

LEGAL MALPRACTICE

STATE OF NEW MEXICO

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I. NATURE OF CASE

Although New Mexico courts have allowed contract claims for professional services negligently performed, “the gravamen of a malpractice action arising out of the lawyer-client relationship is generally recognized to lie in tort.” *Leyba v. Whitley*, 120 N.M. 768, 772, 907 P.2d 172, 176 (1995). See section II D herein for a discussion of a suit based upon breach of contract.

II. ELEMENTS OF LEGAL MALPRACTICE CLAIM

“To recover on a claim of legal malpractice based on negligence, a plaintiff must prove three essential elements: (1) the employment of the defendant attorney; (2) the defendant attorney’s neglect of a reasonable duty; and (3) the negligence resulted in and was the proximate cause of loss to the plaintiff.” *Rancho del Villacito Condos., Inc. v. Weisfeld*, 121 N.M. 52, 55-56, 908 P.2d 745, 748-49 (1995); see also *Bassett v. Sheehan, Sheehan & Stelzner, P.A.*, 2008-NMCA-72, ¶ 7, 144 N.M. 178, 184 P.3d 1072; *Akutagawa v. Laflin, Pick & Heer, P.A.*, 2005-NMCA-132, ¶ 11, 138 N.M. 774, 126 P.3d 1138; *Glenborough Corp. v. Sherman & Howard*, 121 N.M. 253, 256, 910 P.2d 329, 332 (Ct. App. 1995).

A. **Standing/Duty**

(1) **Attorney-Client Relationship**

Plaintiff must prove “that the relationship of attorney and client existed.” *Holland v. Lawless*, 95 N.M. 490, 495, 623 P.2d 1004, 1009 (Ct. App. 1981). The attorney client relationship may be implied, but in order for the implication to arise, Plaintiff must be able to

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show some facts relating directly or inferentially to an attorney-client relationship. *Id.* (holding that the mere fact that Plaintiff discussed the possible purchase of real estate with an attorney was not enough to establish the attorney-client relationship). The duties an attorney owes a client can extend beyond the termination of the representation. *See Rael v. Blair*, 2007-NMSC-006, ¶ 21, 141 N.M. 232, 153 P.3d 657.

(2) Privity Rule and Exceptions

“Historically, an attorney could not be held liable to a third party for professional negligence absent fraud, collusion, or privity of contract.” *Leyba*, 120 N.M. at 772 n.1, 907 P.2d at 176. New Mexico has joined other jurisdictions in rejecting stringent privity tests and relaxing or abandoning the privity requirement and increasingly recognizing that attorneys may owe a duty of care to non-clients under certain circumstances involving justifiable third party reliance on representations made by the attorney. *Id.* at 772-73, 907 P.2d at 176-77. *See also Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 106 N.M. 757, 762, 750 P.2d 118, 123 (1988) (Privity of contract is no longer a prerequisite for [negligent misrepresentation]. Absent fraud, however, it does require a duty on the part of the person furnishing the information and the person receiving the information must have a right to rely on it.”) (internal citation omitted). New Mexico courts apply the following multi-factor balancing test for analyzing when an attorney will owe a duty to a non-client: “(1) the extent to which the transaction was intended to benefit the [non-client]; (2) the foreseeability of harm to the [non-client]; (3) the degree of certainty that the [non-client] 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) the extent to which the profession would be unduly burdened by a finding of liability.” *Leyba*, 120 N.M. at 775, 907 P.2d at 179. The court in *Leyba* held that an attorney who represents the personal representative in a suit under the Wrongful Death Act owes a duty to the statutory beneficiaries to exercise reasonable care to ensure that they actually receive the proceeds of any wrongful death claim. *Id.* 120 N.M. at 776, 778, 907 P.2d at 180, 182. However, such an attorney does not owe such duties to the estate and its beneficiaries, *Id.*, 120 N.M. at 776, 907 P.2d at 178; nor does the attorney for a trustee generally owe a duty to the trust beneficiaries. *Id.*, 120 N.M. at 774, 907 P.2d at 180. When an adversarial relationship exists between the client and the intended beneficiary of the attorney’s services, such that the third party knows or should know that he or she cannot rely on the attorney to act for his or her benefit, then the attorney’s duty to the third party ends. *Id.*, 120 N.M. at 778, 907 P.2d at 182.

(3) Duties to constituents of an organizational client:

The New Mexico Rules of Professional Conduct, NMRA 16-113A, provide that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” In general, shareholders may not bring individual claims against an attorney for that attorney’s legal malpractice in representing the corporation because the corporation and the shareholder are separate entities, notwithstanding the fact that the plaintiffs are the sole shareholders. *Delta Automatic Sys., Inc. v. Bingham*, 1999-NMCA-29, ¶¶ 11-16, 126 N.M. 717, 974 P.2d 1174 (filed 1998). There are two exceptions to this rule: (1) when the shareholder(s) bringing the claim has suffered an injury separate and distinct from that of the other shareholders; and (2) when the shareholder(s) bringing the claim is owed a special duty.

Id. at ¶ 14. The “special duty” exception will only apply when there is a relationship between the attorney and the shareholder creating duties that are above and beyond the attorney’s duties to the corporation. *Id.* at ¶ 16. Even where the “special duties” exist, the harm suffered by the shareholder(s) must be a result of a breach of those duties in order for a cause of action to arise. *Id.* See *Richter v. Van Amberg*, 97 F.Supp.2d 1255, 1263 (D.N.M. 2000) (attorney-client relationship ran only to partnership acting through its duly authorized managing partner).

B. Liability (1) General Standard of Care

An attorney owes a duty to provide professional services with the skill, prudence, and diligence of attorneys of ordinary skill and capacity similarly situated. *Leyba*, 120 N.M. at 176, 907 P.2d at 772 “An attorney’s duty to a client is ‘to exercise the degree of knowledge or skill ordinarily possessed by others in his or her profession similarly situated.’” *Bassett*, 2008-NMCA-72, ¶ 8, (citing *Resolution Trust Corp. v. Barnhart*, 116 N.M. 384, 388, 862 P.2d 1243, 1247 (Ct. App. 1993)). Where it is reasonable for an attorney to consider that his legal interpretation or advice is questionable or debatable, then he has a duty to warn his client of potential liability to the client or adverse consequences which could result should his interpretation or advice be deemed incorrect. *First Nat’l Bank of Clovis v. Diane, Inc.*, 102 N.M. 548, 553, 698 P.2d 5, 10 (Ct. App. 1985).

“[T]he crucial inquiry is whether [the lawyer’s] advice was so legally deficient when given that he could be found to have failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.” *Id.* at 552, 698 P.2d at 9. “[A] mere error of judgment or mistake in point of law that has not been settled by the highest court of law and upon which reasonable lawyers may differ, will not subject an attorney to liability.” *Bassett*, 2008-NMCA-72, ¶ 16.

(2) Locality Rule

The “locality rule” as a method of determining the standard of care required of a professional has been specifically applied in the medical negligence context where it stands for the proposition that it is the duty of a doctor or other health care provider to “possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified doctors...practicing under similar circumstances, *giving due consideration to the locality involved.*” See UJI 13-1101 NMRA; see also *Pharmaseal Lab. v. Goffe*, 90 N.M. 753, 757, 568 P.2d 589, 593 (1977); *Lewis v. Rodriguez*, 107 N.M. 430, 431, 759 P.2d 1012, 1013 (Ct. App. 1988). It can be inferred that a similar rule should exist in legal malpractice cases because the standard of care of attorneys is described as “the degree of knowledge or skill ordinarily possessed by others in his or her profession *similarly situated* ...” *Resolution Trust Corp. v. Barnhart*, 116 N.M. 384, 388, 862 P.2d 1243, 1247 (Ct. App. 1993) (emphasis added); see also *George v. Caton*, 93 N.M. 370, 376, 600 P.2d 822, 828 (Ct. App. 1979).

(3) Specialization

“A lawyer holding himself out to the public as specializing in an area of the law must exercise the same skill as other specialists of ordinary ability specializing in the same field.” *Rodriguez v. Horton*, 95 N.M. 356, 359, 622 P.2d 261, 264 (Ct. App. 1980).

C. Causation

(1) “But For”

In cases involving alleged malpractice in the handling of a litigation matter, the plaintiff must prove that “but for” the attorney’s negligence, the underlying case would have resulted in a more favorable outcome. *See Bassett*, 2008-NMCA-72, ¶ 18-19 (summary judgment in favor of attorneys affirmed because failure to properly advise of the applicable statute of limitations caused no harm since the underlying claim would not have succeeded); *Selby v. Roggow*, 1999-NMCA-44, ¶ 21, 126 N.M. 766, 975 P.2d 379 (summary judgment in favor of attorneys affirmed because the counterclaim plaintiffs contended the attorneys should have filed would have failed even if it had been filed); *Glenborough Corp. v. Sherman & Howard*, 121 N.M. 253, 258, 910 P.2d 329, 334 (Ct. App. 1995) (summary judgment in favor of attorneys affirmed because failure to file administrative claims did not proximately harm plaintiffs where plaintiffs could not prove that they could win any such claims had they been filed); *Collins ex rel. Collins v. Perrine*, 108 N.M. 714, 717, 778 P.2d 912, 915 (Ct. App. 1989) (plaintiff must prove that he would have recovered judgment in the underlying case and the amount of that judgment). The proper measure of damages is the amount of the judgment that could have been recovered but for the attorney’s negligence in the underlying suit; plaintiff must prove “that judgment would have been recovered absent attorney’s negligence, and the amount of that judgment.” *Collins*, 108 N.M. at 719, 778 P.2d at 917. Such a malpractice action thus “involves a trial within a trial.” *George*, 93 N.M. at 378, 600 P.2d at 830.

The New Mexico Court of Appeals has held that the question of proximate cause in a legal malpractice case is generally a question of fact for the jury, even when the question is whether an appeal would have been successful. *Andrews v. Saylor*, 2003-NMCA-132, ¶ 1, 14-16, 134 N.M. 545, 80 P.3d 482. The court explained that “under the preponderance-of-the-evidence standard applicable to legal malpractice actions, complete certainty as to the outcome of the hypothetical appeal is not required: the party bearing the burden of proof need only to persuade the jury that the likelihood of a favorable outcome in the hypothetical appeal was greater than even.” *Id.* at ¶ 15.

In suits involving claims for malpractice in the handling of a non-litigation or transactional matter, such as omission of a critical term when setting up a trust, plaintiffs must show that if the attorney had properly performed then the client would not have suffered damage, at least not to the same degree. *Akutagawa*, 2005-NMCA-132, ¶ 11-13.. In *Akutagawa*, the Court of Appeals held that the plaintiffs, a family who hired the defendant attorney to set up a trust, had to show that the attorney’s failure to include a “critical paragraph” in the trust documents resulted in some legally compensable damages such as those amounts that would restore the plaintiff to the position he or she occupied prior to the attorney’s negligence. *Id.*

Since the attorney offered to reform the trust to more accurately represent the intent of the parties, the court stated, “For example, if it became necessary for the [Plaintiffs] to hire an independent trustee, or pay an accountant during [the time it took to reform the trust], ... those damages may be compensable”. *Id.* at ¶ 17.

(2) Collectability Requirement

There are no reported New Mexico cases where the court decided the issue of whether plaintiff must prove the collectability of any judgment which might have been obtained in the underlying case. However, in *George*, 93 N.M. at 378, 600 P.2d at 830, the court quoted approvingly from *Hoppe v. Ranzini*, 158 N.J. Super. 158, 385 A.2d 913, 917 (1978), that the plaintiff has the burden of proving that he would have recovered a judgment in the underlying case, “the amount of that judgment, and ... the degree of collectability of such judgment.” *See also Davis v. Gabriel*, 111 N.M. 289, 292, 804 P.2d 1108, 1111 (1990).

(3) Appellate Malpractice

The only reported cases involving appellate malpractice are *Andrews v. Saylor*, 2003-NMCA-132, 134 N.M. 545, 80 P.3d 482 which involved the failure to take an appeal, and *Sanders v. Smith*, 83 N.M. 706, 707-08, 496 P.2d 1102, 1103-04 (Ct. App. 1972) (“Plaintiffs contend their attorney negligently prepared, investigated and tried the case in Federal Court as follows: ... The attorney negligently failed to take an appeal from an adverse judgment entered in the Federal Court.”). It would appear likely, however, that the general rules governing legal malpractice in other factual circumstances would be equally applicable where the claim is negligence in the appellate context.

(4) Innocence Requirement for Legal Malpractice in Criminal Cases

In *Duncan v. Campbell*, a case decided on other grounds, the New Mexico Court of Appeals indicated that it accepted different substantive rules about legal malpractice in criminal cases. 1997-NMCA-28, ¶ 12, 123 N.M. 181, 936 P.2d 863. The court explained:

Whereas in ordinary **malpractice** cases the plaintiffs need only show that the attorney did not meet the standard of care as a result of which the client suffered a worse result, in **malpractice** arising out of **criminal** cases, the plaintiff must show in addition that the plaintiff's predicament was not of the plaintiff's own making (or the defendant may defend by showing the opposite), as for example because the plaintiff really is guilty or that the plaintiff's guilt has not been overturned on appeal or in post-conviction proceedings.

Id. at ¶ 14.

(5) Effect of Client's Settlement on Causation

A lawyer may be held liable for malpractice where his or her unreasonable advice to settle a lawsuit is the proximate cause of pecuniary loss to the client. *Collins*, 108 N.M. at 717,

778 P.2d at 915 (Attorney committed legal malpractice by settling the case without conducting proper discovery; the jury determined that, absent the negligence, the settlement would have been greater or a larger jury verdict could have been obtained.). “[I]n a malpractice action alleging the negligence of an attorney in settling a claim for a small amount, the reasonableness of the settlement must necessarily be examined. Malpractice actions are not attempts to set aside the prior settlement, but are entirely separate actions to recover compensation for the negligent performance of duties. Therefore, the doctrine of finality of settlement is not involved in such actions.” *Id.*, 108 N.M. 719, 778 P.2d at 917. .

D. Damages

(1) Monetary

A plaintiff in a legal malpractice case may seek to recover reasonably foreseeable damages proximately caused by the negligent act or omission. *See Carrillo v. Coors*, 120 N.M. 283, 288, 901 P.2d 214, 219 (Ct. App. 1995); *Resolution Trust Corp. v. Barnhart*, 116 N.M. 384, 391-92, 862 P.2d 1243, 1250-51 (Ct. App. 1993). Such damages must not be speculative. *Akutagawa*, 2005-NMCA-132, ¶ 15 (citing *Lovington Cattle Feeders, Inc. v. Abbott Lab.*, 97 N.M. 564, 568, 642 P.2d 167, 171 (1982) (“stating that ‘damages, to be recoverable, must be proven with reasonable certainty and not be based upon speculation’”)).

“In a malpractice action charging that an attorney's negligence in prosecuting an action resulted in the loss of the client's claim, the measure of damages is the value of the lost claim, i.e., the amount that would have been recovered by the client but for the attorney's negligence.” *George*, 93 N.M. at 378, 600 P.2d at 830; *see also Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor*, 115 N.M. 159, 167, 848 P.2d 1086, 1094 (Ct. App. 1993). However, a defendant is entitled to show that the lesser amount plaintiff actually received was due to reasons other than the attorney's malpractice. *Hyden*, 115 N.M. at 167, 848 P.2d at 1094; *see also Andrews*, 2003-NMCA-132, ¶ 27, (holding that the doctrine of comparative fault applies in a legal malpractice action and allowing the defendant attorney to contend that plaintiff's successor attorney was negligent).

Plaintiff must prove by a preponderance of the evidence that a judgment would have been recovered without the attorney's negligence, and in what amount. *Collins*, 108 N.M. at 719, 778 P.2d at 917. In *Collins*, the Court of Appeals held that medical expenses, lost wages, compensation for the nature, duration and extent of the injury, including disfigurement, pain and suffering, loss of enjoyment of life, and shortened life expectancy were proper elements of damage in a legal malpractice action arising from an attorney's recommendation that his client accept an unreasonably low settlement of a medical malpractice claim based upon negligent failure to diagnose a minor's spinal meningitis, which resulted in permanent brain damage. *Id.*, 108 N.M. at 720, 778 P.2d at 918.

(2) Mental Anguish

Generally speaking, damages for emotional distress in ordinary negligence actions are not permitted in New Mexico. *See Flores v. Baca*, 117 N.M. 306, 313, 871 P.2d 962, 969 (1994) (“In

actions sounding in negligence and solely for emotional distress, we have held that recovery is afforded for severe distress only.”). New Mexico allows recovery for stand alone emotional distress only in limited circumstances, including intentional infliction of emotional distress, in connection with certain intentional economic torts, and in contractual situations where the specialized nature of the contract naturally contemplated that reasonable care would be taken to avoid the infliction of severe emotional distress. *See Jaynes v. Strong-Thorne Mortuary, Inc.*, 1998-NMSC-004, ¶ 18, 124 N.M. 613, 954 P.2d 45 (filed 1997) (“Intentional infliction of emotional distress arises when a defendant intentionally or recklessly causes severe emotional distress through extreme and outrageous conduct.”); *Flores*, 117 N.M. at 311, 871 P.2d at 967 (Courts permit recovery for mental anguish caused by breach of contract in which the purpose of the contract would be frustrated unless such damages were awarded, for example in a contract for funeral services.). Emotional harm alone is not enough to support a claim for legal malpractice in New Mexico without extreme and outrageous conduct or some heightened level of culpability resulting in severe distress such “that no reasonable person could be expected to endure.” *Akutagawa*, 2005-NMCA-132, ¶ 25.

(3) Recovery for “Lost Punitive Damages”

There are no reported New Mexico cases that specifically discuss recovery for “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. As set forth above, New Mexico courts will not award damages that are speculative in nature. *Id.*, ¶ 15.

(4) Contingent Fee Offset

There are no reported New Mexico cases that specifically address the issue of whether an attorney-defendant is entitled to an offset in the amount of the contingent fee the attorney would have earned if the underlying case had been successful.

(5) Attorneys’ Fees as Damages

Legal fees incurred by a client to defend an action proximately resulting from the attorney’s negligence, including fees incurred on appeal from an unfavorable summary judgment, can be awarded to a client, not as costs, but as an item of special damages in a malpractice action against an attorney. *See First Nat’l Bank of Clovis*, 102 N.M. at 555-56, 698 P.2d at 12-13. The reasonable value of attorney fees as special damages “is ordinarily established by showing what a competent professional in the community would customarily charge for similar services.” *Id.*, 102 N.M. at 556, 698 P.2d at 13.

Attorneys’ fees for prosecuting a legal malpractice case are generally not recoverable. *See First National Bank of Clovis v. Diane, Inc.*, 102 N.M. 548, 555, 698 P.2d 5, 12 (Ct. App. 1985). New Mexico courts adhere to the so-called “American rule” and will not allow an award of attorney fees in the absence of a statute, rule of court, or contractual agreement that provides for them. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-28, ¶ 9, 127 N.M. 654, 986 P.2d 450; *Gregg v. Gardner*, 73 N.M. 347, 360, 388 P.2d 68 (1963) (The general rule in New

Mexico has been stated many times to the effect that in the absence of a statute or rule of court, attorney fees are not taxed as costs or considered as an item of damages.)

(6) Punitive Damages

Punitive damages may only be awarded in New Mexico upon proof that the conduct of the defendant was malicious, willful, reckless, wanton, fraudulent, or in bad faith. *see Torres v. El Paso Electric Co.*, 1999-NMSC-029, ¶ 27, 127 N.M. 729, 987 P.2d 386; *Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 269, 881 P.2d 11, 14 (1994); *Gonzales v. Surgidev, Corp.*, 120 N.M. 133, 145, 899 P.2d 576, 588 (1995); *see also* UJI 13-1827 NMRA (Punitive damages may be awarded when a party's conduct is "malicious, willful, reckless, wanton, fraudulent or in bad faith."). Punitive damages can be awarded in a legal malpractice case as "long as the amount of the punitive damages is not so unrelated to the actual damages proven as to plainly manifest passion and prejudice" *Rodriguez v. Horton*, 95 N.M. 356, 360, 622 P.2d 261, 265 (Ct. App. 1980).

E. Defenses

(1) Statute of Limitations

The purpose for imposing a statute of limitations in any case is to ensure that a plaintiff brings a cause of action within a reasonable timeframe that will allow the defendant a "fair opportunity to defend." *Duncan*, 1997-NMCA-28, ¶ 15 (citation omitted). In addition, a statute of limitations will help the courts to "avoid stale or fraudulent claims, avoid inconvenience, and avoid loss of evidence." *Id.* (citation omitted).

(a) Three year or four year statute

New Mexico has no specific statutes governing the time to file a legal malpractice case, and as a result, parties have often disputed about which limitations statute is applicable: (1) NMSA 1978, § 37-1-4, which applies a four-year limitations period to all claims based upon accounts, written contract, injuries to property, conversion of personal property, fraud, or any other claims that are not specified by statute, or (2) NMSA 1978, § 37-1-8, which applies a three-year limitations period for, among other causes of action, injuries to the person. The case law has not always been clear about which statute will apply to legal practice claims, often because the difference between the three and four year period will not change the result of the case. *See, e.g., Duncan*, 1997-NMCA-28, ¶ 8.

Several decisions in New Mexico have indicated that legal malpractice claims must be brought within four years. *Jaramillo v. Hood*, 93 N.M. 433, 434, 601 P.2d 66, 67 (1979); *Brown v. Behles & Davis*, 2004-NMCA-28, 135 N.M. 180, 183, 86 P.3d 605, 608; *Brunacini v. Kavanah*, 117 N.M. 122, 127, 869 P.2d 821, 826 n.2 (Ct. App. 1993). However, in none of these cases did there appear to be a serious argument made that the three year statute should apply. Indeed, a 1997 Court of Appeals case indicated that the issue is not yet settled. *See Duncan*, 1997-NMCA-28, ¶ 8. In that case, the parties did not agree on the statute of limitations period. The Court cited to *Brunacini* as authority for the four-year period, but also compared a legal malpractice case to a medical malpractice case that applied a three-year period for personal

injury actions. *Id.* (citing *Mantz v. Follingstad*, 84 N.M. 473, 478-79, 505 P.2d 68, 73-74 (Ct. App. 1972) (holding that the “the three-year limit applies to personal injury even if the cause of action is contractual in nature”). Unfortunately, the *Duncan* Court did not need to resolve this dispute because the claim was untimely under either limitation statute. *Id.*

In *New Mexico Public Schools Ins. Auth. v. Gallagher*, 2008-NMSC-67, ¶ 34, 145 N.M. 316, 198 P.3d 342, the Supreme Court pointedly remarked that the parties in that case agreed that the statute of limitations for a professional negligence action against an insurance broker was four years and said, “We accept this view without deciding it.” *Id.* No New Mexico appellate court has ever affirmatively held that the three-year period applies to legal malpractice claims.

(b) Accrual/Discovery Rule

New Mexico has a two-step approach to determine when a legal malpractice claim begins to accrue. “The limitations period for legal malpractice commences when (1) the client sustains actual injury and (2) the client discovers, or through reasonable diligence should discover, the facts essential to the cause of action.” *Sharts v. Natelson*, 118 N.M. 721, 724, 885 P.2d 642, 645 (1994) (internal footnotes omitted); *see also Jaramillo*, 93 N.M. at 434, 601 P.2d at 67 (holding the limitation period commences when the harm or damage is ascertainable). This rule has also been applied in malpractice cases against other professionals, such as accountants, *Wiste v. Neff & Co., CPA*, 1998-NMCA-165, ¶ 8, 126 N.M. 232, 967 P.2d 1172, and insurance brokers, *Gallagher, supra*. In *Wiste*, the Court held that while both of these requirements may be met simultaneously, the statute does not begin to run until each one is satisfied individually. 1998-NMCA-165, ¶ 8.

Actual injury, for purposes of legal malpractice claims, has been defined as “the loss of a right, remedy or interest, or the imposition of a liability.” *Sharts*, 118 N.M. at 725, 885 P.2d at 646 n.1. A plaintiff in New Mexico needs only to discover the fact that damage has occurred; it does not matter that the Plaintiff is not yet sure of the amount of damages. *Sharts*, 118 N.M. at 725, 885 P.2d at 646. Thus, the clock starts running on the legal malpractice claim even though “future events may affect the permanency of the injury or the amount of monetary damages eventually incurred.” *Id.*

In *Gallagher*, the Supreme Court recognized that New Mexico courts have not always been consistent in determining when an actual injury occurs so as to commence the running of the statute in cases involving a negligently drafted document by the professional. 2008-NMSC-67, ¶ 40. In legal malpractice cases, actual injury to the client was found to occur when the documents became effective. *See Jaramillo*, 93 N.M. at 434, 601 P.2d at 67; *Sharts, supra*, 118 N.M. at 725, 885 P.2d at 646. However, in accountant malpractice cases and cases involving negligent failure to procure insurance, our courts have held the actual injury does not occur until liability is imposed on the client or insured. *See Wiste, supra; La Mure v. Peters*, 1996-NMCA-99, ¶ 18, 122 N.M. 367, 924 P.2d 1379; *Spurlin v. Paul Brown Agency, Inc.*, 80 N.M. 306, 307, 454 P.2d 963, 964 (1969). In *Gallagher, supra*, the Court held that a claim against an insurance broker for failure to draft an insurance policy as a “claims made” policy as requested by the insurer more closely resembled cases of accountant malpractice and failure to procure insurance than legal malpractice because the insurer was injured only when its liability to the insured was

imposed, even though the policy had become effective long before and even though the insurer had been sued on the policy long before liability was eventually imposed. *Id.* ¶ 35-42. Whether this interpretation of when an actual injury occurs, for purposes of the statute of limitations, will eventually be applied in legal malpractice cases involving the negligent drafting of documents remains to be seen.

Whether a plaintiff has discovered the facts essential to the cause of action is usually a question of fact. *Brunacini*, 117 N.M. at 127, 869 P.2d at 826. However, where undisputed facts prove that the Plaintiff knew or should have known the attorney was negligent, a court will answer the question as a matter of law. *Id.*; *Sharts*, 118 N.M. at 726, 885 P.2d at 647. In *Sharts*, the plaintiff's legal malpractice claim was centered around him losing his legal right to subdivide part of his property into less than three-acre units due to his attorney's error. 118 N.M. at 723-24, 885 P.2d at 644-45. Sharts realized this error when a title company would not insure the property due to its restrictive covenants and as a result he could not obtain financing to develop the property. *Id.* When it came to Sharts' attention that he could not get title insurance, Sharts asked the same attorney, Natelson, to file a declaratory judgment action and seek judgment that the covenants restricting less than three-acre lots did not apply to the subject property. *Id.* During the pendency of this action, Sharts sent Natelson a letter indicating that if he prevailed in obtaining declaratory judgment, Sharts would only sue him for the damages he had incurred so far in the amount of \$35,000, but if Natelson lost the case, he would sue him for up to two million dollars. *Id.* Natelson was unsuccessful in obtaining declaratory judgment in Sharts' favor. *Id.* The New Mexico Supreme Court held that, as a matter of law, the limitation period began to run by the time Sharts had Natelson file the declaratory judgment action, and further, that the facts clearly showed that Sharts had actual knowledge of Natelson's malpractice when he sent the letter threatening his attorney. *Sharts*, 118 N.M. at 725, 885 P.2d at 646.

The discovery rule will start the limitations period even when a plaintiff does not have actual knowledge of the facts, but through reasonable diligence, should have learned of the facts. However, in *Brown*, 135 N.M. at 184, 86 P.3d at 609, the Court of Appeals held that landowners would not be charged with knowing "the status of their title at all times" because "imposing such obligations...is contrary to our professional malpractice law, which recognizes that a plaintiff may not always be qualified to ascertain an injury or the source of an injury." *Id.* In *Brown*, the defendant was sued for legal malpractice for failure to take care of the liens on plaintiffs' property in a bankruptcy matter. *Id.* at 182, 86 P.3d at 607. The Court found that plaintiffs' rights were lost when the bankruptcy was discharged, but that the plaintiffs did not discover the facts essential to the legal malpractice claim until the liens were discovered upon plaintiffs' attempts to refinance their home. *Id.* The Court reasoned that the plaintiffs did not have the duty to be aware of liens on their title and it would not have been reasonable for the plaintiffs to hire an attorney to make sure the attorneys they used in the bankruptcy proceedings did not commit any malpractice. *Id.* at 184, 86 P.3d at 609.

(c) Criminal Cases

Some states have adopted special statute of limitation rules that govern legal practice cases in the criminal context. *Duncan*, 1997-NMCA-28, ¶¶ 13-22. In such states, the limitation period will not begin to run until the plaintiff has obtained post-conviction relief. *Id.* The states

that have adopted these special rules cite to many policy reasons and advantages of the rules, such as conservation of judicial resources, that incarcerated persons are litigious, that the attorney may reveal privileged information when defending the legal malpractice case, that the plaintiff should not have to divert his or her attention from his or her own post-conviction relief, and that a bright-line rule is advantageous.

New Mexico, however, applies the same statute of limitations law to legal malpractice cases concerning criminal proceedings as it does to legal malpractice cases concerning civil matters. *Id.* ¶¶ 23-25. In response to the advantages cited above, the New Mexico Court of Appeals in *Duncan* stated that “these policy considerations create legal fictions, too divorced from reality to serve as the basis for the adoption of a specialized substantive rule.” *Id.* ¶ 22. The Court noted that defendants do not have any time constraints on when a petition for habeas relief can be filed, thus a rule that started the limitations period upon post-conviction relief could result in legal malpractice claims being brought indefinitely and result in unfairness to potential legal malpractice defendants. *Id.* ¶ 23. The Court decided that criminal defendants wishing for post-conviction relief and a legal malpractice cause of action will have a two-track system with regard to the attorney’s failures, and a court in a civil action could still decide to stay the proceedings until the criminal action is finally determined. *Id.* ¶¶ 23-24. The Court noted that a criminal defendant who knows enough about his attorney’s failures to file a habeas action should also have realized there is a claim against the attorney. *Id.* ¶ 24.

In *Duncan*, the plaintiff lost his criminal case after his attorney failed to investigate and present his alibi witnesses. *Id.* ¶ 3. The plaintiff knew about this failure at the time he was convicted. *Id.* Years later, the plaintiff filed a habeas corpus action, and it was at the habeas hearing that he first learned that his attorney had not presented the alibi witnesses because he made the procedural mistake of not giving the prosecution proper notice of the defense. *Id.* ¶ 4. The plaintiff ended up prevailing in his habeas corpus action and the subsequent appeals, and thereafter filed a legal malpractice claim against his attorney. *Duncan* claimed that the limitations period did not begin to run on his legal malpractice claim until he was granted post-conviction relief, because until then, “he ha[d] not suffered a loss caused by his attorneys’ actions and therefore could not have discovered a cause of action because he did not have one.” *Id.* ¶ 11. The Court disagreed and found that *Duncan*’s limitation period began when he realized his attorney had erred. *Id.* ¶ 24.

(d) **Tolling**

(1) **Continuous Representation**

The continuous representation doctrine, where applicable, provides that if the plaintiff continues to utilize the services of the attorney for the matters that underlie the legal malpractice claim, the limitations period will not begin to run, and will be tolled until the attorney ends such representation. *Sharts*, 118 N.M. at 726, 885 P.2d at 647. The New Mexico Supreme Court refused to adopt this rule in *Sharts*, partly because application of the doctrine did not change the outcome of the case. *Id.* The Court, however, opined on the policies behind the continuous representation doctrine, noting that the rule helps to avoid interference with the attorney-client relationship. *Id.* In *Brunacini*, the New Mexico Court of Appeals assumed, but did not decide,

that the continuous representation rule was applicable in New Mexico. 117 N.M. at 125, 869 P.2d at 824. In *Brunacini*, just as in *Sharts*, the outcome of the case would not have changed even if the continuous representation rule had been applied. *Id.*

(2) Appeals

A limitation period for filing a legal malpractice claim in some states will be tolled while the underlying lawsuit is moving through the appellate courts. See *Brunacini*, 117 N.M. at 128, 869 P.2d at 827 (citing *Northwestern Nat'l Ins. Co. v. Osborne*, 573 F. Supp. 1045, 1050 (E.D. Ky. 1983); *Bowman v. Abramson*, 545 F. Supp. 227, 228 (E.D. Pa. 1982); *AMFAC Distribution Corp. v. Miller*, 138 Ariz. 155, 673 P.2d 795, 796 (Ariz. Ct. App. 1983); *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 156 (Tex. 1991)). Other states start the limitations period upon entry of judgment, finding that a “malpractice action...accrues when judgment or order is entered and the client sustains some damages.” *Id.* (citing *Lansford v. Harris*, 174 Ariz. 413, 850 P.2d 126, 131-32 (Ariz. Ct. App. 1992)). In *Brunacini*, the Court of Appeals refused to toll the limitations period during the pendency of the appeal. *Id.* The Court’s reasoning came from the Restatement (Second) of Judgments:

A judgment otherwise final for purposes of the law of res judicata is not deprived of such finality by the fact that time still permits commencement of proceedings in the trial court to set aside the judgment and grant a new trial or the like; nor does the fact that a party has made such a motion render the judgment nonfinal.

... The better view is that a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo; finality is not affected by the fact that the taking of the appeal operates automatically as a stay or supersedeas of the judgment appealed from that prevents its execution or enforcement, or by the fact that the appellant has actually obtained a stay or supersedeas pending appeal.

The pendency of a motion for new trial or to set aside a judgment, or of an appeal from a judgment, is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone decision of that question until the proceedings addressed to the judgment are concluded.

Id. at 127-28, 869 P.2d at 826-27. The Court concluded that refusing to toll the statute during an appeal promotes judicial economy, and a contrary rule would be inconsistent with the finality given to district court judgments. *Id.* at 129, 869 P.2d at 828.

(2) **Judgmental Immunity**

(a) **Indigent Defense Act and Public Defenders**

Public defenders and attorneys that represent defendants pursuant to the Indigent Defense Act have absolute immunity from legal malpractice claims. *See generally Duncan*, 1997-NMCA-28, ¶ 18; *Coyazo v. State*, 120 N.M. 47, 51, 897 P.2d 234, 238 (App. Ct. 1995); *Herrera v. Sedillo*, 106 N.M. 206, 207, 740 P.2d 1190, 1191 (App. Ct. 1987). Public defenders are immune from legal malpractice claims pursuant to the Tort Claims Act, NMSA 1978, § 41-4-12. Attorneys representing clients pursuant to the Indigent Defense Act are explicitly given immunity from legal malpractice actions in the Act itself. *See* NMSA 1978, § 31-16-10 (stating “no attorney assigned or contracted with to perform services under the Indigent Defense Act shall be held liable in any civil action respecting his performance or nonperformance of such services.”). The New Mexico Court of Appeals also found that public defenders are protected under this Act because the Public Defenders Act and the Indigent Defense Act must be read and construed together, and there would be “no reason for the legislature to differentiate between the two classes of appointed counsel.” *Herrera*, 106 N.M. at 207, 740 P.2d at 1191.

In *Coyazo*, the full immunity granted to appointed defense counsel was challenged on equal protection grounds. The Court upheld the immunity granted to these attorneys, finding that there were “demonstrable and substantial benefits” that come from this immunity, such as encouraging attorneys to participate in indigent defense, encouraging attorneys to “exercise fully independent legal professional judgment and discretion,” and the lowering of malpractice costs which in turn encourages private attorneys to participate in indigent defense. *Coyazo*, 120 N.M. at 53, 897 P.2d at 240.

(b) **Corporate structure**

An attorney in New Mexico cannot claim that a firm’s professional corporate status limits his or her liability in legal malpractice actions. *Sanders, Bruin, Coll & Worley v. McKay Oil Corp.*, 1997-NMSC-30, ¶ 18, 123 N.M. 457, 943 P.2d 104. “[The] professional corporate status was not intended to confer, nor does it confer, upon an attorney-shareholder a limitation on liability for the attorney’s own improper behavior or malpractice, even in the context of corporate activities and decisions.” *Id.* An attorney will still be subject to personal liability when the firm is a professional corporation because a professional’s duties are not altered just because that professional works within a professional corporation. *See Id.* ¶ 23.

(3) **Claim preclusion**

(a) **Res judicata**

In New Mexico, a legal malpractice claim may be precluded if the court finds that the claim should have been brought as a counterclaim in a previous action. Quoting a legal malpractice treatise, the New Mexico Court of Appeals described the compulsory counterclaim requirement as it pertains to legal malpractice claims:

The most common context of the defense arises out of litigation for legal fees. Res judicata [exists] where a client unsuccessfully [raises] the issue of malpractice in the attorney's action for fees, even though the client [does] not or [can]not cross-claim for affirmative relief. *The failure to raise the issue of legal malpractice by a compulsory counterclaim can also be a bar.* Similarly a client who [allows] a default to be entered against him by his former attorneys in their action to recover legal fees [can] not later urge malpractice as a defense to an action to collect the judgment.

Brunacini, 117 N.M. at 124, 869 P.2d at 823 (emphasis added by the Court) (emphasis and brackets in original).

A Court will find a legal malpractice claim is barred by res judicata if that claim “has a logical relationship” to the origin and subject matter of the initial lawsuit. *Id.* at 126, 869 P.2d at 825. In order to meet the logical relationship requirement, the initial lawsuit and the legal malpractice suit must have the same origin and subject matter. *Id.* In *Brunacini* the defendant attorney filed a lawsuit against the plaintiff seeking legal fees incurred in representing the plaintiff in an employment contract matter. *Id.* at 123, 869 P.2d at 822. After the settlement of the fee dispute suit, plaintiff filed a legal malpractice action against defendant for his negligent opinion regarding the employment contract. *Id.* at 123-24, 869 P.2d at 822-23. The defendant claimed the plaintiff was required to raise the malpractice claim as a counterclaim to its lawsuit against plaintiff for legal fees. *Id.* at 124, 869 P.2d at 823. The Court agreed and found that the malpractice action was a compulsory counterclaim. *Id.* at 125, 869 P.2d at 824. The Court focused on the adversarial nature of the proceedings concerning legal fees and the fact that the defendant attorney was the opposing party in both cases. *Id.* Additionally, the legal malpractice claim had a logical relationship to the claim for legal fees, as both had the origin of the employment contract matter and the same subject matter of performance of legal services. *Id.* at 126, 869 P.2d at 825.

A legal malpractice claim is only a compulsory counterclaim if the initial proceeding is adversarial in nature. See *Computer One, Inc. v. Grisham & Lawless P.A.*, 2008-NMSC-38, ¶ 23, 124 N.M. 424, 188 P.3d 1175 (holding the plaintiff was not required to bring a legal malpractice claim in response to the attorney's charging lien that was filed in the underlying lawsuit); *Bennett v. Kisluk*, 112 N.M. 221, 224, 814 P.2d 89, 92 (1991) (holding the plaintiff was not required to bring a legal malpractice claim in response to the attorney's motion for fees filed in the case underlying the malpractice dispute); *Brunacini*, 117 N.M. at 125, 869 P.2d at 824 (discussing the requirement). If the plaintiff was an “opposing party” in the initial action, a court will apply the principles of res judicata to dismiss the legal malpractice claim. *Bennett*, 112 N.M. at 224, 814 P.2d at 92; *Brunacini*, 117 N.M. at 125, 869 P.2d at 824; *Moffat v. Branch*, 2005-NMCA-103, ¶ 16, 138 N.M. 224, 118 P.3d 732 (finding that the holding in *Bennett* does not stand for the proposition that an attorney seeking fees cannot be an adversary to his former client for the purposes of claim preclusion).

According to the New Mexico Supreme Court in *Bennett*, there is “certainty and predictability implicit in the notion that one must first be a ‘party’ before one can be an ‘opposing party.’” *Id.* ¶ 26. Had the attorneys filed separate causes of action against the plaintiff for failure to pay their legal fees, the legal malpractice claims would have likely been precluded. *Computer One*, 2008-NMSC-38, ¶ 26. However, a charging lien is only an equitable remedy that puts the world on notice that the attorney should be paid proceeds out of the settlement or judgment and is not an action against the non-prevailing party. *Id.* ¶ 27.

(b) Collateral estoppel

Collateral estoppel will also preclude a legal malpractice claim when the plaintiff has had a “full and fair opportunity to litigate the issue in prior proceedings.” *Duncan*, 1997-NMCA-28, ¶ 16. In *Computer One*, the defendant attorney also claimed that the plaintiff’s claim was precluded because it made the same arguments in response to the charging lien as it was making in the malpractice suit, and such issues were already litigated during the charging lien proceedings. 2008-NMSC-38, ¶ 30. The Court disagreed, finding that the plaintiff’s arguments against the charging lien “differed markedly” from the arguments in the malpractice suit. *Id.* ¶ 32. In the charging lien suit, the plaintiff argued that the attorney did not have the authority to enter into the settlement and that the fees were inflated, thus the plaintiff was precluded from making these same claims. *Id.* ¶ 33. The plaintiff, however, was not precluded from bringing the claims related to the defendant’s acts that fell below the standard of care. *Id.* ¶ 34.

In the criminal context, collateral estoppel might be a concern if a prisoner is seeking both habeas relief based on the attorney’s negligence and wishes to bring a malpractice claim against that attorney. In *Duncan*, the Court clarified that “an adverse decision on an ineffective assistance of counsel claim may be a bar, but an adverse decision on another legal issue would not appear to be relevant to the issues in a legal malpractice action under ordinary civil rules.” 1997-NMCA-28, ¶16. In *Duncan*, the Court noted that the appeal proceedings did not give the plaintiff a “full and fair opportunity to litigate an ineffective assistance of counsel claim” *Id.* ¶ 17.

(4) Comparative Fault

Comparative fault principles apply in legal malpractice cases in New Mexico. *Andrews*, 2003-NMCA-132, ¶ 25. In *Andrews*, the New Mexico Court of Appeals rejected the argument that the defendant attorney should not be allowed to argue that plaintiff’s successor attorneys were guilty of comparative fault, concluding that New Mexico’s “system of pure comparative fault is based on fairness to both plaintiffs and defendants.” *Id.* ¶ 24.

F. Other Issues

(1) Special Pleading Requirements

There are no special pleading requirements for a legal malpractice claim in New Mexico.

(a) **Verification**

A verified complaint is not required.

(b) **Expert Report**

Experts are required to be disclosed and may be deposed in legal malpractice cases, but expert reports are not required. *See* Rule 1-026(B)(5), 1-030 NMRA.

(2) **Burdens of Proof**

Issues of fact in civil cases are to be determined according to the preponderance of the evidence. *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 485, 709 P.2d 649, 654 (1985). “In a suit for legal malpractice a plaintiff must prove three essential elements: (1) the employment of the defendant attorney; (2) the defendant attorney’s neglect of a reasonable duty; and (3) the negligence resulted in and was the proximate cause of loss to the plaintiff.” *Akutagawa*, 2005-NMCA-132, ¶11; *Hyden*, 115 N.M. at 162-63, 848 P.2d at 1089-90 (Ct. App. 1993) *Bassett*, 2008-NMCA-72, ¶ 7. “Plaintiffs have the burden of showing not only negligence on the part of their attorney but also that their damages were proximately caused by that negligence.” *Akutagawa*, 2005-NMCA-132, ¶11. “When the attorney’s negligence involves failure to take certain action, the client must show that if the attorney had acted then the client would not have suffered damage, at least not to the same degree.” *Id.*

In a trial within a trial malpractice action claiming that an attorney’s negligence in prosecuting an action resulted in the loss of the client’s claim, “the plaintiff has the burden of proving by a preponderance of the evidence that (1) he would have recovered a judgment in the action against the main defendant, (2) the amount of that judgment, and (3) the degree of collectability of such judgment.” *George*, 93 N.M. at 378, 600 P.2d at 830 (*quoting Hoppe*, 385 A.2d at 917).

(3) **Admissibility of Professional Rules**

The Rules of Professional Conduct cannot be used as a basis for civil liability. *Sanders*, 1997-NMSC-30, ¶ 16; *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 106 N.M. 757, 762, 750 P.2d 118, 123 (1988). The Scope of the New Mexico Rules of Professional Conduct states that

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. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary

authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

See Preamble to NMRA 16-101 through 16-805. Additionally, there is no private action for the breach of an oath taken by an attorney; “[t]he remedy for such a breach is not the private remedy of damages.” *Garcia*, 106 N.M. at 762-63, 750 P.2d at 123-24.

However, the Rules of Professional Conduct provide guidance in ascertaining the extent of lawyers’ professional obligations to their clients. *Sanders*, 1997-NMSC-30, ¶ 16. A malpractice claim should not be barred because its substance enters the realm of conduct covered under the rules of professional conduct. *Id.*

(4) Expert Testimony Requirements

(a) Standard of Care

The “...plaintiff in a legal malpractice case must establish, through expert testimony, that the attorney failed to use the skill, prudence, and diligence of an attorney of ordinary skill and capacity.” *Collins*, 108 N.M. at 717, 778 P.2d at 915; *Hyden*, 115 N.M. at 163, 848 P.2d at 1090. See also *Rancho Del Villacito Condominiums v. Weisfeld*, 121 N.M. 52, 56, 908 P.2d 745, 749 (1995) (quoting *Hyden*, 115 N.M. at 163, 848 P.2d at 1090)); *Computer One*, 2008-NMSC-38, ¶ 35 (citing *Rancho Del Villacito Condominiums v. Weisfeld*, 121 N.M. 52, 56, 908 P.2d 745, 749 (1995)). “New Mexico case law recognizes that in legal malpractice cases expert testimony is admissible to show that an attorney breached the standard of care.” *Andrews*, 2003-NMCA-132, ¶ 17 (citation omitted). “To establish malpractice, testimony of another attorney as to the applicable standards of practicing attorneys is generally necessary.” *First Nat’l Bank*, 102 N.M. at 553, 698 P.2d at 10. However, “[i]t does not require expert testimony to establish the negligence of an attorney who is ignorant of the applicable statute of limitations or who sits idly by and causes the client to lose the value of his claim for relief.” *George*, 93 N.M. at 377, 600 P.2d at 829. Nor is expert testimony necessary “...when the only question to be answered by a jury is whether an attorney, who knew that a filing time limit would soon expire and thus extinguish his client’s rights, did nothing to protect his client’s rights.” *Delisle v. Avallone*, 117 N.M. 602, 607, 874 P.2d 1266, 1271 (Ct. App. 1994). “In such a case, the question of breach of duty can be answered as a matter of law.” *Id.*

The Court in *Andrews* urged trial courts to exercise their gatekeeping function to insure that experts testifying in legal malpractice cases are qualified and that their testimony is not merely subjective belief or unsupported speculation. It anticipated that if such gatekeeping function is performed, “there will be cases involving issues of first impression in which no reputable expert will be able to predict the outcome of a hypothetical appeal to a reasonable legal probability.” *Andrews*, 2003–NMCA-132, ¶ 17 n.3.

(b) Causation

New Mexico case law recognizes that in legal malpractice cases expert testimony is admissible to show not only that an attorney breached the standard of care but also to show that the attorney's breach of the standard of care resulted in damage to the client. *Andrews*, 2003-NMCA-132, ¶ 17.

(5) Assignment

New Mexico has not yet addressed the issue of whether a legal malpractice claim can be assigned. *See Edwards v. Franchini*, 1998-NMCA-128, ¶ 7, 125 N.M. 734, 965 P.2d 318. However, a legal malpractice action is generally recognized as a tort claim. *Leyba*, 120 N.M. at 772, 907 P.2d at 176. Generally, a right of action for purely personal tort is not assignable before judgment. *Young v. New Mexico Broadcasting Co.*, 60 N.M. 475, 479, 292 P.2d 776, 779 (1956) (citation omitted). Additionally, the New Mexico Court of Appeals has upheld the common law rule that personal injury claims are prohibited from being assigned. *Quality Chiropractic v. Farmers Ins. Co.*, 2002-NMCA-80, ¶¶ 30, 36, 132 N.M. 518, 51 P.3d 1172; *Gulf Ins. Co. v. Cottone*, 2006-NMCA-150, ¶ 28, 140 N.M. 728, 148 P.3d 814. The New Mexico Court of appeals has also rejected any distinction between an assignment of the proceeds of a personal injury claim and an assignment of the claim itself, prohibiting the assignment of both. *Quality Chiropractic*, 2002-NMCA-80, ¶ 36; *Espinosa v. United of Omaha Life Ins. Co.*, 2006-NMCA-75, ¶ 19, 139 N.M. 691, 137 P.3d 631..

III. ALTERNATIVE CAUSES OF ACTION

A. Fraud

An allegation that a lawyer failed to disclose information to a client when the lawyer was under a duty to disclose the information states a claim for fraud. *See Duncan v. Campbell*, 1997-NMCA-28, ¶¶ 9-10, 123 N.M. 181, 936 P.2d 863. The statute of limitations for deceit is four years. NMSA 1978 § 37-1-4 (1880, as amended through 1953); *see Ledbetter v. Webb*, 103 N.M. 597, 602, 711 P.2d 874, 879 (1985) (equating fraud and deceit). An action for fraud requires that the representation "was made with intent to deceive and for the purpose of inducing the other party to act upon it." *Sauter v. St. Michael's College*, 70 N.M. 380, 385, 374 P.2d 134, 138 (1962). The essential elements of an action for fraud cannot be presumed and must be shown by "clear and convincing evidence," *id.*, 70 N.M. at 385, 374 P.2d at 138, and it is the fact-finder, and not an appellate court, that must weigh the evidence. *Rodriguez v. Horton*, 95 N.M. 356, 359, 264 (Ct. App. 1980) (internal citations omitted).

A claim that a lawyer misrepresented that he was capable of trying criminal cases in New Mexico, when he knew that he was not so capable, states claims for malpractice or breach of contract, and not fraud. *See Duncan*, 1997-NMCA-28, ¶¶ 9-10 (statutes of limitations for claims of malpractice or personal injury had both run on plaintiff's claim, regardless of the fact that theory sued upon was characterized as fraud).

A client may sue a lawyer for fraud if the following elements are shown: a “false representation, knowingly or recklessly made, with the intent to deceive, on which the other party acted to his detriment.” *Rodriguez*, 95 N.M. at 358-59, 622 P.2d at 263-64 (internal citations omitted).

If the conduct of a lawyer is “maliciously intentional, fraudulent, or committed with a wanton disregard” of the injured third party’s rights, then a punitive damage award is proper. *Id.*, 95 N.M. at 360, 622 P.2d at 265.

B. Negligent Misrepresentation.

A lawyer may be held liable to his or her client for the tort of negligent misrepresentation. *Id.*, 95 N.M. at 361, 622 P.2d at 266. A lawyer may also be held liable for negligent misrepresentation to a person who is not his or her client if the lawyer makes a negligent misrepresentation in the course of his business, profession or employment which causes pecuniary loss because of justifiable reliance by a person or a group or class of persons for whose benefit and guidance the lawyer intended to supply the information or to whom the lawyer knew that the recipient of the information intended to transmit it. *Holland v. Lawless*, 95 N.M. 490, 496-497, 623 P.2d 1004, 1010-1011 (Ct.App. 1981). Negligent misrepresentation is an action separate from the action of fraud or deceit. *Maxey v. Quintana*, 84 N.M. 38, 42, 499 P.2d 356, 360 (Ct.App.1972).

C. Breach of Fiduciary Duty

There is limited support for the proposition that a client may state a claim for breach of fiduciary duty in New Mexico. See *Richter v. Van Amberg*, 97 F. Supp. 2d 1255, 1261 (D.N.M. 2000). In *Richter*, the Court noted that a lawyer had two fiduciary obligations to his client—undivided loyalty and confidentiality. *Id.* The Court said that to the extent such a claim would be recognized, the claim for breach of fiduciary duty “corresponds to a cause of action for negligence, substituting the fiduciary duty for the standard of care . . . [T]he elements to be proven include (1) the existence of a fiduciary relationship between the plaintiff and the defendant attorney, (2) breach of that fiduciary relationship by the defendant attorney, and (3) the breach of fiduciary relationship as the proximate cause of loss to the plaintiff.” *Id.* (quoting *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1290 (Utah 1996); citing *Alleco, Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 192, 665 A.2d 1038, 1046 (Md. Ct. App. 1995).

There is support for the proposition that an attorney’s duty to a client is that of a fiduciary, at least as to matters relating to client funds or the attorney’s involvement in conveyances of interests in real property. See *Mell v. Shrader*, 33 N.M. 55, 59, 263 P. 758, 759 (1927) (“Where the relation is that of . . . attorney and client . . . the presumption [that the attorney owes a fiduciary duty] attaches.”). The principle that such a duty exists “extends to every possible case in which a fiduciary relation exist[s] as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other.” *Id.*, 33 N.M. at 59, 263 P. at 760 (citing *Cardenas v. Ortiz*, 29 N.M. 633, 641-43, 226 P. 418, 421-22 (1924)).

D. Breach of Contract

“When professional services provided pursuant to a contract are substandard, a plaintiff may bring a cause of action for malpractice or for breach of contract arising from the breach of the implied warranty to use reasonable skill.” *N.M. Pub. Schs. Ins. Auth. v. Arthur J. Gallagher & Co.*, 2008-NMSC-67, ¶ 19, 145 N.M. 316, 332, 198 P.3d 342, 348 (suit against an insurance broker); *but see Leyba v. Whitley*, 120 N.M. 768, 772, 907 P.2d 172, 176 (1995) (noting that, while no court in New Mexico has “rejected a contract claim for professional services negligently performed, the gravamen of a malpractice action arising out of the lawyer-client relationship is generally recognized to lie in tort.”).

Regardless of whether a plaintiff sues for malpractice or for breach of contract, “the standard of care is the same and is measured by the duty to apply the knowledge, care, and skill of reasonably well-qualified professionals practicing under similar circumstances.” *N.M. Pub. Schs. Ins. Auth.*, 2008-NMSC-67, ¶ 19 (quoting *Adobe Masters, Inc. v. Downey*, 118 N.M. 547, 548, 883 P.2d 133, 134 (1994)); *see also Leyba*, 120 N.M. at 771 (“As with any service contract, an implied term of an attorney’s contract to provide professional services for the benefit of a third party is the promise to render services with reasonable skill and care.”) Claims that a service professional breached an implied warranty to use reasonable skill under a theory of contract “must be proved by expert testimony unless the case is one where exceptional circumstances within the common experience or knowledge of a layman are present.” *Cf. Adobe Masters v. Downey*, 118 N.M. at 549, 883 P.2d at 135 (suit against an architect). A professional services agreement does not include “an implied warranty of indemnity for losses paid to a third party when the professional who provided those services is not also directly liable to the third party for its injuries.” *N.M. Pub. Schs. Ins. Auth.*, 2008-NMSC-67, ¶ 19.

“Where the act complained of is a breach of specific terms of the contract without any reference to the legal duties imposed by law upon the relationship created thereby, the action is contractual. Where the gravamen of the action is a breach of a duty imposed by law upon the relationship of attorney/client and not of the contract itself, the action is in tort.” *Leyba*, 120 N.M. at 772, 907 P.2d at 176; *see also Adobe Masters, Inc.*, 118 N.M. at 548-49, 883 P.2d at 134-35 (distinguishing breach of specific term of professional service contract from malpractice and implied warranty to use reasonable skill, and holding dismissal of contract action for breach of implied warranty was harmless error when jury was instructed on malpractice).

Alleged breaches of duty by a law firm in deciding to end a contractual agreement establishing legal representation “may sound in tort as well as contract.” *Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp.*, 1997-NMSC-30, ¶ 17, 123 N.M. 457, 943 P.2d 104 (internal citations omitted); *see also Leyba*, 120 N.M. at 772 (recognizing that claims for professional services negligently performed can be brought under contract, but noting that such claims generally lie in tort).

E. Negligent Withdrawal/Termination

“While no New Mexico case specifically addresses negligent withdrawal/termination as a basis for malpractice, our holding in *Leyba v. Whitley*, 120 N.M. 768, 907 P.2d 172 (1995),

supports a finding that attorney-client relationship termination is well within the scope of legal representation and subject to malpractice claims [T]he process of termination stands on equal, if not superior, footing with payment of proceeds in the scope of legal representation. Thus, when an attorney carries out, or participates in, the termination of an attorney-client relationship, the attorney is under a duty to act with reasonable care, in full consideration of the rights of the client.” *Sanders, Bruin, Coll & Worley, P.A.*, 1997-NMSC-30, at ¶ 15, 123 N.M. 457, 459-60, 943 P.2d 104, 106-07.

F. Tortious Interference with a Contractual Relationship

In *Guest v. Berardinelli*, 2008-NMCA-144, 145 N.M. 186, 195 P.3d 353, *rev'd sub nom. Durham v. Guest*, 2009 –NMSC-7, 145 N.M. 694, 204 P.3d 19 (reversed on grounds other than tortious interference with a contractual relationship) an attorney for Allstate was sued by Allstate insureds for her conduct on behalf of Allstate during settlement discussions, discovery, and arbitration of the insured’s claims, and responded with a suit against the insureds’ attorneys for, among other things, tortious interference with her existing and prospective contractual relations with Allstate. In affirming summary judgment in favor of the insureds’ attorneys, the Court of Appeals noted that to prove intentional interference with an existing contract, plaintiff must demonstrate that (1) the attorney had knowledge of the contract, (2) performance of the contract was refused, (3) the attorney played an active and substantial part in causing plaintiff to lose the benefits of the contract, (4) damages flowed from the breached contract, and (5) the attorney induced the breach without justification or privilege. *Guest*, 2008-NMCA-144, *Id.* ¶ 32. Tort liability attaches “only where the interference is without justification or privilege.” *Id.* (quoting *Williams v. Ashcraft*, 72 N.M. 120, 121, 381 P.2d 55, 56 (1963)). To prove intentional interference with prospective contractual relations, plaintiff must show that the attorney damaged the plaintiff by either (1) inducing or otherwise causing the prospective party with whom plaintiff was attempting to contract not to enter into or continue a prospective relation with plaintiff or (2) preventing plaintiff from acquiring or continuing a prospective relation with the prospective party. *Id.* However, to prove either cause of action, the plaintiff must show that the defendant interfered “either through improper means or improper motive.” *Id.*(internal citations omitted).

G. Trade Practices and Frauds Act (Unfair Claims Practices)

Section 59A-16-20, NMSA 1978, of the Trade Practices and Fraud Article (Article 16) of the Insurance Code, §§ 59A-16-1 through 30, prohibits certain unfair and deceptive claims practices. The New Mexico Supreme Court has held that defense attorneys may not be named as parties-defendants in claims brought under the Unfair Claims Practices Section. Defense attorneys do not owe opposing parties any common law duty of care, nor do they owe any statutory duties under the Insurance Code. The private right of action under the Insurance Code is limited by statute to violations by insurance companies and their agents; attorneys are not included. *Hovet v. Allstate Ins. Co.*, 2004-NMSC-10, ¶ 27, 135 N.M. 397, 89 P.3d 69. *See Durham v. Guest*, 2007-NMCA-144, ¶ 32, 142 N.M. 817, 171 P.3d 756, *rev'd on other grounds*, 2009-NMSC-7, 145 N.M. 694, 204 P.3d 19 (claim cannot be stated against defense attorney unless the attorney adjusted, investigated, or evaluated plaintiff’s claims outside defendant’s role as an attorney representing the insurance company).

H. Unfair Practices Act

The New Mexico Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -22 (1967, as amended through 2007) defines “unfair or deceptive trade practices” and “unconscionable trade practices,” see §§ 57-12-2(D) and (E), declares the same to be unlawful, see § 57-12-3, and provides private remedies, see § 57-12-10. Section 57-12-7 provides that nothing in the Unfair Practices Act “shall apply to actions or transactions expressly permitted under laws administered by a regulatory body of New Mexico or the United States, but all actions or transactions forbidden by the regulatory body, and that about which the regulatory body remains silent, are subject to the Unfair Practices Act.”

The question of whether the Unfair Practices Act (“UPA”) applies to attorneys is unsettled. The United States District Court for the District of New Mexico in *Campos v. Brooksbank*, 120 F.Supp.2d 1271, 1275-1278 (D.N.M. 2000) held that while filing an affidavit and a notice of deposition within the context of litigation are actions or transactions permitted by the relevant regulatory body (the New Mexico Supreme Court and State Bar), filing a false, misleading, or deceptive affidavit and seeking a deposition in order to intimidate are not permitted and, therefore, such allegations stated a claim under the UPA. See 120 F.Supp.2d 1271, 1275-1278 (D.N.M. 2000). The Court in *Campos* noted that the parties agreed that § 57-12-7 does not provide a blanket exemption for attorneys, and acknowledged the existence of a contrary unpublished opinion by the same Court, *Branch v. Weltman*, CIV 96-931, MV/RLP, slip op. at 5 (D.N.M. May 22, 1997), which recognized a blanket exemption for attorneys and held the UPA inapplicable to a law firm because it is regulated by the State Bar and the New Mexico Supreme Court.

The Court in *Campos* reasoned that lawyers are subject to the UPA unless the specific activity which would otherwise constitute a violation of the UPA is in fact “permitted” by the State Bar or the Supreme Court. 120 F. Supp. 2d at 1276-1277. See *Azar v. Prudential*, 2003-NMCA-62, ¶ 68, 133 N.M. 669, 68 P.3d 909, (Court construed *Campos* to hold that the phrase “actions or transactions expressly permitted” is to be given narrow reading and that “the specific activity”, including the manner in which it was done, must be expressly permitted in order to fall within the UPA exemption; the Court found that the challenged activity by the insurance company in *Azar* was not “expressly permitted” by the Insurance Division and therefore the UPA was applicable). See also *Truong v. Allstate Ins. Co.*, 2010-NMSC-9 ¶ 22, 147 N.M. 583, 227 P.3d 73 (the Court further articulated how the phrase “expressly permitted” should be interpreted; the Court stated that “in order for an action or transaction to be deemed expressly permitted and thereby exempted from the coverage of the UPA, the permission must be within the authority of the [the relevant regulatory body] to grant and must be specifically articulated in some form of public document” and ultimately decided that the challenged activity by Allstate was not expressly permitted by a market conduct examination undertaken by the Superintendent of Insurance of the State of New Mexico).

In another decision by the federal district court in New Mexico, Senior Judge Conway held in *Eco Resources, Inc. v. Brownstein, Hyatt & Farber, P.A., et al.*, CIV-03-306 JC/LCS, slip. op. at 5-7 (D.N.M. September 25, 2003) (accessible at <http://www.nmcourt.fed.us/drs->

web/input) that the UPA only applies to conduct by attorneys that is “entrepreneurial or commercial in nature” and does not apply to the alleged rendering of erroneous legal advice.

I. Malicious Prosecution/Abuse of Process

In New Mexico, there are no longer separate torts of abuse of process and malicious prosecution; these two torts were restated as a single cause of action, known as malicious abuse of process. *Durham v. Guest*, 2009-NMSC-7, ¶ 1; see *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-1, ¶¶ 1, 17, 124 N.M. 512, 953 P.2d 277, *overruled in part by Durham*, 2009-NMSC-7, ¶ 29.

The tort of malicious abuse of process is generally disfavored as a cause of action, *Guest*, 2008-NMCA-144, ¶ 9, and “should be construed narrowly in order to protect the right of access to the courts.” *Durham*, 2009-NMSC-7, ¶ 29. Malicious abuse of process claims “involve balancing the interest in protecting litigants’ right of access to the courts and the interest in protecting citizens from unfounded or illegitimate applications of the power of the state through the misuse of the courts The filing of a proper complaint with probable cause, and without any overt misuse of process, will not subject a litigant to liability, even if it is the result of a malicious motive.” *Guest*, 2008-NMCA-144, ¶ 9. In order to state a claim of malicious abuse of process, the claimant must show: “(1) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (2) a primary motive in the use of process to accomplish an illegitimate end; and (3) damages.” *Durham*, 2009-NMSC-7, ¶ 29.

A claim for malicious abuse of process may survive a motion to dismiss even though a party defending the abuse of process claim was not a party to the underlying judicial proceeding that is the subject of the claim, see *Valles v. Silverman*, 2004-NMCA-19, ¶ 15, 135 N.M. 91, 84 P.3d 1056 (filed 2003), nor is it necessary for the defendant to have initiated judicial proceedings against the plaintiff in order to state the claim. See *Durham*, 2009-NMSC-7, ¶ 1 (insureds’ claim of malicious abuse of process against insurer’s attorney for attorney’s allegedly illegitimate use of subpoenas during arbitration of insureds’ claims for uninsured motorist coverage survived a motion to dismiss despite the fact that attorney did not initiate any proceeding). The Court in that case also held that arbitration proceedings are judicial proceedings for the purpose of the tort of malicious abuse of process. *Id.*

The element of improper use of process may be satisfied by showing: (1) that an attorney filed a complaint without probable cause; or (2) that the attorney engaged in some other “procedural impropriety suggesting extortion, delay, or harassment.” *Guest*, 2008-NMCA-144, ¶ 10 (internal citations omitted). An attorney has probable cause to prosecute a claim if the attorney has “a reasonable belief, founded on known facts established after a reasonable pre-filing investigation, that a claim could be established to the satisfaction of a court or a jury [T]he fact that the attorney’s claims were ultimately dismissed by the district court has no bearing on the question of whether the attorney had probable cause to file suit.” *Id.*, ¶¶ 11, 18. “Probable cause is to be determined by facts as they appeared at the time, not by later-discovered facts.” *Id.*, ¶ 24. Lack of probable cause must be manifest. *Id.*

Examples of procedural irregularity or impropriety suggesting extortion, delay, or harassment include, but are not limited to: (1) misuse of discovery; (2) using the process to put pressure upon the other to compel the other to take some action or refrain from it; (3) excessive execution on a judgment; (4) attachment on property other than that involved in the litigation or in an excessive amount; (5) oppressive conduct in connection with the arrest of a person or the seizure of property, such as illegal detention and conversion of personal property pending suit; (6) extortion of excessive sums of money. *Id.*, ¶ 26. An attorney's refusal to dismiss another attorney from the underlying case without a settlement agreement does not satisfy the "procedural impropriety" prong of the second element of a claim for malicious abuse of process. *Id.*, ¶ 28.

J. Aiding and Abetting

New Mexico courts recognized the tort of aiding and abetting a breach of fiduciary duty for the first time in *GCM, Inc. v. Kentucky Cent. Life Ins. Co.*, 1997-NMSC-52, ¶ 17, 124 N.M. 186, 947 P.2d 143. For an attorney representing a client fiduciary to be liable for aiding and abetting a breach of the client's fiduciary duty, a non-client beneficiary must prove that the attorney acted in the role of "accomplice," and outside the scope of the attorney-client representation, namely: (1) that the client breached a fiduciary duty owed to the plaintiff, (2) that the attorney knew that the client owed the plaintiff a fiduciary duty, (3) that the attorney intentionally provided substantial assistance or encouragement to the client to commit the act that the attorney knew was a breach of duty, and (4) that the plaintiff suffered damages as a result. *Durham*, 2007-NMCA-144, ¶ 15.

Although the tort of aiding and abetting does not require that the attorney owe a duty to the non-client as an essential element of the claim, the "potential impairment" of an attorney's obligations to a client fiduciary, which has been advanced as a justification for an adversarial exception to a duty that runs from an attorney to a non-client beneficiary of a client fiduciary when conflicting interests develop, demands that a similar result obtain in cases where a non-client beneficiary alleges that an attorney is liable for the attorney's activities that were conducted in the course of the client's representation. *Id.*, ¶ 21. An attorney who is representing a client in an adversarial proceeding, including arbitration, "is not liable for aiding and abetting a breach of the client's fiduciary duty, unless the attorney acted outside the scope of representation, acted only in his or her own self-interest and contrary to the client's interest, or acted in a manner that would fall within the 'crime or fraud' exception to the attorney-client privilege provided in the rules of professional conduct." *Id.*, ¶ 11; *see* Rule 16-102 NMRA (discussing crime or fraud exception).

K. Conspiracy

"A civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means The purpose of a civil conspiracy claim is to impute liability to make members of the conspiracy jointly and severally liable for the torts of any of its members." *Seeds v. Lucero*, 2005-NMCA-67, ¶ 12, 137 N.M. 589, 113 P.3d 859 (citations and quotation marks omitted). In order to prevail on a claim for civil conspiracy, Plaintiffs must show: (1) that a conspiracy between two or more individuals

existed; (2) that specific wrongful acts were carried out by defendants pursuant to the conspiracy; and (3) that plaintiffs were damaged as a result of such acts. *Ettenson v. Burke*, 2001-NMCA-3, ¶ 12, 130 N.M. 67, 17 P.3d 440 (internal quotation marks and citation omitted).

However, “It is well established that Plaintiffs cannot recover on a claim for civil conspiracy unless they can recover against at least one of the conspirators for a specific wrongful act beyond the conspiracy itself.” *Id.* (“[A] civil conspiracy by itself is not actionable, nor does it provide an independent basis for liability unless a civil action in damages would lie against one of the conspirators”). “Without an actionable civil case against one of the conspirators, however, an agreement, no matter how conspiratorial in nature, is not a separate, actionable offense.” *Id.* “A civil conspiracy must actually involve an independent, unlawful act that causes harm -- something that would give rise to a civil action on its own.” *Cain v. Champion Window Co.*, 2007-NMCA-85, ¶ 28, 142 N.M. 209, 164 P.3d 90 (internal quotation marks and citations omitted); *see also Vigil v. Pub. Serv. Co. of N.M.*, 2004-NMCA-85, ¶ 20, 136 N.M. 70, 94 P.3d 813 (explaining that “a conspiracy claim fails as a matter of law when no actionable civil case exists against the defendants”).

The conspiratorial and wrongful intent of a lawyer who is a public employee does not operate to waive the employee’s immunity under New Mexico’s Tort Claims Act, NMSA 1978, §§ 41-4-1 to -29 (1976, as amended through 2007), when the employee’s acts are within the scope of his or her duties. *Seeds*, 2005-NMCA-67, ¶ 16.

L. Prima Facie Tort

A claim of prima facie tort against a lawyer may state an actionable claim. *See Diversified Dev. & Inv. v. Heil*, 119 N.M. 290, 293, 889 P.2d 1212, 1215 (1995) (noting in dictum that trial court had dismissed claim of prima facie tort against attorney in connection with a contractual option to purchase real estate because claim was not supported by the facts). To constitute a prima facie tort, there must be an intentional, otherwise lawful act, committed with the intent to injure the plaintiff, and which act is found to be without any valid justification. *See Beavers v. Johnson Controls World Servs., Inc.*, 120 N.M. 343, 352, 901 P.2d 761, 770 (Ct. App. 1995); *see also* UJI 13-1631 NMRA; UJI 13-1631A NMRA; *Schmitz v. Smentowski*, 109 N.M. 386, 785 P.2d 726 (1990); *Selby v. Roggow*, 1999-NMCA-44, ¶ 22, 126 N.M. 766, 975 P.2d 379. “Prima facie tort is not intended to be a catch-all alternative for every action that cannot stand on its own legs.” *Guest*, 2008-NMCA-144, ¶ 37 (citation and internal quotation marks omitted).