# Minnesota

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Professional liability claims in Minnesota are grounded on principles of negligence.[1] A legal malpractice plaintiff must show four elements: (1) an attorney-client relationship existed; (2) the lawyer was negligent or otherwise breached the contract; (3) the negligence or breach of duty was the proximate cause of damages; and (4) "but for" the lawyer's conduct, the plaintiff would have been successful in the prosecution or defense of their action.[2] If the plaintiff fails to prove any one of these essential elements, the claim will fail.[3]

## Attorney-Client Relationship

Whether an attorney-client relationship existed is typically a question of fact based upon communications between the parties and the surrounding circumstances.[4] Where a written retainer agreement is in place, the existence of an attorney-client relationship is easier to prove. An attorney-client relationship can also be established by evidence of an implied contract, or under a tort or third-party beneficiary analysis.[5] Under a tort theory, an attorney-client relationship is formed when an individual seeks and receives legal advice from an attorney and reasonably relies on such advice.[6] It is a fact question whether the advice could be reasonably relied upon to establish an attorney-client relationship.[7] An intended third-party beneficiary may bring an action for legal malpractice where the client's sole purpose was to benefit the third party directly and the attorney's conduct caused the beneficiary to suffer a loss.[8]

## Negligence/Breach

If a plaintiff establishes the existence of an attorney-client relationship, the plaintiff must then prove the attorney breached the appropriate standard of care.[9] Generally, attorneys have a duty to "exercise that degree of care and skill that is reasonable under the circumstances, considering the nature of the undertaking."[10] Expert testimony is typically required to show the specific applicable standard of care and whether the attorney's conduct deviated from that standard.[11]

Attorneys are usually not liable for mere errors in judgment.[12] To be protected under this so-called "*Meagher* rule," the attorney must still act "in good faith and in an honest belief that [the attorney's] advice and acts are well founded and in the best interest of [their] client…"[13]

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This same exception also applies if the attorney makes a "mistake in a point of law which has not been settled by the court of last resort … and on which reasonable doubt may be entertained by well-informed lawyers."[14] However, an attorney must use reasonable care to obtain the information needed to exercise their professional judgment. The failure to use such reasonable care in obtaining information is negligent, even if performed in good faith.[15]

### Proximate Cause/But For

In legal malpractice actions, proximate cause is the same as in an ordinary negligence action.[16] It is typically a fact question for the jury and must be a "substantial factor in bringing about the injury."[17] Malpractice claims against lawyers typically fall within two categories: (1) loss of or damage to an existing cause of action; or (2) other claims for damages not related to an existing cause of action.[18]

The proximate cause element in a claim for loss of or damage to an existing cause of action is typically referred to as the "case-within-a-case" element.[19] To prove causation in these claims, the plaintiff must prove that, but for the attorney's negligence, "he had a meritorious cause of action originally."[20] For example, where an attorney fails to timely serve a complaint prior to the running of the statute of limitations, the plaintiff must prove the action would have been successful if the complaint had been timely served.[21] In other words, the plaintiff must prove that, but for the attorney's negligence, the plaintiff would have been successful in the prosecution or defense of the action.[22]

In claims not involving loss of or damage to an existing cause of action, such as transactional matters, a plaintiff establishes proximate cause by showing that, but for the attorney's conduct, the plaintiff would have obtained a more favorable result than the one actually obtained.[23]

### Damages

Legal malpractice plaintiffs are entitled to recover damages appropriate in an ordinary negligence action.[24] Additionally, in some instances, a malpractice plaintiff may be awarded legal fees incurred in the underlying litigation.[25] Similarly, if the attorney's negligence causes the client to become involved in further litigation, the amount of fees paid to the new counsel may be awarded as damages.[26] An attorney or firm may also be required to forfeit fees paid by the client upon a showing of a breach of fiduciary duties to the client.[27] If an attorney commits fraud in the context of an action or judicial proceeding underlying the malpractice claim, the attorney may be liable for treble damages.[28] Courts will not allow attorneys or firms to offset hypothetical attorney fees that would have been earned had the matter had been handled properly.[29] In limited circumstances, a plaintiff may also be entitled to damages for emotional distress or punitive damages where the attorney's violation of the plaintiff's rights was by willful, wanton, or malicious conduct - but mere negligence is insufficient.[30]

### Defenses and Other Considerations

Attorneys or firms facing a malpractice suit have several available defenses, including the defense that the plaintiff cannot establish all of the necessary elements – existence of an attorney-client relationship, a breach of the applicable standard of care, proximate causation, and damages. Unless the matter in issue is within a lay jury's common knowledge and comprehension, a legal malpractice plaintiff typically needs to establish the applicable standard of care through expert testimony and the plaintiff's failure to do so can be grounds for dismissal.[31]

A legal malpractice claim must be brought within the six-year statute of limitations.[32] The cause of action accrues and the limitations period begins to run when the first damage results from the malpractice.[33] Minnesota does not mechanically apply a "Discovery Rule," but instead employs a case-by-case rule for the accrual of the cause of action; in some instances, the date of accrual may be easy to determine, while in other cases the determination of the date on which a claim accrues can be much more difficult.[34]

Moreover, in accordance with Minn. Stat. § 544.42, a legal malpractice plaintiff usually must submit an affidavit stating: (1) that the facts have been reviewed by the party's attorney with a qualified expert who believes the defendant attorney deviated from the applicable standard of care; or (2) that the affidavit required could not timely be obtained prior to the running of the statute of limitations; or (3) that the

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parties have agreed to a waiver of the affidavit requirement or that the plaintiff has applied for a waiver from the court.[35] Recent case law suggests the affidavit requirement is not necessarily applicable where the subject matter is within the common knowledge of a lay juror and, accordingly, expert testimony will not be required to establish a prima facie case of malpractice.[36] However, if any of the requisite elements must be proven by expert testimony, an affidavit is required.[37] Failure to comply with the affidavit requirement, when it is applicable, may result in dismissal of the claim with prejudice.[38]

Finally, although the Minnesota Supreme Court has established a Client Security Board to reimburse clients for losses caused by a lawyer's dishonest conduct, this fund does not reimburse losses resulting from malpractice.[39]

1 *See Jerry's Enterprises, Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006).
2 *Blue Water Corp., Inc. v. O'Toole*, 336 N.W.2d 279, 281 (Minn. 1983).
3 *Noske v. Friedberg*, 670 N.W.2d 740, 743 (Minn. 2003).
4 *See Ronnigen v. Hertogs*, 199 N.W.2d 420, 421-422 (Minn. 1972).
5 *Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 265 (Minn. 1992).
6 *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 692-93 (Minn. 1980).
7 *Admiral Merchants Motor Freight, Inc.*, 494 N.W.2d at 266.
8 *Id.*
9 *See id.*
10 *Prawer v. Essling*, 282 N.W.2d 493, 495 (Minn. 1979).
11 *Admiral Merchants Motor Freight, Inc.*, 494 N.W.2d at 266.
12 *Meagher v. Kavli*, 97 N.W.2d 370, 375 (Minn. 1959).
13 *Id.* (quoting *Hodges v. Carter*, 80 S.E.2d 144,146 (N.C. 1954)).
14 *Id.*
15 *Togstad*, 291 N.W.2d at 693.
16 *Raske v. Gavin*, 438 N.W.2d 704, 706 (Minn. Ct. App. 1989).
17 *Vanderweyst v. Langford*, 228 N.W.2d 271, 272 (Minn. 1975); *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980).
18 *Compare Noske*, 656 N.W.2d 409 (alleged malpractice at trial that resulted in conviction) with *Jerry's Enterprises, Inc.*, 711 N.W.2d 811 (alleged malpractice in connection with real estate transaction).
19 *Fiedler v. Adams*, 466 N.W.2d 39, 42 (Minn. Ct. App. 1991).
20 *Hill v. Okay Constr. Co., Inc.*, 252 N.W.2d 107, 117 (Minn. 1977).
21 *See, e.g., Christy v. Saliterman*, 179 N.W.2d 288, 293 (Minn. 1970).
22 *Blue Water Corp., Inc.*, 336 N.W.2d at 281.
23 *Jerry's Enterprises, Inc.*, 711 N.W.2d at 819; *see also Blue Water Corp., Inc.*, 336 N.W.2d at 282-84 (holding attorney's failure to file bank charter application was insufficient basis for award where plaintiff failed to show application would have been granted).
24 DAVID F. HERR, 28A MINNESOTA PRACTICE SERIES: ELEMENTS OF AN ACTION § 13:4 (2013).
25 *See Hill*, 252 N.W.2d at 121.
26 *Autrey v. Trkla*, 350 N.W.2d 409, 413-14 (Minn. Ct. App. 1984).
27 *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982).
28 MINN. STAT. § 481.071; *but see Baker v. Ploetz*, 616 N.W.2d 263, 272-73 (firm not liable for treble damages because fraud occurred during real estate closing and not within judicial action or proceeding).
29 *See Togstad*, 291 N.W.2d at 695-96.
30 *See Lickteig v. Anderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 562 (Minn. 1996); Gillespie v. Klun, 406 N.W.2d 547, 558-59 (Minn. Ct. App. 1987); MINN. STAT. § 549.20.
31 *Hill*, 252 N.W.2d at 116.
32 MINN. STAT. § 541.05, subd. 1(5); Hermann v. McMenomy & Severson, 590 N.W.2d 641, 643 (Minn. 1999).
33 *Thiele v. Stich*, 416 N.W.2d 827, 829 (Minn. Ct. App. 1987) (reversed on unrelated grounds in *Thiele v. Stich*, 425 N.W.2d 580, 584 (Minn. 1988)).
34 *Compare Noske*, 656 N.W.2d at 416 (plaintiff did not suffer damage as a result of conviction, but nine years later when conviction was vacated) *with Antone v. Mirviss*, 720 N.W.2d 331, 338 (Minn. 2006) (action for malpractice in drafting of antenuptial agreement accrued at the time of the client's marriage).
35 MINN. STAT. § 544.42, subd. 3(a).
36 *Timothy Guzick v. Kimball*, A14-0429, 2014 WL 4957973 at *3 (Minn. Ct. App. October 6, 2014) (unpublished).
37 *Id.*
38 MINN. STAT. § 544.42. subd. 6; *Fontaine v. Steen*, 759 N.W.2d 672, 676-77 (Minn. Ct. App. 2009).
39 For additional information, *see* http://csb.mncourts.gov/Pages/default.aspx.

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Malpractice is negligence, and negligence is determined objectively.[1] To establish a legal malpractice claim under Wisconsin law, a plaintiff is generally required to allege and prove four elements: (1) existence of an attorney-client relationship; (2) acts or omissions constituting negligence; (3) proximate cause; and (4) injury.[2] Alleged malpractice often deprives the client of the opportunity to successfully prosecute or defend an action.[3] To prevail on a malpractice claim, the plaintiff typically must prove the alleged negligence caused the plaintiff's inability to pursue or defend the claim successfully. Accordingly, a legal malpractice plaintiff is usually obligated to prove two cases in a single proceeding.[4] This is commonly referred to as the "suit-within-a-suit" requirement.[5] The causation element dictates that the merits of the malpractice claim rest upon the merits of the original or underlying claim.[6]

## Attorney-Client Relationship

The plaintiff must establish the existence of an attorney-client relationship with the defendant.[7] Generally, the formation of an attorney-client relationship rests upon principles of agency and contract law, and contract law determines whether such a relationship is created.[8] In the absence of an express written contract, an attorney-client relationship may be implied by the words and actions of the parties.[9] However, where no written contract exists, the existence of an attorney-client relationship presents a fact question.[10]

## Negligence/Breach

Because malpractice is founded on principles of negligence, a malpractice plaintiff must prove the attorney's conduct breached a duty owed to the plaintiff. Generally, a lawyer's duty in rendering legal services to a client is to exercise the degree of care, skill, and judgment which is usually exercised under like or similar circumstances.[11] A lawyer is not held to a standard of perfection or infallibility of judgment, but must exercise their best judgment in light of their education and experience.[12]

An attorney will generally not be held accountable for an error in judgment if the attorney acts in good faith and their acts are well-founded and in the best interest of their

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client.[13] "Judgment involves a reasoned process under the presumption that the attorney as accumulated all available pertinent facts to arrive at the judgment."[14] However, an attorney's failure to exercise diligence in obtaining pertinent facts can constitute a breach of the duty of care towards a client.[15]

Typically, expert testimony is required to establish the parameters of acceptable professional conduct. However, where an attorney's breach of duty is so obvious the court may determine it as a matter of law or where the standard of care is within the ordinary knowledge and experiences of a lay juror, expert testimony is not required.[16]

### Proximate Cause/But For

To establish, causation, a legal malpractice plaintiff usually must prove the merits of the underlying action.[17] For example, in *Lewandowski v. Continental Cas. Co.*, 88 Wis. 2d 271, 276 N.W.2d 284 (1979), the plaintiff was barred from pursuing a malpractice claim based upon a failure to comply with the applicable statute of limitations involved with the plaintiff's personal injury claim.[18] To resolve the causation and damages elements of the plaintiff's malpractice claim, the court proceeded with a trial of the underlying negligence action between the drivers of the involved vehicles.[19] The purpose of this "suit-within-a-suit" process is to determine what the outcome *should* have been had the issue been properly presented in the first instance.[20] If the plaintiff fails to prove the "suit-within-a-suit", the attorney's alleged negligence was not the proximate cause of the plaintiff's damages, because the underlying case would have failed even in the absence of the claimed negligence.

In other cases, the claim may arise from a less-than-favorable settlement or outcome. For example, the claim in *Helmbrecht v. St. Paul Insurance Co.*, 122 Wis. 2d 94, 362 N.W.2d 118 (1985) arose out of a settlement in a divorce proceeding. The plaintiff alleged the attorney's failure to adequately investigate marital assets resulted in a less favorable settlement than if the attorney had conducted a diligent investigation.[21] Thus, the claim was not for the total loss of an action, as in *Lewandowski*, but for **damages resulting from** the handling of an action.

### Damages

In malpractice cases involving the total loss of an action, as in *Lewandowski*, the measure of damages is the amount that would have been recovered by the client absent the attorney's negligence.[22] In cases involving damages resulting from the handling of an action, such as Helmbrecht, the measure of damages is the difference between the amount actually recovered and the amount that would have been recovered if not for the attorney's negligence.[23] Wisconsin law also allows for an award of punitive damages where there is evidence the attorney acted in intentional disregard of the plaintiff's rights.[24]

### Defenses and Other Considerations

The most common defense in legal malpractice claims arises in connection with the "suit-within-a-suit" requirement. Specifically, a defendant often attempts to prevail by showing the plaintiff would not have been successful in the underlying case irrespective of the conduct complained of *i.e.* the defendant's claimed negligence was not the cause of the plaintiff's damages. However, unlike in an ordinary negligence case, a malpractice plaintiff's failure to mitigate damages is not always a viable defense.[25]

Contributory negligence is an available defense to a malpractice claim, but is waived if not pleaded.[26] The statute of limitations applicable to legal malpractice claims is six years from the date the cause of action accrues.[27] A claim does not accrue and the limitations period does not begin to run under Wisconsin law until the plaintiff discovers, or by exercise of reasonable diligence, should have discovered the injury.[28] Under this "discovery rule," the action accrues when the client discovers the essential facts constituting a cause of action.[29] If a claim is not asserted within six years of its accrual, it is time-barred.

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1 *Helmbrecht v. St. Paul Ins. Co.*, 362 N.W.2d 118, 125, 122 Wis.2d 94, 105 (1985).
2 *See Lewandowski v. Continental Casualty Co.*, 276 N.W.2d 284, 287, 88 Wis.2d 271, 277 (1979).
3 *See Glamann v. St. Paul Fire & Marine Ins. Co.*, 424 N.W.2d 924, 926, 144 Wis.2d 865, 870 (1988).
4 *See Acharya v. Carroll*, 448 N.W.2d 275, 279-80 n.6, 152 Wis.2d 330, 339 n.6 (Ct. App. 1989).
5 *See Glamann*, 424 N.W.2d at 926, 144 Wis.2d at 870.
6 *See Acharya*, 448 N.W.2d at 279-80 n.6, 152 Wis.2d at 339 n.6.
7 *Lewandowski*, 276 N.W.2d at 287, 88 Wis.2d at 277.
8 *Security Bank v. Klicker*, 418 N.W.2d 27, 30, 142 Wis.2d 289, 295 (Ct. App. 1987).
9 *Id.*
10 *Security Bank*, 418 N.W.2d at 30-33, 142 Wis.2d at 294-99 (declining to find, as a matter of law, attorney for general partnership was also attorney for each individual partner).
11 *Helmbrecht*, 362 N.W.2d at 128, 122 Wis.2d at 111.
12 *Id.*
13 *Helmbrecht*, 326 N.W.2d at 130-31, 122 Wis.2d at 117.
14 *Helmbrecht*, 326 N.W.2d at 131, 122 Wis.2d at 117 (quoting *Glenna v. Sullivan*, 245 N.W.2d 869, 873 (Minn. 1976) (Todd, J., concurring specially)).
15 *See Helmbrecht*, 362 N.W.2d at 130-131, 122 Wis.2d at 117.
16 *Helmbrecht*, 362 N.W.2d at 128, 122 Wis.2d at 111; *see also Olfe v. Gordon*, 286 N.W.2d 573, 576-77, 93 Wis.2d 173, 181-83 (1980).
17 *See Helmbrecht*, 362 N.W.2d at 124, 122 Wis.2d at 103.
18 *Lewandowski*, 276 N.W.2d at 285, 88 Wis.2d at 272.
19 *Id.*
20 *Lewandowski*, 276 N.W.2d at 289, 88 Wis.2d at 281.
21 *Helmbrecht*, 362 N.W.2d at 128-29, 122 Wis.2d at 111-13.
22 *Lewandowski*, 276 N.W.2d at 287, 88 Wis.2d at 277-78.
23 *Helmbrecht*, 362 N.W.2d at 126, 122 Wis.2d at 108.
24 WIS. STAT. § 895.043(3); *Berner Cheese Corp. v. Krug*, 752 N.W.2d 800, 814, 312 Wis.2d 251, 279 (2008).
25 *See Langreck v. Wisconsin Lawyers Mut. Ins. Co.*, 594 N.W.2d 818, 821, 226 Wis.2d 520, 526 (Ct. App. 1999) (failure to contest foreclosure action was reasonable when attorney advised that it would be futile).
26 *Gustavson v. O'Brien*, 274 N.W.2d 627, 633, 87 Wis.2d 193, 204 (1979); *Musil v. Barron Electrical Co-operative*, 108 N.W.2d 652, 661, 13 Wis.2d 342, 359 (1961).
27 WIS. STAT. § 893.53; Acharya, 448 N.W.2d at 279, 152 Wis.2d at 337.
28 *Hansen v. A.H. Robins, Inc.*, 335 N.W.2d 578, 583, 113 Wis.2d 550, 560 (1983); *Hennekens v. Hoerl*, 465 N.W.2d 812, 819, 160 Wis.2d 144, 160 (1991).
29 *See Hennekens*, 465 N.W.2d at 822, 160 Wis.2d at 167-68 (client's receipt of demand letter was sufficient notice of injury and claim against attorney who had represented client in connection with associated land transaction).