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North Dakota Legal Malpractice: A Summary of the Law

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NORTH DAKOTA LEGAL MALPRACTICE: A SUMMARY OF THE LAW

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I. INTRODUCTION

The frequency of legal malpractice[1] claims has been increasing rapidly in the United States over the last decade.[2] North Dakota has seen a similar rise in such claims.[3] As the frequency of legal malpractice claims increases in North Dakota, more of North Dakota's attorneys will be approached by clients seeking legal representation. Although an article,[4] a note,[5] a case comment,[6] and two bibliographies[7] have been published in the North Dakota Law Review on the subject of legal malpractice, until

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1. The first reported North Dakota case to use the words "legal malpractice" was Feil v. Wishek, 193 N.W.2d 218 (1971). The term "legal malpractice," however, was not defined until Johnson v. Haugland, 303 N.W.2d 533 (1981), when the court stated:

> Malpractice . . . is the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result that injury, loss or damage to . . . those entitled to rely upon them.

Id. at 538 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 1971)). The term malpractice "refers to the nature of the subject matter of the action and not to the form of remedial procedure, whether it be in tort or contract." *Id.* Thus, legal malpractice is simply negligence by an attorney in his or her professional duty toward a client.

Legal malpractice is just one type of lawsuit that can be brought against an attorney by a client. Along with the legal malpractice case, or in lieu thereof, the attorney may be sued for breach of contract, fraud, misrepresentation, breach of warranties or implied promises, malicious prosecution, abuse of process, false arrest or imprisonment, interference with an advantageous relationship, intentional infliction of emotional distress, invasion of privacy, defamation, and conversion. While these actions can be brought against an attorney, they are not unique to the legal profession; therefore, they are not considered to be legal malpractice. 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 1.1, at 3 (3d ed. 1989).

2. *Id.* § 1.6, at 17-19. When the first edition of the Mallen & Smith treatise about legal malpractice was published in the 1970's, Mr. Mallen had read about 600 malpractice cases nationwide; now he reads 700 cases a year. Thom Weidlich, *Suing Lawyers Brings Growth to Shadow Bar*, 16 NAT'L. L.J. June 13, 1994, at 1.

3. *See infra* note 10 (citing North Dakota legal malpractice cases).

4. *See* Franklin D. Houser, *Legal Malpractice—An Overview*, 55 N.D. L. REV. 185 (1979). This article provides an overview of the law of legal malpractice and a bibliography. However, there is not a single citation to a North Dakota case in its 39 pages.

5. *See* Dwain E. Fagerlund, Note, *Legal Malpractice: The Locality Rule and Other Limitations of the Standard of Care: Should Rural and Metropolitan Lawyers Be Held to the Same Standard of Care?*, 64 N.D. L. REV. 661 (1988).

6. *See* Jeffrey P. Rude, Comment, *Limitations of Actions—North Dakota Adopts Continuous Representation Rule for Tolling Statute of Limitations In Legal Malpractice Actions*, 64 N.D. L. REV. 719 (1988).

7. Bibliography, *Selected Journal Articles Concerning Legal Malpractice*, 64 N.D. L. REV. 719 (1988); *see also supra* note 4 (referring to the bibliography in the Houser article).

now no article has discussed the range of North Dakota's case law on the subject of attorney malpractice.[8] This article summarizes the current status of legal malpractice law in North Dakota. It is not intended to be an exhaustive analysis of the law of legal malpractice, but instead is intended to be a basic primer of North Dakota legal malpractice law for attorneys.

Each section of this article discusses a different aspect of legal malpractice in North Dakota. Part II provides a brief history of the development of legal malpractice case law in North Dakota. Part III of this article discusses the four essential elements of a legal malpractice case. Part IV explains some of the common defenses raised in legal malpractice cases. Because there are a limited number of attorneys in North Dakota willing to sue another North Dakota attorney, the ultimate goal of this article is to encourage more attorneys to represent clients in legal malpractice cases.[9]

II. A BRIEF HISTORY OF THE DEVELOPMENT OF CASE LAW IN NORTH DAKOTA

There are thirty-one reported legal malpractice cases decided by the North Dakota Supreme Court and the federal courts of North Dakota.[10] Since 1980, North Dakota has seen a relative explosion of reported cases involving legal malpractice. Over two-thirds (twenty) of the reported

8. There was also an article written on legal malpractice insurance policies. *See* Robert W. Minto & Marcia D. Morton, *The Anatomy of Legal Malpractice Insurance: A Comparative View*, 64 N.D. L. REV. 547 (1988). Legal malpractice cases are also very generally discussed in the Law Review's North Dakota Supreme Court Review. *See, e.g.*, *North Dakota Supreme Court Review*, 66 N.D. L. REV. 834-36 (1990) (discussing Swanson v. Sheppard, 445 N.W.2d 654 (1989)); *North Dakota Supreme Court Review*, 68 N.D. L. REV. 758-60 (1992) (discussing Bjorgen v. Kinsey, 466 N.W.2d 553 (1992)).

9. This has been observed from the author's personal experience in attempting to refer clients for representation and in talking with other plaintiff legal malpractice attorneys. *See also* 1 MALLEN & SMITH, *supra* note 1, § 1.1, at 1-2.

10. Of the 31 decisions, the following 29 cases are North Dakota Supreme Court decisions: Bye v. Mack, 519 N.W.2d 302 (N.D. 1994); Richmond v. Nodland, 501 N.W.2d 759 (1993); Finch v. Backes, 491 N.W.2d 705 (1992); Bjorgen v. Kinsey, 466 N.W.2d 553 (1991); Thompson v. Goetz, 455 N.W.2d 580 (1990); Klem v. Greenwood, 450 N.W.2d 738 (1990); Berglund v. Gulsvig, 448 N.W.2d 627 (1989); Swanson v. Sheppard, 445 N.W.2d 654 (1989); Wastvedt v. Vaaler, 430 N.W.2d 561 (1988); Herzog v. Yuill, 399 N.W.2d 287 (1987); Olson v. Fraase, 421 N.W.2d 820 (1988); Wall v. Lewis, 393 N.W.2d 758 (1986) [hereinafter *Wall II*]; Binstock v. Tschider, 374 N.W.2d 81 (1985); Shark v. Thompson, 373 N.W.2d 859 (1985); Bohn v. Johnson, 371 N.W.2d 781 (1985); Wall v. Lewis, 366 N.W.2d 471 (1985) [hereinafter *Wall I*]; Martinson Bros. v. Hjellum, 359 N.W.2d 865 (1985); Phillips Fur and Wool Co. v. Bailey, 340 N.W.2d 448 (1983); Sheets v. Letnes, Marshall & Fiedler, Ltd., 311 N.W.2d 175 (1981); Johnson v. Haugland, 303 N.W.2d 533 (1981); Rolfstad, Winkjer, Suess, McKennett & Kaiser v. Hanson, 221 N.W.2d 734 (1974); Feil v. Wishek, 193 N.W.2d 218 (1971); White Earth Creamery v. Edwardson, 191 N.W. 622 (1922); Stark County v. Mischel, 173 N.W. 817 (1919); Moran v. Simpson, 173 N.W. 769 (1919); Harmening v. Howland, 141 N.W. 131 (1913); Riegi v. Phelps, 60 N.W. 402 (1894); Logan v. Freerks, 103 N.W. 426 (1905); Yerkes v. Crum, 49 N.W. 422 (1891).

The remaining two decisions are North Dakota federal court decisions: Knoshaug v. Pollman, 245 F.2d 271 (8th Cir. 1957); Kuehn v. Garcia, 608 F.2d 1143 (8th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980).

cases have been decided since 1980.[11] Of all reported cases, over one-half (seventeen) have been decided in the last ten years.[12] Only two cases were decided between 1925 and 1979.[13] Between 1889 and 1925, there were only seven cases.[14]

All of the first seven reported cases in North Dakota involved acts of dishonesty or acquisition of an adverse financial interest by the attorneys.[15] After these cases, which were decided during the late 1800's and early 1900's, the North Dakota Supreme Court did not issue another legal malpractice decision until almost fifty years later in *Feil v. Wishek*.[16]

While a large number of the modern cases discuss issues of deceit and acquisition of adverse interests, the reported cases since *Wishek* present a broader range of malpractice allegations. The allegations include: representation of adverse interests;[17] failure to initiate a lawsuit within the statute of limitations;[18] negligence in business contracts and dealings;[19] negligence in criminal defense matters;[20] fraud and deceit;[21] negligence

11. *Mack*, 519 N.W.2d 302 (N.D. 1994); *Nodland*, 501 N.W.2d 759 (1993); *Finch*, 491 N.W.2d 705 (1992); *Kinsey*, 466 N.W.2d 553 (1991); *Goetz*, 455 N.W.2d 580 (1990); *Greenwood*, 450 N.W.2d 738 (1990); *Berglund*, 448 N.W.2d 627 (1989); *Swanson*, 445 N.W.2d 654 (1989); *Vaaler*, 430 N.W.2d 561 (1988); *Fraase*, 421 N.W.2d 820 (1988); *Herzog*, 399 N.W.2d 287 (1987); *Wall II*, 393 N.W.2d 758 (1986); *Binstock*, 374 N.W.2d 81 (1985); *Shark*, 373 N.W.2d 859 (1985); *Bohn*, 371 N.W.2d 781 (1985); *Wall I*, 366 N.W.2d 471 (1985); *Martinson Bros.*, 359 N.W.2d 865 (1985); *Bailey*, 340 N.W.2d 448 (1983); *Letnes*, 311 N.W.2d 175 (1981); *Haugland*, 303 N.W.2d 533 (1981).

12. *Mack*, 519 N.W.2d 302 (N.D. 1994); *Nodland*, 501 N.W.2d 759 (1993); *Finch*, 491 N.W.2d 705 (1992); *Kinsey*, 466 N.W.2d 553 (1991); *Goetz*, 455 N.W.2d 580 (1990); *Greenwood*, 450 N.W.2d 738 (1990); *Berglund*, 448 N.W.2d 627 (1989); *Swanson*, 445 N.W.2d 654 (1989); *Vaaler*, 430 N.W.2d 561 (1988); *Fraase*, 421 N.W.2d 820 (1988); *Herzog*, 399 N.W.2d 287 (1987); *Wall II*, 393 N.W.2d 758 (1986); *Binstock*, 374 N.W.2d 81 (1985); *Shark*, 373 N.W.2d 859 (1985); *Bohn*, 371 N.W.2d 781 (1985); *Wall I*, 366 N.W.2d 471 (1985); *Martinson Bros.*, 359 N.W.2d 865 (1985).

13. *Rolfstad*, 221 N.W.2d 734 (1974); *Wishek*, 193 N.W.2d 218 (1971).

14. *White Earth Creamery*, 191 N.W. 622 (1922); *Stark County*, 173 N.W. 817 (1919); *Moran*, 173 N.W. 769 (1919); *Harmening*, 141 N.W. 130 (1913); *Logan*, 103 N.W. 426 (1905); *Phelps*, 60 N.W. 402 (1894); *Yerkes*, 49 N.W. 422 (1891).

15. *See White Earth Creamery*, 191 N.W. 622 (1922) (finding that an adverse financial interest was acquired by the attorney); *Stark County*, 173 N.W. 817 (1919) (declaring improper an attorney's withdrawal from representation in order to acquire an adverse financial interest); *Moran*, 173 N.W. 769 (1919) (finding that an attorney acquired an adverse financial interest in an estate matter); *Harmening*, 141 N.W. 130 (1913) (involving a suit against an attorney for fraud, deceit, and exemplary damages related to a homestead claim); *Logan*, 103 N.W. 426 (1905) (involving a suit against an attorney for conversion after he used a client's money for a purpose not designated by the client); *Phelps*, 60 N.W. 402 (1894) (involving a suit against an attorney for fraud after he took a portion of a settlement without disclosing the true amount of the settlement); *Yerkes*, 49 N.W. 422 (1891) (voiding a transaction in which an attorney acquired an interest in the client's property, although there was no intention to defraud). These first seven cases are not "true" legal malpractice cases, but they contain some of the elements of modern legal malpractice cases. *See supra* note 1 (defining legal malpractice).

16. 193 N.W.2d at 219 (1971) (alleging failure to properly file, or advise a client to file, a security agreement).

17. *Kinsey*, 446 N.W.2d at 557; *Vaaler*, 430 N.W.2d at 564; *Olson*, 421 N.W.2d at 825; *Haugland*, 303 N.W.2d at 537; *Rolfstad*, 221 N.W.2d at 736.

18. *Finch*, 491 N.W.2d at 705; *Letnes*, 311 N.W.2d at 177.

19. *Vaaler*, 430 N.W.2d at 564; *Wall II*, 393 N.W.2d at 760; *Binstock*, 374 N.W.2d at 82; *Shark*, 373 N.W.2d at 862; *Bohn*, 371 N.W.2d at 783; *Wall I*, 366 N.W.2d at 472; *Martinson Bros.*, 359 N.W.2d at 868.

20. *Nodland*, 501 N.W.2d at 761; *Greenwood*, 450 N.W.2d at 740; *Herzog*, 399 N.W.2d at 289.

in bankruptcy representation;[22] negligence in probate representation;[23] failure to file a timely appeal;[24] negligence in family law matters,[25] and negligence in the supervision of young associate attorneys.[26]

The upward trend in the number of recently reported opinions suggests that North Dakota attorneys will increasingly be exposed to the possibility of being sued by a client. The reported cases suggest that at the turn of the century, attorneys were only sued if they engaged in breaches of fiduciary duty. The cases since 1971, however, suggest that attorneys are now being sued for a wide range of errors in a broader range of subject matter. The next section of this article discusses the elements a plaintiff must allege and prove to successfully sue an attorney.

III. THE ELEMENTS OF A LEGAL MALPRACTICE CASE

A client must allege and prove four essential elements to support a legal malpractice claim: (1) the existence of an attorney/client relationship; (2) a duty owed by the attorney to the client; (3) a breach of that duty by the attorney; and (4) damages to the client proximately caused by the breach of duty.[27] Each of these four elements is discussed below.

A. THE PLAINTIFF MUST ESTABLISH THE EXISTENCE OF AN ATTORNEY/CLIENT RELATIONSHIP

It is well established that, generally, an attorney/client relationship must have existed before a legal malpractice claim can be maintained against an attorney.[28] Although the North Dakota Supreme Court has stated that an attorney/client relationship is a necessary predicate to successful pursuit of a malpractice case,[29] no reported cases in North Dakota identify the criteria necessary to meet this essential element of a legal malpractice case.[30]

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21. *Knoshaug v. Pollman*, 245 F.2d 271, 273 (8th Cir. 1957); *Nodland*, 501 N.W.2d at 759-760; *Kinsey*, 466 N.W.2d at 557; *Goetz*, 455 N.W.2d at 582; *Olson*, 421 N.W.2d at 825.

22. *Swanson*, 445 N.W.2d at 656.

23. *Berglund*, 448 N.W.2d at 628.

24. *Mack*, 519 N.W.2d at 304; *Goetz*, 455 N.W.2d at 581.

25. Kuehn v. Garcia, 608 F.2d 1143, 1145 (8th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980).

26. *Mack*, 519 N.W.2d at 304.

27. Wastvedt v. Vaaler, 430 N.W.2d 561, 564-65 (N.D. 1988). These elements were reaffirmed most recently in Richmond v. Nodland, 501 N.W.2d 749, 761 (1993) (involving allegations against an attorney of fraud, deceit, and legal malpractice due to the attorney's retention of a $10,000 retainer fee after obtaining dismissal of criminal charges against the client after a minimum amount of effort and time).

28. 1 MALLEN & SMITH, *supra* note 1, § 7.1 at 360; § 8.1 at 401.

29. *Vaaler*, 430 N.W.2d at 564.

30. The North Dakota Supreme Court has held, however, that payment of a fee is not necessary to establish an attorney/client relationship for purposes of confidentiality. Shong v. Farmers' & Merchants' State Bank, Inc., 70 N.W.2d 907, 922 (N.D. 1955) (not a legal malpractice case).

If confronted with the issue, however, the supreme court could look to a number of sources, including the Rules of Evidence and case law from other jurisdictions, in determining whether an attorney/client relationship existed. The North Dakota Rules of Evidence, for example, define a client as follows: "A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him."[31]

The Supreme Court of North Dakota could also look to other jurisdictions for guidance in analyzing the existence of an attorney/client relationship. While an analysis of the case law from other jurisdictions regarding attorney/client relationships is beyond the scope of this article, courts have recognized two possible theories of the attorney/client relationship in legal malpractice cases, as explained in a Minnesota case:

> [We] have recognized both a 'contract theory' and a 'tort theory' of the attorney-client relationship. An attorney-client relationship exists under the 'contract theory' if the parties explicitly or implicitly agree that the attorney will provide legal services to the client. . . . An attorney-client relationship exists under the 'tort theory' even in the absence of an express contract 'whenever a person seeks and receives legal advice from a lawyer under circumstances in which a reasonable person would rely on the advice.' . . . '[I]t must . . . be shown that [the attorney] rendered legal advice (not necessarily at someone's request) under circumstances which made it reasonably foreseeable to the attorney that if such advice was rendered negligently, the individual receiving the advice might be injured thereby.'[32]

Attorneys can also be liable to nonclients for malpractice. This is most common in estate legal malpractice cases.[33] Two principle approaches are used to determine whether an attorney is liable to a nonclient for legal malpractice: a multi-criteria balancing test and a third party beneficiary contract theory.[34]

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31. N.D. R. EVID. 502(a)(1).

32. Schuler v. Meschke, 435 N.W.2d 156, 161-62 (Minn. Ct. App. 1989) (quoting Viet v. Anderson, 428 N.W.2d 429, 431-32 (Minn. Ct. App. 1988)). The *Schuler* case involved a North Dakota attorney representing a business composed of North Dakota and Minnesota farmers. *Id.* at 158. Individual farmers sued Mr. Meschke for legal malpractice, but the Minnesota Court of Appeals found that he represented the cooperative rather than the individual farmers; thus, no attorney/client relationship existed. *Id.* at 162.

33. The first case in the United States in which legal malpractice liability was extended to third party nonclients was Lucas v. Hamm, 364 P.2d 685, 688 (1961), *cert. denied*, 368 U.S. 987 (1962) (stating that heirs of an estate can sue an attorney for malpractice in drafting a will even though they were not in privity with the attorney when the will was drafted).

34. 1 MALLEN & SMITH, *supra* note 1, § 7.11 at 382. North Dakota has not decided whether it will apply either of the tests, but, according to Mallen and Smith, the balancing test has been

B. THE PLAINTIFF MUST ESTABLISH THE STANDARD OF CARE OWED BY THE ATTORNEY TO THE CLIENT

Created concurrently with an attorney/client relationship is a confidential, fiduciary relationship between the attorney and client.[35] This confidential, fiduciary relationship is the fundamental principle underlying all duties owed by an attorney to a client.[36] Failure to exercise the duties created by that relationship can result not only in financial liability to the client for damages in a legal malpractice action, but also in professional sanctions.

The North Dakota Supreme Court first articulated the broad principles of an attorney's duty toward a client in *Feil v. Wishek*.[37] The *Wishek* court explained that while an attorney "is not a guarantor of the soundness of his opinions, or the successful outcome of . . . litigation," an attorney is obliged "to use the reasonable knowledge and skill in the transaction of business which lawyers of ordinary ability and skill possess and exercise."[38]

"accepted with near unanimity by those jurisdictions which have examined the issue." *Id.* at 383 n.5 (citations omitted).

The California balancing test was developed in *Lucas*. 364 P.2d 685 (1961), *cert. denied*, 368 U.S. 987 (1962). The six criteria of the California balancing test are the following:

(1) the extent to which the transaction was intended to affect the plaintiff;
(2) the foreseeability of harm to the plaintiff;
(3) the degree of certainty that the plaintiff suffered injury;
(4) the closeness of the connection between the defendant's conduct and the injury;
(5) the policy of preventing future harm; and
(6) whether recognition of liability under the circumstances would impose an undue burden on the profession.

1 MALLEN & SMITH, *supra* note 1, § 7.11 at 382.

The third party beneficiary test is based on the concept of third party beneficiary in contract cases. Under this test, the principle inquiry is whether the plaintiff is an intended beneficiary of the attorney/client relationship with the principal or just an incidental beneficiary. 1 MALLEN & SMITH, *supra* note 1, § 7.11 at 389, 390 n.36-44 (citing jurisdictions and cases).

35. Moran v. Simpson, 173 N.W. 769, 774 (N.D. 1919).

36. 1 MALLEN & SMITH, *supra* note 1, § 11.1 at 633.

37. 193 N.W.2d 218 (N.D. 1971) (involving an attorney sued for failure to properly advise clients regarding the filing of a security agreement for the sale of a grocery store).

38. Feil v. Wishek, 193 N.W.2d 218, 224 (N.D. 1971) (citing McCullough v. Sullivan, 132 A. 102, 103 (1926)). This standard has been applied in recent cases. *E.g.*, Swanson v. Sheppard, 445 N.W.2d 654, 657 (N.D. 1989). The *Wishek* case is significant in another respect because it applied medical malpractice principles in a legal malpractice case. The *Wishek* court stated that "[t]he duties and liability between an attorney and his client are the same as those between a physician and his patient." *Wishek*, 193 N.W.2d at 224-25. Since there are more reported medical malpractice cases than legal malpractice cases in North Dakota, the supreme court often turns to medical malpractice cases for guidance if there is no controlling case law available in a legal malpractice case. For example, the court recently adopted the continuous representation rule as a toll to the statute of limitations by applying the continuing treatment principles of medical malpractice cases to legal malpractice cases. *Wall II*, 393 N.W.2d 758, 762-64 (N.D. 1986).

1. *A Statewide Standard of Care Is the Rule in North Dakota*

The *Wishek* court spoke of both a "statewide" standard[39] and a "similar community" standard for evaluating an attorney's conduct.[40] The similar community standard is also known as the "locality rule."[41] The *Wishek* court, however, clearly articulated that Mr. Wishek was governed by a statewide standard when it held: "Mr. Wishek . . . failed to exercise that degree of care commonly possessed and exercised by other reasonable, careful and prudent lawyers *of this state*[.]"[42] This standard continues to be applied by the North Dakota Supreme Court.[43]

2. *Expert Opinion Is Generally Required to Establish the Standard of Care*

Generally, the client must submit the opinion of an expert to establish the standard of care of the attorney being sued for malpractice.[44] Surprisingly, it was not until 1988 that the North Dakota Supreme Court specifically held that expert opinion was an essential element of most legal malpractice cases.[45] Expert opinion is necessary to acquaint a jury with the standard of care because "a jury cannot rationally apply negligence principles to professional conduct without evidence of what a reasonable attorney would have done under the circumstances and the jury may not be permitted to speculate about what the professional custom may be."[46]

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39. *Wishek*, 193 N.W.2d at 224 (citing Cook, Flanagan & Berst v. Clausing, 438 P.2d 865, 866 (1968)).

40. *See id.* (citing RESTATEMENT (SECOND) OF TORTS § 229A (1965)).

41. For a detailed discussion of the "locality rule," see Fagerlund, *supra* note 5, at 707-11. While accurate when written, the existence of a statewide standard, rather than a local standard, is now unequivocal. *See infra* note 43.

42. *Wishek*, 193 N.W.2d at 225 (emphasis added).

43. The most recent case to articulate the statewide standard of care was Bye v. Mack, 519 N.W.2d 302, 305 (N.D. 1994). *See also* Richmond v. Nodland, 501 N.W.2d 759, 761 (N.D. 1993); Klem v. Greenwood, 450 N.W.2d 738, 743 (N.D. 1990); Swanson v. Sheppard, 445 N.W.2d 654, 657 (N.D. 1989); Wastvedt v. Vaaler, 430 N.W.2d 561, 565 (N.D. 1988). A slightly different standard was articulated by the court in Sheets v. Letnes, Marshall & Fiedler, Ltd., 311 N.W.2d 175, 180 (N.D. 1981) (describing the standard of care with reference to "similar communities"). The standard of care language used in *Letnes* has not been articulated since that time.

44. *Vaaler*, 430 N.W.2d at 565. Although no legal malpractice case is precisely on point in North Dakota, the duty of care can probably be established with the testimony of the defendant attorney. *See* Iverson v. Lancaster, 158 N.W.2d 507, 508 (N.D. 1968) (medical malpractice case) (holding that a defendant physician can be made to testify regarding the standard of care).

45. *Vaaler*, 430 N.W.2d at 565. In *Vaaler*, the supreme court cited *Letnes* as a legal malpractice case supporting the requirement of expert opinion. *Id.* at 565-66. Actually, in *Letnes* the language used in the footnote discussing expert opinion was permissive, not mandatory: "We note that expert testimony is *permissible* to establish the degree of skill and care required whenever the matters to be proved are not within the knowledge of laymen." *See Letnes*, 311 N.W.2d at 181 n.4 (emphasis added). This language appears to be *dicta* rather than holding because the need for expert opinion was not an issue in the case. Nonetheless, *Letnes* is commonly cited by the North Dakota Supreme Court as holding that expert opinion is generally necessary in legal malpractice cases.

46. *Vaaler*, 430 N.W.2d at 566 (citations omitted).

An exception to this requirement exists if an attorney's malpractice is "so egregious and obvious" that a layperson can identify it as such without expert testimony.[47] The North Dakota Supreme Court recently applied this exception in *Swanson v. Sheppard*.[48] The plaintiff had alleged that the defendant attorney failed to advise him that student loan obligations were treated differently under Chapter 7 and Chapter 13 bankruptcy filings and that the attorney should have filed under Chapter 13 instead of Chapter 7.[49] The *Swanson* court held that expert testimony was not necessary to establish the standard of care because the attorney's "misconduct is so obvious that the trier of fact can adequately evaluate the professional's conduct and comprehend the breach of duty without the assistance of expert testimony."[50] The court determined that the attorney had a duty to correctly advise his client about basic principles of bankruptcy law.[51] This decision indicates that attorneys have a duty, as a matter of law, to advise clients about basic legal principles related to the attorney's representation of the client. Although the existence of the duty itself can be established without expert opinion, expert opinion will probably be required to establish the particular principles that must be explained.

3. *Duties That Exist as a Matter of Law*

Besides the duty to advise a client of basic legal principles, the North Dakota Supreme Court has identified other duties that an attorney has to a client as a matter of law. These include:

1. A duty not to acquire a beneficial interest in, or title to, the subject matter of the litigation.[52]
2. A duty not to acquire an adverse interest in a client's property.[53]
3. A duty of full disclosure of all facts to a client when settling a client's case.[54]

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47. *Id.* at 565. An interesting side issue is whether expert opinion is required if a legal malpractice case is tried to a judge instead of a jury. *See generally*, 1 MALLEN & SMITH, *supra* note 1, § 27.15 at 674-75. While North Dakota does not have case law specifically on this issue, *Swanson* seems to suggest that a judge can rule as a matter of law, without aid of expert opinion, that an attorney had a particular duty and breached that duty if the matter is well settled in the law or obvious. *See Swanson*, 445 N.W.2d at 657. Note, however, that expert opinion was offered in that case. *Id.* at 658.

48. 445 N.W.2d 654 (N.D. 1989).

49. Swanson v. Sheppard, 445 N.W.2d 654, 656 (N.D. 1989).

50. *Id.* at 657 (citing *Vaaler*, 430 N.W.2d at 565).

51. *Id.*

52. Yerkes v. Crum, 49 N.W. 422, 423 (N.D. 1891).

53. White Earth Creamery Co. v. Edwardson, 191 N.W. 622, 623 (N.D. 1922).

54. Riegi v. Phelps, 60 N.W. 402, 403 (N.D. 1894).

4. A duty to exercise the best judgment in determining the merits of a claim before starting an action.[55]
5. A duty to fully and fairly explain the meaning of the terms of contracts.[56]
6. A duty of undivided loyalty to clients.[57]
7. A duty to conduct at least minimal legal research.[58]
8. A duty to follow the client's legal instructions with reasonable promptness, even if the attorney honestly believes that the instructions are not in the best interests of the client.[59]
9. A duty to advise of potential conflicts of interest and withdraw from, or refuse to undertake, legal representation.[60]
10. A duty to disclose the significance of documents signed in a legal transaction, including the various clauses and provisions.[61]
11. A duty not to abandon a client without reasonable cause.[62]
12. A duty to initiate a lawsuit within the statute of limitations.[63]
13. A duty to exercise the highest good faith in the interest of the client.[64]

4. *The Duty of the Specialist*

Some jurisdictions hold an attorney who specializes in a particular area of law to a higher standard of care than a generalist attorney.[65] The North Dakota Supreme Court has not yet adopted such a standard. Most jurisdictions that have considered the issue hold the specialist to a higher

55. Stark County v. Mischel, 173 N.W. 817, 819 (N.D. 1919).

56. Moran v. Simpson, 173 N.W. 769, 773 (N.D. 1919).

57. *See* Rolfstad, Winkjer, Suess, McKennett & Kaiser v. Hanson, 221 N.W.2d 734, 737 (N.D. 1974) (holding that an attorney can be liable to his client for losses resulting from representing adverse interests).

58. Martinson Bros. v. Hjellum, 359 N.W.2d 865, 874 (N.D. 1985) (suggesting the proposition and citing Smith v. Lewis, 530 P.2d 589 (Cal. 1975) in support).

59. Olson v. Fraase, 421 N.W.2d 820, 829-830 (N.D. 1988) (stating that "an attorney's honest belief that the instructions were not in the best interests of the client is not a defense to a suit for malpractice").

60. Vorachek v. Citizens State Bank of Lankin, 421 N.W.2d 45, 53 (N.D. 1988) (not a legal malpractice case, however); *see also*, *Rolfstad*, 221 N.W.2d at 737.

61. *Vaaler*, 430 N.W.2d at 566.

62. *Stark County*, 173 N.W. at 820 ("Among the fundamental rules of ethics is the principle that an attorney who undertakes to conduct an action impliedly stipulates to carry it to its termination, and he is not at liberty to abandon it without reasonable cause.").

63. *Letnes*, 311 N.W.2d at 181 (finding this to be true when the statute of limitations is well settled).

64. *Stark County*, 175 N.W. at 820; *White Earth Creamery*, 191 N.W. at 623.

65. *See* 1 MALLEN & SMITH, *supra* note 1, § 15.4 at 863-67. *See also* Fagerlund, *supra* note 5, at 690-97 (discussing the "specialist" standard of care).

standard of care because of the attorney's more advanced knowledge of the subject matter.[66]

A related issue is whether an attorney engaged in the general practice of law should be held to the standard of care of a specialist if the generalist attorney represents a client in a specialized area of law, such as a medical malpractice case. Although North Dakota does not have case law on the subject, this rule applies to physicians in medical malpractice cases when a general practitioner undertakes care normally practiced by a medical specialist.[67] It seems logical to hold the attorney to the higher standard of care, especially in areas where a higher degree of expertise is required and where the attorney undertakes representation knowing that the matter is beyond the attorney's knowledge and expertise.[68]

C. THE PLAINTIFF MUST ESTABLISH A BREACH OF THE STANDARD OF CARE OWED BY THE ATTORNEY TO THE CLIENT

Once an attorney/client relationship and the duty of care are established, the client also must establish a breach of that duty. Whether the attorney's conduct met the appropriate standard of care is generally a question for the trier of fact.[69]

1. *Expert Opinion Is Generally Necessary to Establish Breach of the Standard of Care*

The same rules regarding the necessity of expert opinion to establish the standard of care also govern whether the attorney's conduct deviated from the standard of care.[70] In other words, expert opinion is usually required unless the conduct "is so egregious or obvious that a layperson can comprehend the professional's breach of duty without the existence of expert testimony."[71]

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66. 1 MALLEN & SMITH, *supra* note 1, § 15.4 at 863-67.

67. *See, e.g.*, Larson v. Yelle, 246 N.W.2d 841, 845 (Minn. 1976) (holding a general practitioner to the standard of an obstetrician because the general practitioner failed to refer the patient to an obstetrician or consult with the specialist).

68. 1 MALLEN & SMITH, *supra* note 1, § 15.4 at 871.

69. Bye v. Mack, 519 N.W.2d 302, 305 (N.D. 1994) (citing Martinson Bros. v. Hjellum, 359 N.W.2d 865 (N.D. 1985) and 1 MALLEN & SMITH, LEGAL MALPRACTICE § 27.7). Generally, findings of fact will not be reversed on appeal unless they are clearly erroneous. *Id.* "[A] finding of fact is clearly erroneous only when the reviewing court, upon review of the entire evidence, is left with a definite and firm conviction that a mistake has been made." *Id.*

70. Wastvedt v. Vaaler, 430 N.W.2d 561, 565 (N.D. 1988).

71. *Id. See supra* part III.B.2 (discussing the need to offer expert testimony to establish the standard of care). A good example of the need for expert testimony to prove a breach of duty is provided by Sheets v. Letnes, Marshall & Fiedler, Ltd., in which it was alleged that the Letnes law firm was negligent in failing to initiate a wrongful death action within the two-year statute of limitations. 311 N.W.2d 175, 177 (N.D. 1981). The trial court had granted the plaintiff's motion for summary judgment, finding the defendant negligent as a matter of law. *Id.* at 180. The supreme court reversed, stating that the applicable statute of limitations in a wrongful death case had not been

2. *Use of Disciplinary Proceedings to Prove Breach of the Standard of Care*

The North Dakota Supreme Court has not addressed the possibility of using collateral estoppel to apply prior disciplinary proceedings against an attorney to prove a breach of the duty of care owed to a client. The Eighth Circuit Court of Appeals, however, has ruled that under North Dakota state law, a client cannot use collateral estoppel in this manner because of a lack of privity in the disciplinary proceeding.[72]

3. *The North Dakota Rules of Professional Conduct and the Breach of Standards of Care*

Clients also have attempted to use violations of the Code of Professional Responsibility, or the Rules of Professional Conduct, to establish an attorney's duty and to prove that an attorney breached that duty.[73] However, the North Dakota Supreme Court has held that although breaches of ethical rules can be relevant and admissible in legal malpractice cases, violations of these rules "constitute only rebuttable evidence of legal malpractice."[74] For a violation of the Rules of Professional Responsibility to be admissible in a legal malpractice case, damages must have arisen from the conduct alleged to be a violation of the ethics rules.[75]

4. *Use of the Judgment and Evidence From the Case Underlying the Legal Malpractice Case*

In a legal malpractice case, a client may attempt to introduce evidence and the judgment from the case out of which the legal malpractice arose. This may not be permissible if the defendant attorney was not a party in the previous case, because "the judgment and evidence introduced in the previous action [would] have no evidentiary value against him."[76] In some cases, however, it may be appropriate to admit documentation from the previous case, even if the defendant attorney was not a party.[77] Moreover, if the conduct of the defendant attorney in the former action is at issue, the North Dakota Supreme Court has indicated

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decided in North Dakota and that expert opinion was allowable on the issue. *Id.* at 181. The court pointed out, however, that an attorney could be negligent in overlooking a statute of limitations if it was well established. *Id.*

72. Kuehn v. Garcia, 608 F.2d 1143 (8th Cir. 1979) *cert. denied*, 445 U.S. 943 (1980). The *Kuehn* court indicated that it thought North Dakota's collateral estoppel law was flawed; however, it recognized that in a diversity case it was bound to apply the substantive law of North Dakota. *Id.* at 1147.

73. *See Martinson Bros.*, 359 N.W.2d at 875 ; Olson v. Fraase, 421 N.W.2d 820, 827 (N.D. 1988); Binstock v. Tschider, 374 N.W.2d 81, 86 (N.D. 1985).

74. *Martinson Bros.*, 359 N.W.2d at 875.

75. *Binstock*, 374 N.W.2d at 86.

76. Bohn v. Johnson, 371 N.W.2d 781, 785 (N.D. 1985).

77. *Id.* at 786.

that the documentation shall be admissible: "[T]he judgment, evidence, and transcripts in the former action may [be] not only the best, but perhaps the only, evidence upon which to make a determination of whether or not the attorney was negligent in handling the former litigation."[78]

Whether or not findings from a previous case are admitted, a plaintiff may not be wise in relying upon them to establish an attorney's negligence. In one North Dakota case, a plaintiff attempted to rely upon a court's interpretation of a contract which the defendant attorney had drafted to show the attorney's negligence in drafting the contract in a subsequent legal malpractice case.[79] The North Dakota Supreme Court stated: "A successfully asserted claim for legal malpractice requires more than the fact, standing alone, that a trial or appellate court interpreted a document differently than the lawyer or his client assumed they would."[80] The court has also stated that an attorney's possible breach of a standard of care at issue in a malpractice case cannot be resolved by the opinion of the supreme court in the underlying case when the attorney's conduct was not at issue in the underlying case.[81]

D. THE PLAINTIFF MUST ESTABLISH THAT THE ATTORNEY'S BREACH OF CARE CAUSED INJURY TO THE CLIENT

Once the client has established the existence of an attorney/client relationship, the attorney's duty, and breach of that duty, the client has the burden of proving that damages proximately resulted from the breach of that duty.[82] In other words, the client must prove that had the attorney not acted in the manner alleged, a more favorable result to the client would have occurred.[83]

In deciding the issue of proximate cause, the North Dakota Supreme Court has in some cases applied the "case-within-a-case" doctrine.[84] This

78. *Id.* at 787.

79. *Martinson Bros.*, 359 N.W.2d at 873. The defendant attorney in that case had drafted a purchase contract for the plaintiffs. *Id.* at 869. The North Dakota Supreme Court, in a case involving the subject matter of the contract, had stated that " 'the contract is, at best, confusing or ambiguous as to what was actually purchased by [the plaintiff].' " *Id.* (quoting Oakes Farming Ass'n v. Martinson Bros., 318 N.W.2d 897, 908 (N.D. 1982)).

80. *Id.* The court was influenced by its holding in *Feil v. Wishek*, 193 N.W.2d 218 (N.D. 1971), stating: "a lawyer, without an express agreement, 'is not a guarantor . . . that the instruments he will draft will be held valid by the court of last resort.' " *Id.* (quoting *Wishek*, 193 N.W.2d at 224).

81. Klem v. Greenwood, 450 N.W.2d 738, 744 (N.D. 1990).

82. *Martinson Bros.*, 359 N.W.2d at 872, 875. *See also* Wastvedt v. Vaaler, 430 N.W.2d 561, 564-65 (N.D. 1988). In *Vaaler*, shareholders in a bank brought a legal malpractice action against Mr. Vaaler alleging, among other things, a conflict of interest in the sale of bank stock. *Id.* at 561. Although the jury found in favor of the plaintiffs, the North Dakota Supreme Court agreed with the district court in granting Mr. Vaaler's motion for judgment notwithstanding the verdict, finding that the plaintiffs had not shown that a nonnegligent attorney would have obtained a better result. *Id.* at 568.

83. Bye v. Mack, 519 N.W.2d 302, 305 (N.D. 1994); Swanson v. Sheppard, 445 N.W.2d 654, 658 (N.D. 1989).

84. *E.g.*, *Mack*, 519 N.W.2d at 305; *Vaaler*, 430 N.W.2d at 567.

doctrine is normally applied in cases involving negligently conducted litigation, but the court has also found it to be applicable in conflict of interest cases.[85] In the traditional "case-within-a-case" approach in negligent litigation cases, the client must essentially put on a trial within a trial.[86] A good example of this is an attorney's failure to sue an automobile accident case within the statute of limitations. Under the "case-within-a-case" doctrine, the plaintiff must try the automobile negligence case to the jury or court to prove that had the case been timely initiated, the plaintiff would have prevailed. The legal malpractice case is then tried.[87]

The "case-within-a-case" approach, however, can create a very difficult burden for a client to meet. For instance, if an attorney does not investigate or preserve evidence in an automobile injury case and then fails to bring the case within the six-year statute of limitations, it is very likely that the evidence necessary to prove the underlying personal injury case will be destroyed, lost, or altered. In essence, the attorney's lack of due diligence could make the "case-within-a-case" virtually impossible to prove, creating a "Catch 22." In such a case, an attorney might ask a court to make an exception to the "case-within-a-case" doctrine. While the "case-within-a-case" approach is considered the majority rule,[88] some jurisdictions allow the client to establish proximate cause through the use of expert testimony regarding the likelihood of success and the value of the claim lost.[89] The North Dakota Supreme Court has not considered this issue.

E. THE PLAINTIFF MUST ESTABLISH DAMAGES

Proof of damages is an essential element of a legal malpractice case, even if a breach of accepted standards of care has been established.[90] If the client fails to establish an actual loss proximately caused by the attorney's breach of duty, not even nominal damages can be awarded because liability has not been established.[91]

Although the supreme court has not identified damages as a separate element of a legal malpractice case, many of its decisions discuss damages issues in detail. This subsection contains a discussion of those damages issues, including: the general measure of damages; economic and

85. *Vaaler*, 430 N.W.2d at 567.
86. 1 MALLEN & SMITH, *supra* note 1, § 27.1 at 624-625.
87. *Id.* at 624.
88. *Id.* § 27.7 at 642.
89. *Id.* § 27.14 at 664.
90. Olson v. Fraase, 421 N.W.2d 820, 827 (N.D. 1988).
91. *Id.* The requirement of proof of damages has an interesting application in situations in which a default judgment has been obtained by a client against a defendant attorney. Thompson v. Goetz, 455 N.W.2d 580, 585 (N.D. 1990). If damages are not established in the default hearing, the legal malpractice claim must fail because an essential element of the claim has not been proved. *Id.*

noneconomic damages, including emotional distress damages; attorneys' fees; mitigation of damages; exemplary damages; statutory treble damages; and joint and several liability of law partners.

1. *The Measure of Damages, Generally*

Damages in a legal malpractice case are generally governed by the same statutory provisions as damages for any other tort action.[92] The North Dakota Century Code provides that the measure of damages for a tort "is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."[93]

2. *Economic and Noneconomic Damages in Legal Malpractice Cases*

In 1987, the North Dakota Legislature codified the types of damages that are recoverable in North Dakota.[94] Essentially, the legislation divided damages into two categories: economic and noneconomic damages. Economic damages include "medical expenses and medical care, rehabilitation services, custodial care, loss of earnings and earning capacity, loss of income or support, burial costs, cost of substitute domestic services, loss of employment or business or employment opportunities and other monetary losses."[95] Noneconomic damages include "pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, loss or illness, loss of society and companionship, loss of consortium, injury to reputation, humiliation, and other nonpecuniary damage.[96]

The supreme court has not yet applied these provisions to a legal malpractice case. It would appear that these provisions should apply to legal malpractice cases, however, because the statute states that it is to be applied in "any civil action for damages for . . . injury to a person whether arising out of breach of contract or tort . . . ."[97] A legal malpractice case is an action in tort. Moreover, the statute has already been used in medical malpractice cases,[98] and the North Dakota Supreme Court has applied medical malpractice principles in legal malpractice cases.[99]

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92. Bohn v. Johnson, 371 N.W.2d 781, 789 (N.D. 1985) (citing N.D. CENT. CODE §§ 32-03-01, -20).

93. N.D. CENT. CODE § 32-03-20 (1976).

94. 1987 N.D. Laws ch. 404, § 4. The statute had a sunset clause which was repealed in 1993. *See* 1993 N.D. Laws ch. 339, § 1.

95. N.D. CENT. CODE § 32-03.2-04(1) (Supp. 1993).

96. N.D. CENT. CODE § 32-03.2-04(2) (Supp. 1993).

97. N.D. CENT. CODE § 32-03.2-04 (Supp. 1993).

98. *See* Hopkins v. McBane, 427 N.W.2d 85, 87 (N.D. 1988).

99. *See supra* note 38 (discussing medical malpractice principles applied in legal malpractice cases in North Dakota).

On the other hand, the majority of jurisdictions hold that pain and suffering and emotional distress damages generally are not recoverable in legal malpractice cases.[100] If the North Dakota Supreme Court were to allow damages for pain and suffering or emotional distress under the broad provisions of this statute, it would deviate from the majority rule. Yet, the supreme court has taken a more expansive view of damages since section 32-03.2-04 became effective in 1987.[101] Case law in North Dakota suggests that a claim for noneconomic damages may be pursued if a legal malpractice case involves palpable emotional distress caused by an attorney's breach of duty.[102]

3. *Attorneys' Fees in Legal Malpractice Cases*

Attorneys' fees generally are not recoverable in legal malpractice cases,[103] unless the attorney's negligence forced the client into litigation with another party.[104]

The general rule against recovery of attorneys' fees in legal malpractice cases may result in an insufficient recovery for some plaintiffs. For example, if an attorney's negligence caused a client to have a judgment of $200,000.00 entered against him, the client's basic damages would be the judgment and any interest accrued on the judgment. This is the minimum recovery necessary to satisfy the judgment. If a jury awards only this amount, the entire award will be used to satisfy the judgment. The

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100. 1 MALLEN & SMITH, *supra* note 1, § 16.11 at 903-905. Emotional distress damages, however, can be recovered in the legal malpractice case as an element of damages in the underlying case. For example, if the attorney is negligent in missing a statute of limitations in an automobile crash case, the emotional distress damages the client incurred as a result of the crash are recoverable damages in the malpractice case against the attorney. Under the majority rule, however, additional emotional distress damages incurred by the client as a result of the attorney's malpractice would not be recoverable.

101. *See e.g.*, *Hopkins*, 427 N.W.2d at 95 (holding that a parent may recover damages in a wrongful death action for the loss of society and companionship of a child and for mental anguish related to the child's death in a medical malpractice case); First Trust Company of North Dakota v. Scheel's Hardware, 429 N.W.2d 5, 10-11 (N.D. 1988) (holding that a parent can recover damages for loss of society and companionship of a child in a personal injury action); Jacobs v. Anderson Bldg. Co., 430 N.W.2d 558, 559-60 (N.D. 1988) (discussing emotional distress damages, but refusing to overrule the "zone of danger" test enunciated in Whetham v. Bismarck Hospital, 197 N.W.2d 678 (N.D. 1972)).

102. This issue was raised, but not answered, in Finch v. Backes, 491 N.W.2d 705, 707 (N.D. 1992). In cases of severe emotional distress, a client's attorney suing a legal malpractice case should not overlook the possibility of the tort of outrage. Muchow v. Linblad, 435 N.W.2d 918, 924 (N.D. 1989) and Hanke v. Global Van Lines, 533 F.2d 396 (8th Cir. 1976) are cases in which the tort of outrage was applied; however, they are not legal malpractice cases. *See also* Bjorgen v. Kinsey, 466 N.W.2d 553, 559 (N.D. 1991) (recognizing that an attorney can be liable for other torts besides negligence, such as fraud). Outrageous conduct by an attorney should support a claim for the tort of outrage, just as deceit by an attorney will support a claim for fraud.

103. *Fraase*, 421 N.W.2d at 829. This is the majority rule. 1 MALLEN & SMITH, *supra* note 1, § 16.14 at 908.

104. *Fraase*, 421 N.W.2d at 829 (*citing* First Nat'l Bank of Clovis v. Diane, Inc., 698 P.2d 5, 12 (Ct. App. 1985)); Annotation, *Measure and Elements of Damages Recoverable for Attorney's Negligence with Respect to Maintenance or Prosecution of Litigation on Appeal*, 45 A.L.R.2D 62, 84 (1956)); *see also*, 1 MALLEN & SMITH, *supra* note 1, § 16.6 at 899-900.

client must still pay attorneys' fees for the malpractice case. Thus, the client is not made whole.

Some jurisdictions hold that a legal malpractice damage award must be reduced by any attorneys' fees the client would have had to pay in the underlying action had the malpractice not occurred.[105] Other jurisdictions, including Minnesota, take the view that legal malpractice awards are not reduced by the attorneys' fees the client would have had to pay in the underlying action.[106] The latter approach is more likely to fully compensate the client. This is particularly true in legal malpractice cases arising out of personal injury claims. Personal injury claims are often accepted by attorneys on a contingency fee basis. Legal malpractice claims arising out of personal injury claims are also often accepted on a contingency fee basis. If the legal malpractice jury award is reduced by the contingent fee agreed to in the underlying case and the legal malpractice plaintiff's attorney takes a contingency fee on the remainder, the client is not fully and fairly compensated for the injuries suffered. Under the Minnesota approach, the client ultimately receives greater compensation.

4. *Mitigation of Damages*

Plaintiffs in legal malpractice cases have a duty to reasonably minimize or mitigate damages.[107] This means that an attorney representing a client may have to take legal action to limit a client's damages.

One mitigation issue that often surfaces in legal malpractice cases is whether Rule 60(b) of the North Dakota Rules of Civil Procedure can be used to reopen a previous judgment to undo a prior attorney's negligent conduct. While use of Rule 60(b) should be considered as a potential mitigation tool, the case law is clear that the legal malpractice of an attorney is generally not sufficient grounds to reopen a judgment; there must be other Rule 60(b) grounds to reopen the judgment.[108] North Dakota has not yet discussed Rule 60(b) as it relates to mitigation in legal malpractice cases.

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105. 1 MALLEN & SMITH, *supra* note 1, § 16.18 at 911-914 (discussing both sides of the issue).

106. *See* Christy v. Saliterman, 179 N.W.2d 288 (Minn. 1970); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980).

107. Swanson v. Sheppard, 445 N.W.2d 654, 658 (N.D. 1989). The *Swanson* court stated: "If an attorney's negligent conduct in representing a client leaves the client with an alternative remedy or remedies which are both viable and equivalent, the result may be that the client suffers no loss or a reduced loss as the proximate cause of the attorney's negligent conduct." *Id.* Of course, the interesting corollary to this rule is the possibility that a client may have a case against the malpractice attorney for failing to recommend mitigation of damages or for failing to actually mitigate the damages.

108. 11 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2858 (1982).

While clients must reasonably mitigate damages, they are not required to proceed with unreasonable, impractical, disproportionately expensive, or futile efforts to mitigate damages.[109]

In general, attorneys' fees and costs related to the mitigation of damages are recoverable in a legal malpractice case.[110] However, the mitigation of damages requirement may still be cost prohibitive to a client of limited financial means.

5. *Exemplary Damages*

Exemplary damages are recoverable in legal malpractice cases.[111] To support a claim for exemplary damages, the client must establish that the attorney engaged in oppression, fraud, or malice, actual or presumed.[112] In addition, the client must establish that the acts of oppression, fraud, or malice resulted in damage to the client.[113]

6. *Treble Damages Pursuant to North Dakota Century Code Section 27-13-08*

Section 27-13-08 of the North Dakota Century Code is an exceptionally useful damages tool for malpractice clients. This statute allows clients to collect treble damages if an attorney has engaged in certain types of deceitful or collusive misconduct.[114] In construing this statute, the North Dakota Supreme Court has held that while no criminal conviction of the defendant attorney is required for treble damages, only those damages resulting from fraud or collusion may be trebled.[115] The court has also held that a client cannot obtain both treble damages and punitive damages for the same acts because this would amount to a double recovery or an excessive penalty.[116] The client should still be able to present both the

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109. *Id.*; 1 MALLEN & SMITH, *supra* note 1, § 16.21 at 917.

110. 1 MALLEN & SMITH, *supra* note 1, § 16.10 at 902-903.

111. *See* N.D. CENT. CODE § 32-03.2-11 (Supp. 1993) (restricting pleading of exemplary damages so that they cannot be pleaded until leave is obtained from the court). The first North Dakota legal malpractice case to discuss exemplary damages was Harmening v. Howland, 141 N.W.2d 131 (N.D. 1913). *See also Kinsey*, 466 N.W.2d at 553.

112. *Fraase*, 421 N.W.2d at 828.

113. *Id.*

114. N.D. CENT. CODE § 27-13-08 (1991) (providing that an attorney who deceives a client, delays a client's suit for personal gain, or improperly receives money is guilty of a class A misdemeanor and liable for treble damages in a civil action).

115. *Kinsey*, 466 N.W.2d at 559. Since only those damages caused by the fraud or collusion can be trebled, attorneys representing the attorney defendant should request a special verdict separating out the damages so as to avoid having the entire verdict trebled. This is what happened in *Kinsey*. *Id.* at 559. Mr. Kinsey tried to raise this issue on appeal, but was prohibited from doing so because the record on appeal did not reveal that he had requested separation before submission of the case to the jury. *Id.*

116. *Id.* at 561-62. It would appear proper, however, for a client to obtain both punitive and treble damages in the same case if *different* acts of deceit or collusion exist. This may allow the client to recover exemplary damages on an act of deceit, while recovering treble damages on the damages directly resulting from a separate act of collusion or even a separate act of deceit.

treble damages and punitive damages to the jury and elect judgment on the greater verdict.[117]

7. *Joint and Several Liability of Law Partners*

Financial liability for legal malpractice can be extended vicariously to the partners of the negligent attorney by the joint and several liability rules of partnership law.[118] In order for joint and several liability to exist, the wrong must have occurred on behalf of the law firm and must have been within the scope of the business of the law firm.[119]

IV. COMMON DEFENSES TO LEGAL MALPRACTICE CLAIMS

In addition to the defenses that the essential elements of a legal malpractice case have not been established, or that a plaintiff has failed to mitigate damages, there are two other common defenses used in legal malpractice cases: contributory negligence of the client and expiration of the statute of limitations. Other defenses have also been attempted. Each of these is discussed below.

A. CONTRIBUTORY NEGLIGENCE OF THE CLIENT

While contributory negligence is available as a defense in legal malpractice cases, it generally is not a defense in fraud or deceit actions.[120] Under current comparative negligence principles in North Dakota, a client's contributory negligence is not necessarily a total bar to recovery, but it can serve to reduce a client's malpractice award in proportion to the client's negligence.[121]

B. STATUTE OF LIMITATIONS

Generally, the statute of limitations for legal malpractice in North Dakota is two years from the date of the malpractice.[122] Numerous North

117. *See* Butz v. Werner, 438 N.W.2d 509, 515-16 (N.D. 1989) (holding that in a products liability case, the plaintiff may submit two different theories of recovery to the jury and elect to have judgment entered on the theory that provides the greatest recovery).

118. Olson v. Fraase, 421 N.W.2d 820, 832-33 (N.D. 1988).

119. *Id.* at 832. In the *Fraase* case, the North Dakota Supreme Court upheld a judgment entered against a partner in a law firm on the basis of joint and several liability for another partner's negligent preparation of a mineral interest deed. *Id.* at 832-33.

120. Bjorgen v. Kinsey, 466 N.W.2d 553, 559 (N.D. 1991).

121. *See* N.D. CENT. CODE §§ 32-03.2-01, -02 (Supp. 1993).

122. N.D. CENT. CODE § 28-01-18(3) (1991). *See also* Johnson v. Haugland, 303 N.W.2d 533 (N.D. 1981) (explaining that these statutory provisions apply to both tort and contract causes of action); *but see* N.D. CENT. CODE § 28-01-16(6) (1991) (providing a six-year statute of limitations for claims alleging fraud, deceit, or collusion); *Kinsey*, 466 N.W.2d at 558 (holding that fraud cases against attorneys have a six-year statute of limitations and citing Herzog v. Yuill, 399 N.W.2d 287, 291 (N.D. 1987)).

Dakota cases have attempted to clarify the meaning of this general rule.[123]

1. *The Discovery Rule*

The North Dakota Supreme Court has explained that a cause of action for legal malpractice accrues when "the act of malpractice with resulting injury is, or by reasonable diligence could be, discovered."[124] This is commonly called the discovery rule.

The court has held that three elements are necessary for discovery to have occurred: "Time starts running when the plaintiff knows, or with reasonable diligence should have known, (1) of the injury, (2) its cause, and (3) defendant's possible negligence."[125] However, a cause of action may arise before the client sustains all of the damage flowing from the attorney's malpractice. As the North Dakota Supreme Court has explained: "Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue."[126] Moreover, discovery does not occur when a client "subjectively believe[s]" that he or she has suffered injury resulting from an attorney's malpractice.[127] Rather, the standard is an objective one, "focus[ing] . . . upon whether the plaintiff has been apprised of facts which would place a *reasonable person* on notice that a *potential claim* exists."[128] For example, discovery occurs when a client is advised by an attorney of his or her potential malpractice claim.[129]

It should also be noted that the six-year statutory limit to nondiscovery in medical malpractice cases does not apply to legal malpractice cases.[130] Thus, lack of discovery in a legal malpractice case, unlike a medical malpractice case, could toll the statute of limitations for an indefinite period of time.

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123. *Haugland*, 303 N.W.2d at 536; Phillips Fur and Wool Co. v. Bailey, 340 N.W.2d 448 (N.D. 1983); *Wall I*, 366 N.W.2d 471, 472 (N.D. 1985); *Wall II*, 393 N.W.2d 758, 760 (N.D. 1986); *Herzog*, 399 N.W.2d at 290; Berglund v. Gulsvig, 448 N.W.2d 627, 628 (N.D. 1989); *Kinsey*, 466 N.W.2d at 557; Finch v. Backes, 491 N.W.2d 705, 705 (N.D. 1992).

124. *Haugland*, 303 N.W.2d at 539 (citing Iverson v. Lancaster, 158 N.W.2d 507 (N.D. 1969) (a medical malpractice case)).

125. *Phillips Fur*, 340 N.W.2d at 449.

126. *Wall I*, 366 N.W.2d at 473 (quoting PROSSER, LAW OF TORTS § 30 at 144 (4th ed. 1971)).

127. *Wall II*, 393 N.W.2d at 761.

128. *Id.* (emphasis added).

129. *Id.* at 762.

130. *Id.* Section 28-01-18(3) of the North Dakota Century Code states:

> 3. An action for the recovery of damages resulting from malpractice; provided, however, that the limitation of an action against a physician or licensed hospital will not be extended beyond *six years* of the act or omission of alleged malpractice by a nondiscovery thereof unless discovery was prevented by the fraudulent conduct of the physician or licensed hospital. This limitation is subject to the provisions of section 28-01-25.

N.D. CENT. CODE § 28-01-18(3) (1991) (emphasis added).

2. *The Continuous Representation Rule*

The North Dakota Supreme Court has applied the continuous representation rule in legal malpractice cases.[131] Under this rule, the statute of limitations is tolled, or deferred, while the attorney continues to represent the client with respect to the same subject matter as the allegedly negligent acts.[132] There are three policies behind the rule: (1) the attorney/client relationship is one of trust and confidence that can deter the client from realizing there is a negligence case;[133] (2) an attorney knowing of his or her own negligence might procrastinate while the statute of limitations runs;[134] and (3) the attorney should be allowed time to correct the wrong so that potential malpractice lawsuits may be avoided.[135]

Under the continuous representation rule, termination of representation is the key date for the running of the limitation period.[136] The court has stated that the time at which representation terminates is generally a question of fact for the jury.[137] However, the court has not identified any clear factors for deciding when representation terminates. The court has suggested that representation continues if the attorney is rendering legal advice or services.[138]

3. *Other Tolls to the Statute of Limitations*

Besides the continuous representation toll, the statute of limitations can be tolled by disability, infancy, imprisonment, or an attorney's absence from the state or fraudulent concealment.[139] The North Dakota Supreme Court has dealt with imprisonment, attorney's absence from the state, and attorney's fraudulent concealment as tolls to the statute of limitations. The court has stated that a plaintiff must bring a legal malpractice action within one year from his or her release from prison.[140] The court has also stated that the statute of limitations may be tolled for a maximum of one year by a defendant attorney's absence from the state by

131. *E.g.*, *Wall II*, 393 N.W.2d at 762.

132. *Id. See also* Rude, *supra* note 6, at 719.

133. *Wall II*, 393 N.W.2d at 762 (citing Siegel v. Kranis, 288 N.Y.S.2d 831 (N.Y. App. Div. 1968)).

134. *Id.* at 763 (citing Siegel v. Kranis, 288 N.Y.S.2d 831 (N.Y. App. Div. 1968)).

135. *Id.* (citing Note, *Civil Procedure—Statute of Limitations Accrued in Attorney Malpractice Actions: Thorpe v. DeMent*, 20 WAKE FOREST L. REV. 1017, 1028-29 (1984)).

136. *Id.*

137. *Id.*

138. *Wall II*, 393 N.W.2d at 764.

139. *See* N.D. CENT. CODE § 28-01-25 (1991). *See also Herzog*, 399 N.W.2d at 290 (discussing imprisonment as a toll to the statute of limitations); *Berglund*, 448 N.W.2d at 628 (discussing an attorney's absence from the state as a toll to the statute of limitations); Binstock v. Tschider, 374 N.W.2d 81, 85 (N.D. 1985) (discussing an attorney's fraudulent concealment as a toll to the statute of limitations).

140. *Herzog*, 399 N.W.2d 287, 290 (N.D. 1987).

operation of section 28-01-32 of the North Dakota Century Code.[141] Finally, fraudulent concealment by an attorney can provide a client with additional time to bring an action against the attorney.[142]

In one case, a plaintiff argued that the statute of limitations should have been tolled because he could not locate an attorney to represent him.[143] The supreme court stated that while difficulty in obtaining an attorney is unfortunate, "it is not a proper basis for extending the limitation period."[144]

4. *Equitable Estoppel as a Bar to the Statute of Limitations*

Clients have also attempted to argue that an attorney can be barred from asserting a statute of limitations defense to a legal malpractice claim by the doctrine of equitable estoppel.[145] The argument is that if an attorney makes statements to a client that the client relies upon in failing to bring a legal malpractice case against the attorney in a timely manner, the attorney is barred by equitable principles from asserting the defense of untimeliness. The North Dakota Supreme Court has not yet applied this theory to bar a statute of limitations defense.

C. OTHER DEFENSES

There is at least one reported North Dakota case discussing the use of a compulsory counterclaim defense in a legal malpractice case. In *Klem v. Greenwood*,[146] Mr. Greenwood attempted to defeat Mr. Klem's *pro se* legal malpractice claim against him by asserting that the legal malpractice case was a compulsory counterclaim to an attorney fee collection action that had previously been filed by the attorney and decided against Mr. Klem.[147] Because the North Dakota Supreme Court decided the case on other grounds, however, the potential success of a compulsory counterclaim defense remains uncertain.

Although not a true defense to a legal malpractice case, an attorney's counterclaim of defamation also has been used in response to a client's legal malpractice claim.[148] In the only case in which it dealt with this tactic, however, the North Dakota Supreme Court frowned upon it, stating that if the attorney had filed the counterclaim of defamation in order

141. *Berglund*, 448 N.W.2d at 628 (involving negligence in the probate of a will).
142. N.D. CENT. CODE § 28-01-24 (1991) (providing a one-year statute of limitations for claims for relief fraudulently concealed); *See also Binstock*, 374 N.W.2d at 85 (declining to rule upon a fraudulent concealment claim against an attorney because of lack of evidence).
143. *Haugland*, 303 N.W.2d at 540.
144. *Id.* (citing Harvey v. Connor, 407 N.E.2d 879, 881 (Ill. App. 1980)).
145. *See Binstock*, 374 N.W.2d at 85.
146. 450 N.W.2d 738 (N.D. 1990).
147. Klem v. Greenwood, 450 N.W.2d 738, 741 (N.D. 1990).
148. Swanson v. Sheppard, 445 N.W.2d 655, 659 (N.D. 1989).

to deter the client from pursuing his malpractice case, this would constitute an improper purpose warranting sanctions.[149]

VI. CONCLUSION

There has been a dramatic increase in the number of reported legal malpractice cases in North Dakota within the last decade. At the turn of the century, North Dakota attorneys were sued only if they engaged in breaches of fiduciary duty. Cases decided more recently, however, suggest that attorneys are not only being sued more often, but they are being sued for a broader range of errors and subject matter. If this trend continues, which there is every reason to believe it will, North Dakota attorneys will increasingly be exposed to the possibility of being sued for legal malpractice. As clients become more willing to sue their lawyers, they will be seeking representation from North Dakota attorneys. While it may be distasteful to sue a legal colleague, members of the bar must be willing to represent injured clients. If the legal profession is to maintain credibility with the public, we must demonstrate a willingness to police our profession. While a number of North Dakota attorneys have represented legal malpractice plaintiffs, more attorneys are needed to protect the rights of those injured by legal malpractice. This article has provided a basic outline of the law of legal malpractice in North Dakota and will, hopefully, encourage more attorneys to represent clients who have been victimized by legal malpractice.

149. *Id.*