the existence of a conflict of law automatically renders an attorney's action or inaction as not negligent"). Although this defense has not been adopted in Indiana, the holding in *Clary v. Lite Machines Corp.* suggests that the Court of Appeals may be willing to revisit the issue in instances where the law on a particular issue is truly unsettled and the defendant attorney has researched the issue and proceeded in good faith.[6]

3. Comparative Fault

At least one recent authority holds that the doctrine of comparative fault applies to legal malpractice actions. In *Solnosky v. Goodwell*, 892 N.E.2d 174, 185 (Ind. Ct. App. 2008), the Court of Appeals explained that the Comparative Fault Act, Ind. Code §§ 34-51-2-1 *et seq.*, applies generally to damage actions based upon fault, and to legal malpractice claims in particular. The Act's primary objective "was to modify the common law rule of contributory negligence under which a plaintiff was barred from recovery where he was only slightly negligent. The Act seeks to achieve this result through proportional allocation of fault, ensuring that each person whose fault contributed to cause injury bears his or her proportionate share of the total fault contributing to the injury." *Id.* While application of the Act may preclude dismissal of claims where the plaintiff was partly at fault, it can help to insulate the attorney whose client is so difficult to work with as to create a situation where the client is more at fault than the attorney for an alleged breach of fiduciary duty. The Act bars the claimant from recovery where "the claimant's contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages." Ind. Code § 34-51-2-6.

4. The Doctrine of *In Pari Delicto*

As a corollary to the issue of comparative fault, a defendant attorney accused of negligence may have the defense of *in pari delicto* at their disposal. "The expression 'in pari delicto' is a portion of the longer Latin sentence, 'In pari delicto potior est conditio defendantis,' which means that, where the wrong of both parties is equal, the position of the defendant is the stronger." *Theye v. Bates*, 337 N.E.2d 837, 844 (Ind. Ct. App. 1975) (quoting 84 A.L.R.2d 479, 491 (1962)). At a minimum, in the context of the attorney-client relationship, an attorney may not rely upon the doctrine where he or she induces the client to take or accept an unlawful course

[6] It is also worth noting that the holding in *Oxley* does not prohibit presenting a conflict in the law as evidence that an attorney did not breach the standard of care. 819 N.E.2d at 857 ("[I]t it is for the jury to determine, given the then existing conflict of case law, whether Lenn breached his duty by failing to exercise ordinary skill and knowledge when he failed to tender the summons at the time he filed the complaint"). However, such evidence likely needs to be presented through an expert opinion. *Id.*

of action, even in cases in which the client is aware of the impropriety of the course of action. *See Lane v. Gugsell*, 47 N.E.2d 835 (Ind. Ct. App. 1943).

D. Other Issues

Legal malpractice actions in Indiana are not subject to any special pleading requirements. That is, a claim for legal malpractice need not contain any additional specificity, *see Godby v. Whitehead*, 837 N.E.2d 146 (Ind. Ct. App. 2006) (applying notice pleading standard to legal malpractice action), nor must a complaint alleging legal malpractice be verified. *See* IND. TRIAL RULE 11; 21 INDIANA PRACTICE SERIES § 13.3 (2007). Still, the ultimate burden of proof rests with the plaintiff. *Bernstein v. Glavin*, 725 N.E.2d 455, 462 (Ind. Ct. App. 2000) (quoting *Fricke v. Gray*, 705 N.E.2d 1027, 1033 (Ind. Ct. App. 1999) ("To prove a legal malpractice claim, 'a plaintiff-client must show (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 the plaintiff (damages)'")).

1. Admissibility and Use of Ethical Rules

Legal malpractice claims generally may not be predicated on a claimed violation of a rule of professional conduct. *Liggett v. Young*, 877 N.E.2d 178, 182-83 (Ind. 2007) (holding breach of fiduciary duty could not be predicated upon a violation of Rule of Professional Conduct 1.8); *but see Trotter v. Nelson*, 684 N.E.2d 1150, 1153 (Ind. 1997) ("The Rules at issue ... are explicit judicial declarations of Indiana public policy and, akin to contravening a statute, agreements in violation of these rules are unenforceable"); *Picadilly, Inc., v. Raikos*, 582 N.E.2d 338, 342 (Ind. 1991) ("An attorney who breaches any of these duties may face both disciplinary action and a legal malpractice claim"). *See also Sanders v. Townsend*, 582 N.E.2d 355 (Ind. 1991) (noting that the Rules of Professional Conduct and the Code of Professional Responsibility "make it clear that their provisions do not purport to create or describe any civil liability"). Notwithstanding contrary older authorities such as *Trotter* and *Picadilly*, *Liggett* remains the dominant rule. In *Fitzpatrick v. Kenneth J. Allen & Assocs., P.C.*, 913 N.E.2d 255 (Ind. Ct. App. 2009), the Indiana Court of Appeals noted that *Liggett* expressly disapproved of the suggestions in *Trotter* and *Picadilly* to the effect that violations of the Professional Rules can give rise to civil liability. *See id*. at 183.

According to the Preamble to the Rules:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability, but reference to these rules as evidence of the applicable standard of care is not prohibited.

Id. (quoting IND. R. PROF. COND. PREAMBLE (2005-2008)). However, the rules of professional conduct can be admitted as evidence of a breach of the standard of conduct. *Liggett*, 877 N.E.2d at 187 n.6 (Boehm, concurring).

2. The Expert Testimony Requirement

Expert testimony is usually required in a legal malpractice action to establish the standard of care by which the defendant attorney's conduct is measured. *Oxley v. Lenn*, 819 N.E.2d at 857. However, expert testimony is not needed to establish a question of fact regarding the standard of care and successfully oppose summary judgment. *Thomsen v. Musall*, 708 N.E.2d 911, 912 (Ind. Ct. App. 1999). 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 in appraising it,'" no expert testimony is needed to establish a breach of the standard of care. *Hacker v. Holland*, 570 N.E.2d 951, 953 n. 2 (Ind. Ct. App. 1991).

Proximate cause "requires that there be a reasonable connection between the defendant's allegedly negligent conduct and the plaintiff's damages." *Clary v. Lite Machines Corp.*, 850 N.E.2d at 430. That is, at a minimum, the harm would not have occurred but for the defendant's conduct. *Id.* Unlike the standard of care, there is no rule of law in Indiana that requires proximate cause be established by expert testimony. *See, e.g., id*. (holding that a finding of fact from underlying case could support a finding that BB&C's failure to research and argue the mitigation issue contributed to the reduced damages award in that case). Proximate cause "is primarily a question of fact to be determined by the jury." *Vernon v. Kroger Co.*, 712 N.E.2d 976, 981 (Ind. 1999).

3. Attorneys Fees

Under Indiana law, an attorney may recover their attorney fees in defending a legal malpractice action where the case brought was groundless, unreasonable, or frivolous. In pertinent part, Indiana Code § 34-52-1-1 provides:

> (a) In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law;
> (b) In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:
> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
> (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
> (3) litigated the action in bad faith.
> (c) The award of fees under subsection (b) does not prevent a prevailing party

> from bringing an action against another party for abuse of process arising in any part on the same facts. However, the prevailing party may not recover the same attorney's fees twice.

Ind. Code § 34-52-1-1. *See also Crosson v. Berry*, 829 N.E.2d 184 (Ind. Ct. App. 2005).

II. Alternative Causes of Action

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); *Keystone Distribution Park v. Kennerk, Dumas, Burke, Backs, Long & Salin*, 461 N.E.2d 749, 751 (Ind. Ct. App. 1984); *but see Marwil v. Ent & Imler CPA Group, PC*, 2004 WL 2750255 (S.D. Ind. 2004) (denying motion to dismiss claim for breach of accountant agreement, noting Indiana case decided at summary judgment on statute of limitations grounds). Still, 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).

A. Fraud/Constructive 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. *Wright v. Pennamped*, 657 N.E.2d 1223 (Ind. Ct. App. 1995). As many courts have stated, the hallmark of any fraud claim is the false representation. *Short v. Haywood Printing Co., Inc.*, 667 N.E.2d 209, 213 (Ind. Ct. App. 1996); *Lycan v. Walters*, 904 F. Supp. 884, 897 (S.D. Ind. 1995).

In *Loomis v. Eichhorn & Eichhorn*, 764 N.E.2d 658 (Ind. Ct. App. 2002), plaintiffs alleged that opposing counsel had committed fraud by making false statements to a witness, drafting an affidavit with such false statements, and then submitting the signed affidavit as evidence. *Id.* at 661. Both the trial and appellate courts disagreed with Loomises' theory of liability against the attorney:

> In order to maintain an action based on fraud, the complaining party must have relied upon misrepresentations *made by the party to be charged*. The Loomises' complaint does not allege nor do the Loomises argue that they have in any way relied upon any misrepresentations made by the Attorneys . . . the Loomises' complaint does not state a claim based upon fraud.

Id. at 667 (emphasis added). In the alternative, the Loomises argued that the attorney fraudulently induced the witness to commit perjury. Once again, the trial and appellate courts held such allegations did not state a claim for relief against the attorney:

> The Loomises argue there are issues as to whether [the witness'] affidavit was procured through undue influence, fraud in the inducement, or by abuse of a confidential relationship. Even if true, these allegations standing alone do not provide the Loomises with an independent cause of action against the Attorneys.

Id. (emphasis added).

It is the third element of constructive fraud which differs from an actual fraud claim. As noted above, in fraud, the plaintiff must prove that the defendant knew the representation was false or recklessly ignored its falsity. In constructive fraud, this element is replaced by the existence of a special relationship between the parties that imposes a duty on the defendant to protect the plaintiff, and a resulting gain by the defendant at the plaintiff's expense. *Id.* Constructive fraud differs from traditional fraud in that the element of intent is replaced by the requirement of a "special relationship between the parties as, for example, the fiduciary relationship." *Henkin v. Skane-Gripen A.B.*, 1991 U.S. Dist. LEXIS 20923, at *14 (N.D. Ind. August 7, 1991).

With no allegation of a special relationship, there can be no claim for constructive fraud. In *Rice v. Strunk*, the Indiana Supreme Court dismissed a constructive fraud claim due to the lack of an attorney-client relationship between the plaintiff and defendant. 670 N.E. 2d at 1284. The plaintiff, Donald Rice, was involved in a partnership, "Oak Lawn," which managed apartments. Oak Lawn employed Rice as a property manager and employed Russell Strunk as an attorney. After a falling out, Rice terminated Strunk. Shortly thereafter, Oak Lawn re-hired Strunk and employed him to replace Rice. Rice responded by suing Strunk for legal malpractice, actual fraud, and constructive fraud. *Id.* at 1282. Strunk moved for summary judgment, arguing he owed no duty to Rice once he had been fired. The Indiana Supreme Court agreed:

> [P]laintiffs' claims for both attorney malpractice and constructive fraud depend upon the existence of a duty running from defendants to plaintiffs. In the absence of such a duty, plaintiffs cannot recover under either theory.

Id. at 1284, 1289.

B. Breach of Fiduciary Duty

The breach of a fiduciary duty can constitute malpractice. *See, e.g., Apple v. Hall*, 412 N.E.2d 114, 116 (Ind. Ct. App. 1980) (holding representation of client whose interests are adverse to former client can constitute malpractice); *accord Bell v. Clark*, 653 N.E.2d 483, 489

(Ind. Ct. App. 1995). 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. *Matter of Smith*, 572 N.E.2d 1280, 1285 (Ind. 1991).

C. Negligent Misrepresentation

A client may not sue his or her attorney in Indiana for negligent misrepresentation. While its sister state of Illinois recognizes the tort of negligent misrepresentation in the context of professional opinions, *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1564-65 (7th Cir. 1987), Indiana has specifically rejected this tort and its application to professionals who render opinions. *Emmons v. Brown*, 600 N.E.2d 133, 135 (Ind. Ct. App. 1992) ("Indiana has declined to recognize the tort of negligent misrepresentation in the context of rendering professional opinions") *See also RTC v. O'Bear, Overholser, Smith & Huffer*, 840 F. Supp. 1270, 1282-83 (N.D. Ind. 1993) (striking plaintiff's claims against an appraiser for negligent misrepresentation and breach of assumed duty because these claims were actually claims for professional negligence under Indiana law, and a professional negligence claim had been stated elsewhere in plaintiff's complaint).

D. 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." *International Medical Group v. American Arbitration Ass'n*, 149 F. Supp.2d 615, 630 (S.D. Ind. 2001). "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." *Ziobron v. Crawford*, 667 N.E.2d 202, 208 (Ind. Ct. App. 1996).

In Indiana, the elements for a malicious prosecution claim are:

(1) the defendant instituted or caused to be instituted an action against the plaintiff;
(2) the defendant acted maliciously in so doing;
(3) the defendant had no probable cause to institute the action; and
(4) the original action was terminated in the plaintiff's favor.

Crosson, 829 N.E.2d at 189.

E. Abuse of Process

Abuse of process has two elements which must be met: (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. *Austin v. Globe American Casualty Co.*, 2007 WL 925767, at *10 (Ind. Ct. App. 2007). A party's intent for engaging in the legal process is irrelevant, so long as the party's "acts are procedurally and substantively proper." *Reichart v. City of New Haven*, 674 N.E.2d 27, 31 (Ind. Ct. App. 1996). Put another way, "a party may not be liable for abuse of process where legal process has been used to accomplish an outcome which that process was designed to accomplish." *International Medical Group, Inc. v. American Arbitration Ass'n*, 149 F. Supp.2d 615, 631 (S.D. Ind. 2001). Thus, a court will not find liability for abuse of process "where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Austin*, 2007 WL 925767 at *10.

F. Conspiracy

Generally, an agent cannot conspire with its principal. *See, e.g., Jamerson v. Anderson Newspapers, Inc.*, 469 N.E.2d 1243 (Ind. App. 1984). The relationship between an attorney and client is one of agent and principal. *In re Adoption of Infant Female Fitz*, 778 N.E.2d 432, 437 (Ind. Ct. App. 2002) ("an attorney acts on behalf of and in the name of the client. The attorney is the agent of the party employing him"); *United Farm Bureau Mut. Ins. Co. v. Groen*, 486 N.E.2d 571, 573 (Ind. Ct. App. 1985) ("an attorney is generally considered the agent of his client"). As such, an attorney acting within the scope of his agency relationship should not be found to have conspired with his client. *See DuBrueler v. Hartford Fire Insurance Co.*, 4 Va. Cir. 135 (1983) (stating that an attorney is not liable for conspiracy where the attorney has not performed a self-interested activity that went beyond the scope of the attorney's practice of law), citing *Worldwide Marine Trading Corp. v. Marine Transport Service, Inc*., 527 F. Supp. 581, 583 (E.D. Pa. 1981)).

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