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Chapter 2

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I. (§2.1) Introduction

This chapter addresses claims against lawyers. Actions by clients against their lawyers, including claims for negligence, breach of contract, and breach of fiduciary duty, and the principal defenses to these claims are discussed. In addition, the chapter surveys attorney liability to third parties, including claims against attorneys for malicious prosecution and abuse of process.

II. (§2.2) Elements of a Legal Malpractice Action

To maintain a legal malpractice claim, the client must generally plead and prove that:

- an attorney-client relationship existed;
- the attorney acted negligently or in breach of contract;
- the attorney's acts were the proximate cause of the client's damages; and
- but for the attorney's conduct, the client would have been successful in the underlying claim.

Emery v. Carnahan, 88 S.W.3d 138, 142 (Mo. App. S.D. 2002); *see also O'Neal v. Agee*, 8 S.W.3d 238, 241 n. 3 (Mo. App. E.D. 1999); *Egan v. Craig*, 967 S.W.2d 120, 124 (Mo. App. E.D. 1998); *Huber v. Magna Bank of Mo.*, 959 S.W.2d 812, 815 (Mo. App. E.D. 1997).

These elements aptly state the pleading requirements for malpractice claims based on an attorney's handling of litigation matters. When the alleged malpractice arises in a non-litigation context, the same essential elements may be restated in a slightly different manner. The client must generally plead and prove that:

- the lawyer was negligent in failing to exercise the degree of skill and diligence ordinarily used under the same or similar circumstances by members of the legal profession;
- the client sustained some loss or injury; and
- there was a causal connection between the attorney's negligence and the client's loss.

Steward v. Goetz, 945 S.W.2d 520, 531 (Mo. App. E.D. 1997).

The Missouri Rules of Professional Conduct do not create a private cause of action for the client. *Greening v. Klamen*, 652 S.W.2d 730, 734 (Mo. App. E.D. 1983); *Chrysler Corp. v. Carey*, 5 F. Supp. 2d 1023, 1031 (E.D. Mo. 1998), *aff'd*, 186 F.3d 1016 (8th Cir. 1999). The ethical rules are not designed to:

- be a basis for civil liability, Rule 4 Preamble;
- augment an attorney's substantive legal duty or the extra-disciplinary consequences of violating a duty, *Roth v. La Societe Anonyme Turbomeca France*, 120 S.W.3d 764, 777 (Mo. App. W.D. 2003); or
- create a presumption that a legal duty has been breached, Rule 4 Preamble.

But the ethical rules may provide guidance to the courts in determining the duties that attorneys owe their clients. *McRentals, Inc. v. Barber*, 62 S.W.3d 684, 697 (Mo. App. W.D. 2001); *Beare v. Yarbrough*, 941 S.W.2d 552, 556 (Mo. App. E.D. 1997); *Greening*, 652 S.W.2d at 734. In *McRentals, Inc.*, the court referred to the ethical rules for guidance in determining the fiduciary duty owed to a client by an attorney. *McRentals, Inc.*, 62 S.W.3d at 697. In *Beare*, the court considered the ethical rules in determining whether an attorney was engaged in a conflict of interest. *Beare*, 941 S.W.2d at 556.

A. (§2.3) Attorney-Client Relationship

The first element of a legal malpractice claim requires the client to establish as a matter of fact that an attorney-client relationship existed between the client and attorney or that the attorney performed services specifically intended by the client to benefit the plaintiff. *Multilist Serv. of Cape Girardeau v. Wilson*, 14 S.W.3d 110, 114 (Mo. App. E.D. 2000). The attorney-client relationship is treated as an agency relationship and governed by the same rules applicable to other agencies. *Sappington v. Miller*, 821 S.W.2d 901, 904 (Mo. App. W.D. 1992); *Southwestern Bell Tel. Co. v. Roussin*, 534 S.W.2d 273, 276 (Mo. App. E.D. 1976); see also *World Resources, Ltd. v. Utterback*, 943 S.W.2d 269, 271 (Mo. App. E.D. 1997); *Multilist Serv. of Cape Girardeau*, 14 S.W.3d at 114. The existence of an attorney-client relationship is generally a fact question to be determined by the jury. *Smoot v. Marks*, 564 S.W.2d 231, 236 (Mo. App. E.D. 1978).

The burden of proof rests on the party seeking to establish the existence of the relationship. *Qualls v. Field Enters. Educ. Corp.*, 302 F. Supp. 152, 153 (E.D. Mo. 1969); *Schwarze v. May Dep't Stores*, 360 S.W.2d 336, 339 (Mo. App. E.D. 1962); *Corrington Park Assocs. v. Barefoot, Inc.*, 983 S.W.2d 210, 213 (Mo. App. W.D. 1999). The existence of an attorney-client relationship need not be shown by direct and positive evidence. *World Resources, Ltd.*, 943 S.W.2d at 271. It may be inferred from the surrounding facts and circumstances and the conduct of the parties. *Id.*; *Multilist Serv. of Cape Girardeau*, 14 S.W.3d at 114.

But the attorney-client relationship may not be established by conjecture or surmise. *Wilson*, 14 S.W.3d at 114. Restated, there is no presumption of agency, and while it may be inferred from a natural and reasonable construction of the facts, it will not be created from a forced, strained, or distorted construction. *Id.*

1. (§2.4) Creation of Attorney-Client Relationship

An attorney-client relationship is created when a client seeks and receives legal advice or assistance and the attorney intends to undertake to give advice or assistance on the client's behalf. *Donahue v. Shughart, Thompson & Kilroy, P.C.*, 900 S.W.2d 624, 626 (Mo. banc 1995); *Resolution Trust Corp. v. Gibson*, 829 F. Supp. 1121, 1127 (W.D. Mo. 1993). Thus, when the plaintiff neither hired the attorney nor relied on the attorney's legal advice, no attorney-client relationship was created. *Huber v. Magna Bank of Mo.*, 959 S.W.2d 812, 815 (Mo. App. E.D. 1997).

Filing a lawsuit, or appearing in court, on the client's behalf raises a presumption that the attorney had the authority to appear and represent that party in the action. *Schwarze v. May Dep't Stores*, 360 S.W.2d 336, 339 (Mo. App. E.D. 1962); *Qualls v. Field Enters. Educ. Corp.*, 302 F. Supp. 152, 153 (E.D. Mo. 1969).

Attorneys can testify as to the fact and to the scope of their authority. *Sappington v. Miller*, 821 S.W.2d 901, 904 (Mo. App. W.D. 1992). If the attorney denies the attorney-client relationship, the burden of proof that the relationship existed rests on the party asserting the relationship. *Schwarze*, 360 S.W.2d at 339.

Mere reliance on the attorney's advice or conduct does not create an attorney-client relationship. *Donahue*, 900 S.W.2d at 626. Similarly, representation of the client in one matter by the attorney is insufficient to create an attorney-client relationship for other unrelated matters. *Id.*

But an attorney should be mindful that if the terms of engagement are ambiguous, the attorney could be at risk for liability under certain circumstances beyond that which the attorney may have believed at the beginning of the relationship. For example, unless the relationship is limited, an attorney handling a workers' compensation claim could be subject to a malpractice claim if the attorney fails to advise the client of a possible third-party action. Similarly, when an attorney has been hired to rewrite certain elements of a will, the attorney must also check the will to ensure that the client's intent is carried throughout, even when this task is not specifically requested. *Johnson v. Sandler, Balkin, Hellman & Weinstein, P.C.*, 958 S.W.2d 42, 52 (Mo. App. W.D. 1997). Thus, attorneys should be

very clear in communicating with their clients on the scope of their representation. Engagement letters defining the attorney's undertaking are highly recommended.

2. (§2.5) Termination of Attorney-Client Relationship

A client may terminate the attorney-client relationship at any time, with or without just cause. *The Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53, 58 (Mo. banc 1982). Although Missouri once followed the rule that the contract between attorney and client is governed by the same rules as any other employment contract, this is no longer the case. *Id.* at 56.

Missouri now subscribes to the view that the attorney-client relationship is peculiar in the level of trust involved and falls outside the boundaries of the normal employment contract. *Id.* at 57. Therefore, if at any time a client becomes dissatisfied with the attorney, the client may terminate the relationship and hire another attorney. *Id.* at 58.

Once an attorney is discharged, the attorney can no longer act on the former client's behalf. *McLaughlin v. McLaughlin*, 427 S.W.2d 767, 768 (Mo. App. E.D. 1968); *Cosby v. Harding*, 553 S.W.2d 535, 538 (Mo. App. W.D. 1977). An attorney may be liable for damage resulting from actions subsequently taken without the client's authority. *Cosby*, 553 S.W.2d at 538. But the client's right to terminate the attorney-client relationship is subject to the attorney's right, under certain conditions, to be paid a fee. *Risjord v. Lewis*, 987 S.W.2d 403, 405 (Mo. App. W.D. 1999).

The attorney-client relationship automatically terminates when the purpose of an attorney's employment has been accomplished. *Schwarze v. May Dep't Stores*, 360 S.W.2d 336, 338 (Mo. App. E.D. 1962). But when the attorney is working on contingency, entry of a judgment does not complete the services for which the attorney was retained. *Goldstein & Price v. Tonkin & Mondl*, 974 S.W.2d 543, 548 (Mo. App. E.D. 1998). Instead, money must be recovered through judgment or settlement to satisfy the contingency. *Id.* In addition, the employment and authority of an attorney generally terminate upon the client's death. *Glaser v. Hornbeck*, 477 S.W.2d 432, 433 (Mo. App. E.D. 1972). See also Rule 4-1.16, which discusses the termination of the attorney-client relationship.

At the conclusion of the attorney-client relationship, attorneys must ensure that their clients' interests are protected. Rule 4-1.16 makes plain that an attorney:

shall take steps to the extent reasonably practicable to protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of the fee that has not been earned.

A litigation attorney should obtain leave of court to withdraw if required by the court rules.

3. (§2.6) Liability Absent an Attorney-Client Relationship

The Supreme Court of Missouri has extended the right to bring legal malpractice claims to those parties who are not in strict privity of contract with the attorney but who are the intended beneficiaries of the attorney's retention by the client. *Donahue v. Shughart, Thompson & Kilroy, P.C.*, 900 S.W.2d 624, 627 (Mo. banc 1995). Before *Donahue*, Missouri did not follow this view but held that the existence of privity within an attorney-client relationship was a necessary element of a legal malpractice claim. *Mark Twain Kansas City Bank v. Jackson*, 912 S.W.2d 536, 538 (Mo. App. W.D. 1995); *Williams v. Bryan, Cave, McPheeters, McRoberts*, 774 S.W.2d 847, 849 (Mo. App. E.D. 1989); *Lackey v. Vickery*, 57 F. Supp. 791, 792 (W.D. Mo. 1944).

a. (§2.7) Non-Client as Intended Beneficiary of Attorney-Client Relationship

In *Donahue v. Shughart, Thompson & Kilroy, P.C.*, 900 S.W.2d 624, 627 (Mo. banc 1995), the Supreme Court held that a non-client could bring a malpractice claim against a lawyer as long as the non-client could establish as a matter of fact that the lawyer's client specifically intended the attorney-client relationship to benefit the non-client. *Id.* at 628-29; *Multilist Serv. of Cape Girardeau v. Wilson*, 14 S.W.3d 110, 114 (Mo. App. E.D. 2000). An incidental or indirect benefit is insufficient to create liability. *Donahue*, 900 S.W.2d at 628. In addition, a benefit to one in an adversarial relationship to the client will not create liability between a non-client and the attorney. *Id.*

The Supreme Court of Missouri adopted a balancing test to determine when an attorney owes a duty to a non-client. *Id.* at 629. The six factors are as follows:

1. The existence of a specific intent by the client that the purpose of the attorney's services was to benefit the plaintiff
2. The foreseeability of the harm to the plaintiff as a result of the attorney's negligence
3. The degree of certainty that the plaintiff will suffer injury from the attorney's misconduct
4. The closeness of the connection between the attorney's conduct and the injury
5. The policy of preventing future harm
6. The burden on the profession of recognizing liability under the circumstances

Id.

In a subsequent case, a court applied the *Donahue* test to find an attorney-client relationship between an attorney preparing a will and the instrument's intended beneficiaries. *Johnson v. Sandler, Balkin, Hellman & Weinstein*, 958 S.W.2d 42, 50 (Mo. App. W.D. 1997).

b. (§2.8) "Exceptional Circumstances" Rule

As a general rule, attorneys owe no duty to their clients' adversaries. *Bates v. Law Firm of Dysart, Taylor, Penner, Lay & Lewandowski*, 844 S.W.2d 1, 5 (Mo. App. W.D. 1992); *see also Andes v. Albano*, 853 S.W.2d 936, 941-44 (Mo. banc 1993). Although attorneys should endeavor to avoid causing needless pain to opposing parties in litigation, the law does not impose a duty to do so. *Roth v. La Societe Anonyme Turbomeca France*, 120 S.W.3d 764, 777 (Mo. App. W.D. 2003).

The *Donahue v. Shughart, Thompson & Kilroy, P.C.*, 900 S.W.2d 624, 627 (Mo. banc 1995), "intended-benefit" rule does

not apply to the client's adversaries. *Wild v. Trans World Airlines, Inc.*, 14 S.W.3d 166, 168 (Mo. App. W.D. 2000). Courts have held that attorneys are not liable for malpractice claims brought by their clients' adversaries on the ground that adversaries would never desire to benefit one another. *Roth*, 120 S.W.3d at 776. Therefore, attorneys have no duty to disclose to their clients' adversaries misrepresentations that the clients have made in an adversarial proceeding. *Id.* at 777.

But there are "exceptional" cases under Missouri law in which an attorney may be held liable to third parties for unprofessional conduct either when acting on the client's behalf or when acting out of self-interest. *Kennedy v. Kennedy*, 819 S.W.2d 406, 410 (Mo. App. S.D. 1991); *Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co.*, 931 S.W.2d 166, 178 (Mo. App. W.D. 1996). Liability may occur if the attorney is guilty of fraud, collusion, or a malicious or tortious act committed in furtherance of the client's representation. *Id.* Examples of grounds for third-party liability under the "exceptional circumstances" rule include:

- abuse of process and malicious prosecution, *Romeo v. Jones*, 86 S.W.3d 428, 432 (Mo. App. E.D. 2002);
- slander of title, *Kennedy*, 819 S.W.2d at 409; and
- wrongful garnishment, *Thomas Berkeley Consulting Engineer, Inc. v. Zerman*, 911 S.W.2d 962, 967 (Mo. App. E.D. 1995).

The term "collusion," as used in the "exceptional circumstances" rule, denotes more than a conspiracy, or concert of action, between the client and the attorney. *Macke Laundry Serv. Ltd. P'ship*, 931 S.W.2d at 179 n.6. Collusion, as used in this context, requires fraud or an illegal purpose. *Id.*

Although "tortious act" is broadly stated in the cases, liability under the "exceptional circumstances" rule flows only from intentional torts. *Macke Laundry Serv. Ltd. P'ship*, 931 S.W.2d at 178 (citing *Mark Twain Kansas City Bank v. Jackson*, 912 S.W.2d 536, 538 (Mo. App. W.D. 1995)). Therefore, the tort of "legal malpractice does not qualify as the exceptional case necessary to justify liability to a third party." *Rose v. Summers, Compton, Wells & Hamburg, P.C.*, 887 S.W.2d 683, 686 (Mo. App. E.D. 1994).

The agency nature of the attorney-client relationship leads to an identity of interests between the client and attorney. *Macke Laundry Serv. Ltd. P'ship*, 931 S.W.2d at 176. This unity of interests between attorneys and their clients renders a conspiracy claim by a non-client against an attorney and the client impossible in a claim based on the attorney's actions taken on the client's behalf. *Id.* As a matter of law, "[t]wo entities, which are not legally distinct, may not conspire with one another" because there can be no "meeting of the minds." *Id.* Therefore, the client's misconduct cannot be imputed to the attorney in the guise of a conspiracy claim. *Id.*; *Roth*, 120 S.W.3d at 778.

But an attorney may be liable to a non-client when the attorney acts outside the scope of the attorney-client relationship and has an independent personal stake in the object of the conspiracy. *Id.*; see also *Creative Walking, Inc. v. Am. States Ins. Co.*, 25 S.W.3d 682, 688 (Mo. App. E.D. 2000). Receipt of attorney fees does not qualify as a personal stake for the attorney in this context. *Macke Laundry Serv. Ltd. P'ship*, 931 S.W.2d at 178 n.4; *Wiles v. Capitol Indem. Corp.*, 75 F. Supp. 2d 1003, 1004–05 (E.D. Mo. 1999), *aff'd*, 280 F.3d 871 (8th Cir. 2002).

c. (§2.9) Corporations and Limited Partnerships

A corporation is a legal entity separate and apart from the person or persons who are the corporation's stockholders and directors. *Terre Du Lac Prop. Owners' Ass'n, Inc. v. Shrum*, 661 S.W.2d 45, 48 (Mo. App. E.D. 1983). Therefore, an attorney's representation of a corporation does not mean that the attorney is acting as counsel for the individual directors and shareholders. *Id.* Similarly, an attorney representing a limited partnership owes a duty only to the limited partnership as an organization and not to the individual limited partners. *Rose v. Summers, Compton, Wells & Hamburg, P.C.*, 887 S.W.2d 683, 686 (Mo. App. E.D. 1994).

B. (§2.10) Negligence or Breach of Contract

A legal malpractice action "is founded on the attorney's duty to exercise due care or to honor express contract commitments." *Patterson v. Checkett*, 43 S.W.3d 477, 481 (Mo. App. S.D. 2001) (quoting *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. banc 1997)). This

second element of a legal malpractice claim can be satisfied by showing that the attorney acted either negligently or in breach of contract. *Johnson v. Sandler, Balkin, Hellman & Weinstein, P.C.*, 958 S.W.2d 42, 52 (Mo. App. W.D. 1997); *Thompson v. Gilmore*, 888 S.W.2d 715, 716 (Mo. App. S.D. 1994).

1. (§2.11) Standard of Care Required

The standard of care requires the attorney to exercise the skill and knowledge ordinarily possessed by attorneys under the same or similar circumstances. *Johnson v. Sandler, Balkin, Hellman & Weinstein*, 958 S.W.2d 42, 52 (Mo. App. W.D. 1997); *Steward v. Goetz*, 945 S.W.2d 520, 531 (Mo. App. E.D. 1997). Attorneys represent to their clients that they will exhibit the skill and diligence ordinarily possessed and employed by well-informed members of the legal profession in conducting the tasks for which they were hired. *Roehl v. Ralph*, 84 S.W.2d 405, 409 (Mo. App. E.D. 1935).

For purposes of trial, the standard of care will be presented to the jury in the court's instructions. Typically, the standard in a legal malpractice action will be submitted under MAI 11.06 [1990 Revision] Definitions—Negligence—Healthcare Providers, which provides: "The term "negligent" or "negligence" as used in this [these] instruction[s] means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by the members of defendant's profession."

The standard of care does not require the highest degree of skill, care, or knowledge. Nor does the standard require any special skills or knowledge outside of those ordinarily possessed by attorneys under similar circumstances.

Satisfaction of the standard of care may require the attorney to perform services not requested by the client. For example, when an attorney is hired to rewrite certain elements of a will, the attorney must also check the will to ensure that the client's intent is carried throughout, even when this task is not specifically requested. *Johnson*, 958 S.W.2d at 52.

2. (§2.12) Expert Testimony Required to Establish the Standard of Care

Expert testimony is required to prove legal malpractice except in clear and palpable cases. *Zweifel v. Zenge & Smith*, 778 S.W.2d 372, 373 (Mo. App. W.D. 1989); *see also Cooper v. Simon*, 719 S.W.2d 463, 464–65 (Mo. App. W.D. 1986); *Steward v. Goetz*, 945 S.W.2d 520, 533 (Mo. App. E.D. 1997); *Baldrige v. Lacks*, 883 S.W.2d 947, 954 (Mo. App. E.D. 1994). On the standard of care, the court will not be considered an expert and is as dependent as the jury on expert testimony. *Zweifel*, 778 S.W.2d at 374.

To escape the requirement of expert testimony, the malpractice must be clear to a jury of laypersons. *Id.* For example, expert testimony may not be necessary to show negligence if the attorney allowed a statute of limitations or some other time limit to pass. *Id.* at 375. Nor is expert testimony necessary when the attorney admits negligence and the fact that damages occurred in the underlying case. *Briggs v. King*, 714 S.W.2d 694, 698 (Mo. App. W.D. 1986).

Moreover, an attorney must follow the client's instructions. If the attorney has contracted to do so, expert testimony may not be necessary to prove a simple failure on the attorney's part to follow the client's instructions based on the contract. *Jarnagin v. Terry*, 807 S.W.2d 190, 191 (Mo. App. W.D. 1991).

Admissibility of expert testimony is within the court's discretion. *Baldrige*, 883 S.W.2d at 954; *Bross v. Denny*, 791 S.W.2d 416, 421 (Mo. App. W.D. 1990). The Supreme Court of Missouri has held that the only relevant standard for evaluating the admissibility of expert testimony is § 490.065, RSMo 2000. *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003). The Court made plain in *McDonagh* that all other standards are incorrect and should not be followed.

C. (§2.13) Causation

In a legal malpractice claim, the client must plead and prove a causal connection between the attorney's negligence and the client's alleged damages. *See*:

- *Mogley v. Fleming*, 11 S.W.3d 740, 747 (Mo. App. E.D. 1999)
- *State ex rel. O'Blennis v. Adolf*, 691 S.W.2d 498, 501 (Mo. App. E.D. 1985)
- *Pool v. Burlison*, 736 S.W.2d 485, 486 (Mo. App. E.D. 1987)
- *Cain v. Hershewe*, 760 S.W.2d 146, 149 (Mo. App. S.D. 1988)
- *Bross v. Denny*, 791 S.W.2d 416, 421 (Mo. App. W.D. 1990)

The client has the burden of establishing proximate causation between the alleged negligence and damages. *Lange v. Marshall*, 622 S.W.2d 237, 238 (Mo. App. E.D. 1981).

The client must specifically plead and prove that because of the attorney's negligence the client sustained some loss or injury. *Steward v. Goetz*, 945 S.W.2d 520, 531 (Mo. App. E.D. 1997). In a malpractice action against a litigation attorney, the client must establish that the client would have been successful in the underlying action. *Mogley*, 11 S.W.3d at 747. Restated, attorneys cannot be held liable for their acts and omissions absent a showing that their omissions caused an adverse result in the underlying case. *Flavan v. Cundiff*, 83 S.W.3d 18, 27 (Mo. App. E.D. 2002). In the non-litigation context, the client must show that the adverse result was caused by the attorney's malpractice. *Steward*, 945 S.W.2d at 532.

The question of proximate cause is generally a question of fact for the jury. But when the client's evidence of causation and damage in the underlying case amounts to speculation and conjecture or when the evidence supports two inconsistent and contradictory causes of the harm, the court may decide the issue as a matter of law. *Tompkins v. Cervantes*, 917 S.W.2d 186, 191 (Mo. App. E.D. 1996); *Lange v. Marshall*, 622 S.W.2d 237, 238 (Mo. App. E.D. 1981).

1. (§2.14) "But for" Causation—The "Case-Within-a-Case"

When the alleged malpractice arises from an attorney's conduct of the client's litigation matter, the client must plead and prove that the client would have recovered a judgment in the underlying case "but for" the attorney's malpractice. *Faulkner v. Ensz*, 109 F.3d 474, 476 (8th Cir. 1997); *see also Brown v. Adams*, 715 S.W.2d 940, 941 (Mo. App. W.D. 1986); *Calhoun v. Lang*, 694 S.W.2d 740 (Mo. App. E.D. 1985). The petition must state sufficient facts showing that the plaintiff had a meritorious cause of action in the underlying case as well as a causal connection between the attorney's fault and the client's damages. *Cain v. Hershewe*, 760 S.W.2d 146, 149 (Mo. App. S.D. 1988).

This causal connection requires the client to establish the merits of the underlying case and leads to what is commonly known as the “case-within-a-case.” In the case-within-a-case, the client must successfully relitigate the underlying lawsuit to show a causal connection between the attorney’s breach of the standard of care and the plaintiff’s damage. *Tompkins v. Cervantes*, 917 S.W.2d 186, 189 (Mo. App. E.D. 1996). If the underlying lawsuit was an appeal, clients must prove that they would have won their appeals and any subsequent trial. *Pool v. Burlison*, 736 S.W.2d 485, 486 (Mo. App. E.D. 1987); *Laws v. O’Brien*, 718 S.W.2d 615, 616–17 (Mo. App. E.D. 1986).

Consistent with the case-within-a-case analysis, the attorney may relitigate all defenses that would have been available to the defendant in the underlying case when defending against the client’s malpractice claim. *Lewis v. Barnes Hosp.*, 685 S.W.2d 591, 594 (Mo. App. E.D. 1985).

2. (§2.15) Judge or Jury

While causation is generally a question of fact for the jury, the issue becomes more complicated in the context of a legal malpractice action and, in particular, when applied to issues in the case-within-the-case. Who should decide the case-within-the-case, the judge or the jury? If the underlying action is one that is tried to the court, should the trial court in the malpractice action decide whether the client would have prevailed?

In *Williams v. Preman*, 911 S.W.2d 288, 295 (Mo. App. W.D. 1995), the court held that the role of the jury as the factfinder should remain intact for the case-within-a-case determination, regardless of whether the factfinder in the underlying action would have been the judge or the jury. But the court in *Williams* did not specify what role the judge would play on issues of law in the underlying case.

In *Flavan v. Cundiff*, 83 S.W.3d 18 (Mo. App. E.D. 2002), the court addressed the issue of whether a question of law in the underlying action should be properly decided by the judge or given to the jury in a malpractice case. In *Flavan*, the client alleged negligence based on the attorney’s failure to raise the statute of frauds defense in the underlying action. *Id.* at 21. The trial court determined that the client’s malpractice action hinged on the merits of the statute of frauds defense. *Id.* at 23. The trial

court determined that the statute of frauds was inapplicable to the underlying action and, therefore, granted the attorney summary judgment. *Id.* On appeal, the client argued that the trial court erred in not sending the statute of frauds issue to the jury. *Id.* at 24.

The court of appeals rejected the client's argument. The court held that the jury in a legal malpractice action maintains its conventional role of factfinder, while the judge retains the power to decide questions of law. *Id.* The court cited the different standards of review applied on the appellate level, explaining that jury questions have a narrower standard of review than questions of law. *Id.* at 26–27. The court explained that these differences would make it difficult to correct a misinterpretation of the law by the jury on legal issues in the underlying action. *Id.* at 27. Therefore, the court held that all questions of law should be decided by the judge in a malpractice action and not by the jury. *Id.*

3. (§2.16) Intervening Causation

The doctrine of intervening cause applies in legal malpractice actions. *Faulkner v. Ensz*, 109 F.3d 474, 476 (8th Cir. 1997). “An intervening cause is a new and independent force which interrupts the chain of events initiated by the defendant's negligence in such a significant manner as to become the direct and proximate cause of the plaintiff's damages.” *Id.* at 476–77 (quoting *Rodgers v. Czamanske*, 862 S.W.2d 453, 458 (Mo. App. W.D. 1993)).

In the context of legal malpractice actions, an intervening event that interrupts the causation chain occurs when the attorney-client relationship is terminated and the client hires a second attorney to handle the underlying case. In *Faulkner*, the attorney was hired by his client to pursue appellate remedies following the client's termination from an apprenticeship. *Id.* at 475–76. After the appellate hearing, the client expressed the desire to pursue a sex-discrimination action, and the attorney arranged a meeting with another attorney experienced in that area of law. *Id.* at 476. Thereafter, the first attorney had no further contact with the client and gave his complete file to the new attorney to handle the discrimination claim. *Id.* Under these facts, the court held that the actions of the second attorney were an intervening event that shielded the first attorney from liability for the former client's

malpractice claim based on the handling of the discrimination claim. *Id.* at 477.

Consider also *Rodgers*, 862 S.W.2d 453, in which the client alleged that the attorney's malpractice hindered the successful prosecution of the client's counterclaim. *Id.* at 458. But the court applied the doctrine of intervening causation to bar the claim because the client's second attorney voluntarily dismissed the counterclaim with the intention of refileing the claim in a separate county. *Id.* When procedural issues precluded the filing of the client's counterclaim, the court held that the second attorney's actions were a new and independent force interrupting the chain of events and that this intervening force barred the client's malpractice claim against the first attorney as a matter of law. *Id.*

Note, however, that the involvement of a second attorney on the client's behalf does not always save the original attorney from a malpractice claim. In *Suelthaus & Kaplan, P.C. v. Byron Oil Indus., Inc.*, 847 S.W.2d 873 (Mo. App. E.D. 1992), the court rejected the broad principle that, when there are successive attorneys, the prior attorneys are insulated from liability as a matter of law. There, the defendant law firm argued that two subsequent law firms handled the client's case; therefore, the firm could not be held liable for the client's damages. *Id.* at 877. But the court looked to the facts pleaded and refused to find as a matter of law that the original law firm did not have some causal connection to the client's loss. *Id.*

4. (§2.17) Settlement

In *Baldrige v. Lacks*, 883 S.W.2d 947 (Mo. App. E.D. 1994), the attorneys argued that the client's settlement of the underlying action acted as a bar to liability for malpractice. The attorneys argued that public policy should bar the client's claim because it constituted a collateral attack on the adequacy of a settlement. *Id.* at 951–52. The attorneys argued that this type of case would encourage clients to settle lawsuits, only to turn around and sue their attorneys in hopes of recovering additional monies. *Id.* at 952.

But the court rejected the attorneys' argument, balancing the public policy of discouraging collusion with that of allowing clients to recover for their attorneys' fault as long as clients are able to establish all of the elements of a legal malpractice claim.

Id. Thus, the court refused to create a bright-line rule that protects attorneys from liability when their clients settle underlying actions. *Id.*

In *Ryan v. Ford*, 16 S.W.3d 644, 645 (Mo. App. W.D. 2000), the court held that a child was not estopped from suing the attorneys who represented the child in underlying personal injury and wrongful death actions even though the probate and civil courts found that the settlements in the underlying actions were reasonable. *Id.* The court reasoned that a prior determination that the settlements were reasonable did not address the issue of whether the attorneys had adequately represented the child in the suits or whether the attorneys had a conflict of interest that prejudiced the child. *Id.* The appellate court held that, in determining that the settlements were reasonable, the trial court acted on the assumption that the child's attorneys were adequately representing the child's interests and approved the settlements in light of the known facts. *Id.* at 649. But if, as the child alleged, the attorneys made material misrepresentations and had a conflict of interest that prevented them from acting in the child's best interests, the trial court may not have found the settlements to be reasonable. *Id.*

In settlement cases in which the defendant lawyer has been discharged or is otherwise no longer involved, a different standard applies. Courts give settlements greater scrutiny when a subsequent attorney has settled the underlying case. *Heartland Stores, Inc. v. Royal Ins. Co.*, 815 S.W.2d 39, 42 (Mo. App. W.D. 1991); *Lange v. Marshall*, 622 S.W.2d 237, 239 (Mo. App. E.D. 1981). Thus, "where the underlying claim has been voluntarily settled, the courts are going to require a strong showing that the settlement was justified before the court will be willing to pass the cost of the settlement on to the [attorney] defendant." *Williams v. Preman*, 911 S.W.2d 288, 297 (Mo. App. W.D. 1995), *overruled on other grounds*, *Klemme v. Best*, 941 S.W.2d 493 (Mo. banc 1997).

The stricter scrutiny in the class of cases involving a second attorney is justified by the factor of speculation injected into the client's malpractice claim. *Williams*, 911 S.W.2d at 297. When the client is on notice of the attorney's alleged negligence and attributes the loss to the attorney, speculation over the client's damages results because of the client's voluntary settlement of the case. *Id.* In the case of a subsequent settlement, the original

attorney has no control over the negotiations or the settlement. *Id.* Therefore, the client must prove that the settlement was necessary to mitigate the damages resulting from the alleged negligence before responsibility for the loss is passed on to the first attorney. *Id.*

The court in *Williams* warned that litigation clients should not assume that justification for a subsequent settlement is self-proving. *Id.* at 298. Rather, “[i]n most cases, part of the showing of justification must include evidence that, because of defendant attorney’s negligence, plaintiff would have lost the underlying litigation if it had been tried.” *Id.* It is not enough to say that the defendant attorney’s negligence made a favorable result less likely. *Id.*

While a client may bring a malpractice action based on the settlement of the underlying action, an alleged inability to settle does not constitute causation in a legal malpractice action. Consider *Novich v. Husch & Eppenberger*, 24 S.W.3d 734, 736–37 (Mo. App. E.D. 2000), in which the client argued that he could have settled his underlying action for less than his liability in the case absent his attorney’s fault. The court again pointed to public policy in rejecting this argument. *Id.* The court explained that to allow this type of speculation would encourage collusion between plaintiffs and defendants in the underlying action because the client may well prefer to obtain a recovery from the attorney involved in the case, particularly when the defendant in the underlying action is insolvent. *Id.*

5. (§2.18) Criminal Representation Cases

To assert a claim for legal malpractice following a criminal conviction, the courts require the client to first allege and establish that the attorney’s actions prevented an acquittal. *Johnson v. Schmidt*, 719 S.W.2d 825, 826 (Mo. App. W.D. 1986). Therefore, as a preliminary action, the client must be successful in securing post-conviction relief, or any claim of legal malpractice is barred under collateral estoppel. *Id.* This holds true even when the client accepts a plea bargain because the guilty plea acts as an admission of guilt and collateral estoppel bars the client from bringing a legal malpractice action based on the possibility of an acquittal. *State ex rel. O’Blennis v. Adolf*, 691 S.W.2d 498, 503 (Mo. App. E.D. 1985).

When a client brought a legal malpractice action against an attorney for malpractice in the post-conviction appeal process, the client was required to show that the appeal would have been successful but for the attorney's fault. *Laws v. O'Brien*, 718 S.W.2d 615, 617 (Mo. App. E.D. 1986). Moreover, when the alleged misconduct was corrected and the appeal went forward, the client was deemed not to have incurred any damages, which is an essential element of a legal malpractice claim. *Id.*

D. (§2.19) Damages

The elements of causation and damages are closely linked. To maintain a malpractice action based on the attorney's conduct of the client's litigation matter, the client must plead and prove that the underlying claim would have been successful but for the attorney's negligence, thereby proving damages and causation. *See*:

- *Mogley v. Fleming*, 11 S.W.3d 740, 747 (Mo. App. E.D. 2000)
- *Baldrige v. Lacks*, 883 S.W.2d 947, 954 (Mo. App. E.D. 1994)
- *Bross v. Denny*, 791 S.W.2d 416, 421 (Mo. App. W.D. 1990)
- *Brown v. Adams*, 715 S.W.2d 940 (Mo. App. W.D. 1986)
- *Lange v. Marshall*, 622 S.W.2d 237, 238 (Mo. App. E.D. 1981)

In the non-litigation context, the client must establish that the adverse result was caused by the attorney's negligence. *Steward v. Goetz*, 945 S.W.2d 520, 532 (Mo. App. E.D. 1997). In either context, the client must show some loss or injury. *Id.* at 531.

The measure of damages in a malpractice action is calculated by the sum the client would have received but for the attorney's negligence. *Steward*, 945 S.W.2d at 532. In a malpractice claim based on the attorney's conduct of the client's litigation matter, the measure of damages is determined by the damages available to the client in the underlying action. *See generally O'Neal v. Agee*, 8 S.W.3d 238, 241 n.4 (Mo. App. E.D. 1999); *Greening v. Klamen*, 652 S.W.2d 730, 734 (Mo. App. E.D. 1983); *Baldrige*, 883 S.W.2d at 954. In the non-litigation context, the measure is the sum the client would have profited, recovered, or earned absent the attorney's negligence. *Steward*, 945 S.W.2d at 532–33.

The client may be required to prove damages by expert testimony. *Williams v. Preman*, 911 S.W.2d 288, 297 (Mo. App. W.D. 1995). Indeed, except in "clear and palpable" cases, expert testimony is

generally required to establish the client's damage claim. *Baldrige*, 883 S.W.2d at 954; *Steward*, 945 S.W.2d at 533.

Nominal damages are insufficient to sustain a legal malpractice action. The Supreme Court has held that "mere nominal damage" is insufficient to sustain a claim. *Nat'l Hollow Brake Beam Co. v. Bakewell*, 123 S.W. 561, 565 (Mo. 1909); *see also Heartland Stores, Inc. v. Royal Ins. Co.*, 815 S.W.2d 39, 42 (Mo. App. W.D. 1991) (a lawyer's failure to file a directed verdict motion at the close of the evidence did not cause any damage because any resulting damage was speculative as the case was settled); *Buch v. Holliday*, 803 S.W.2d 56, 60 (Mo. App. E.D. 1990) (a claim against a lawyer for intentional breach of fiduciary duty and conflict of interest was dismissed when there were no allegations of a causal connection between the conflict and the damages claimed).

E. (§2.20) Punitive Damages

Punitive damages are available to a plaintiff in a legal malpractice action under certain circumstances. *Briggs v. King*, 714 S.W.2d 694, 695 (Mo. App. W.D. 1986). A punitive damage instruction is properly given when there is evidence of wantonness or bad motive on the attorney's part. *Bross v. Denny*, 791 S.W.2d 416, 422 (Mo. App. W.D. 1990).

But punitive damages are not a matter of right, and it is within the trial court's discretion whether to instruct the jury on punitive damages. *Id.* Before punitive damages may be awarded, the evidence supporting the claim must meet the "clear and convincing" standard of proof. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. banc 1996).

In *Bross*, the court refused to instruct the jury on punitive damages when the client alleged a lack of diligence on the attorney's part. *Bross*, 791 S.W.2d 416. The court explained that the attorney was generally trying to procure the best settlement for the client and, therefore, was not guilty of disregarding his client's interest such that punitive damages would be appropriate. *Id.*

Punitive damages are generally not available under a breach of contract theory unless the breach is an independent and willful tort. *Greening v. Klamen*, 652 S.W.2d 730, 734 (Mo. App. E.D. 1983). Therefore, if the legal malpractice action is based on the attorney's

breach of contract, the client will also have to meet this additional burden to recover punitive damages. *Id.*

III. (§2.21) Breach of Fiduciary Duty as a Separate Cause of Action

A fiduciary relationship exists between an attorney and the client. *Jo B. Gardner, Inc. v. Beanland*, 611 S.W.2d 317, 320 (Mo. App. W.D. 1980); *Resolution Trust Corp. v. Gibson*, 829 F. Supp. 1121, 1128 (W.D. Mo. 1993). This relationship is “highly fiduciary” and requires a very high degree of fidelity and good faith on the attorney’s part. *In re Oliver*, 285 S.W.2d 648, 655 (Mo. banc 1956).

In *Arana v. Koerner*, 735 S.W.2d 729 (Mo. App. W.D. 1987), the court recognized a cause of action against an attorney for breach of fiduciary duty or constructive fraud, separate and distinct from a claim for legal malpractice. The court held that when an attorney intentionally commits acts of misconduct during the client’s representation, there is a viable claim for either breach of fiduciary duty or constructive fraud. *Id.* at 735.

The Supreme Court addressed an attorney’s liability for breach of fiduciary duty in *Donahue v. Shughart, Thompson & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. banc 1995). In *Donahue*, the plaintiffs were the intended beneficiaries of a will and alleged that the attorneys had failed to properly draft documents. *Id.* at 626. The plaintiffs pleaded claims for both legal malpractice and breach of fiduciary duty. *Id.* The court noted that if a fiduciary relationship existed, it arose from the attorney-client relationship. *Id.* at 628. Therefore, the breach of duty was dependent on the existence of attorney negligence rather than on a breach of trust. *Id.* at 629. The court held that the breach of fiduciary duty was nothing more than a claim for legal malpractice restated and, therefore, dismissed the client’s breach of fiduciary duty claim. *Id.* at 629–30.

The court considered an attorney’s alleged breach of fiduciary duty in *Williams v. Preman*, 911 S.W.2d 288 (Mo. App. W.D. 1995). The client alleged that the attorney executed a false affidavit by making statements contrary to the client’s best interests after the attorney-client relationship had terminated. *Id.* at 301. The court interpreted *Donahue* as holding that, when an attorney breaches a duty to a client during the representation, the client has a viable claim for legal malpractice rather than for a breach of fiduciary duty. *Id.* But the

Williams court held that, when the representation is terminated before the breach of trust, there is a viable claim for a breach of fiduciary duty. *Id.*

Finally, in *Klemme v. Best*, 941 S.W.2d 493 (Mo. banc 1997), the Supreme Court again addressed these issues and discussed the appropriate interpretation of the court's earlier decision in *Donahue*. In *Klemme*, the Court identified the five elements of a claim for breach of fiduciary duty or constructive fraud:

1. An attorney-client relationship
2. Breach of a fiduciary obligation by the attorney
3. Proximate causation
4. Damages to the client
5. No other recognized tort encompassing the facts alleged

Id. at 496. Proof of intent, however, is not required. *Id.*

The Court explained that the fifth element for a breach of fiduciary duty claim embraced its prior holding in *Donahue*. When the alleged breach can be characterized as both a breach of fiduciary duty and legal malpractice, the exclusive remedy is legal malpractice. *Klemme*, 941 S.W.2d at 496. But the Court held that the rule in *Donahue* does not bar a claim for breach of fiduciary duty or constructive fraud against an attorney arising out of the client's representation as long as the breach was independent of the alleged legal malpractice. *Klemme*, 941 S.W.2d at 496.

The Court then overruled *Williams* to the extent that it limited viable claims for breach of fiduciary duty to actions taking place outside the boundaries of the attorney-client relationship. *Klemme*, 941 S.W.2d at 496. The Court also overruled the *Arana* decision, which limited claims for breach of fiduciary duty to intentional misconduct by attorneys in representing their clients. *Klemme*, 941 S.W.2d at 496.

IV. (§2.22) Statute of Limitations

Section 516.120(4), RSMo 2000, provides the limitations period for legal malpractice actions. The statute requires clients to bring their legal malpractice claims within five years. *Wilson v. Lodwick*, 96 S.W.3d 879, 882 (Mo. App. W.D. 2001); *Heintz v. Swimmer*, 922 S.W.2d 772, 775 (Mo. App. E.D. 1996).

The statute of limitations is an affirmative defense that must be specifically pleaded. *Heintz*, 922 S.W.2d at 774. Missouri law requires the party asserting the statute of limitations to plead the specific statutory section relied on. *Id.* Bare averments that the action is barred by the applicable statute of limitations are insufficient to preserve the issue. *Id.* at 774–75.

A. (§2.23) Accrual of the Cause of Action

Section 516.100, RSMo 2000, governs application of the five-year statute of limitations. Section 516.120(4), RSMo 2000; *Fischer v. Browne*, 586 S.W.2d 733, 736–37 (Mo. App. W.D. 1979). Section 516.100 provides in pertinent part:

the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

Under § 516.100, the statute of limitations for legal malpractice actions begins to run once the fact of damage becomes capable of ascertainment. *Klemme v. Best*, 941 S.W.2d 493, 497 (Mo. banc 1997); *Brower v. Davidson, Deckert, Schutter & Glassman, P.C.*, 686 S.W.2d 1, 4 (Mo. App. W.D. 1984). The test for whether an action is capable of ascertainment is an objective one to be determined by the court as a matter of law. *See*:

- *Klemme*, 941 S.W.2d at 497
- *Murray v. Fleischaker*, 949 S.W.2d 203, 206 (Mo. App. S.D. 1997)
- *M & D Enters., Inc. v. Wolff*, 923 S.W.2d 389, 394 (Mo. App. S.D. 1996)
- *Carr v. Anding*, 793 S.W.2d 148, 150 (Mo. App. E.D. 1990)
- *Anderson v. Griffin, Dysart, Taylor, Penner & Lay, P.C.*, 684 S.W.2d 858, 861 (Mo. App. W.D. 1984)

This determination may be made by way of summary disposition. *Dixon v. Shafton*, 649 S.W.2d 435, 440 (Mo. banc 1983). *But see Chicago Title Ins. Co. v. Jackson, Brouillette, Pohl & Kirley, P.C.*, 930 S.W.2d 22, 25 (Mo. App. W.D. 1996) (if contradictory conclusions can be drawn from the evidence as to when the cause of action accrued, the question should be submitted to the jury).

Under § 516.100, damage is sustained and capable of ascertainment whenever the damage is such that it can be discovered or made known. *See*:

- *Laiben v. Roberts*, 936 S.W.2d 220, 222 (Mo. App. E.D. 1996)
- *Jordan v. Willens*, 937 S.W.2d 291, 294 (Mo. App. W.D. 1996)
- *M & D Enters., Inc.*, 923 S.W.2d at 394
- *Heintz*, 922 S.W.2d at 775
- *Lehnig v. Bornhop*, 859 S.W.2d 271, 273 (Mo. App. E.D. 1993)
- *Carr*, 793 S.W.2d at 150
- *Zero Mfg. Co. v. Husch*, 743 S.W.2d 439, 441 (Mo. App. E.D. 1987)

The client's cause of action will accrue for purposes of the statute of limitations when the client is aware of the facts constituting the alleged malpractice but ignorant of the possibility that a cause of action exists. *Anderson*, 684 S.W.2d at 861 (citing *Chem. Workers Basic Union v. Arnold Savings Bank*, 411 S.W.2d 159 (Mo. banc 1966)).

The fact of the damage, however, does not need to actually be discovered or ascertained. *Carr*, 793 S.W.2d at 150. Nor must the amount or the extent of the alleged damage be ascertainable. *Laiben*, 936 S.W.2d at 222; *Dixon v. Shafton*, 649 S.W.2d 435, 440 (Mo. banc 1983). Rather, the courts look to the point when the client could have first successfully maintained a malpractice action. *Id.*

The principal cases addressing the accrual of legal malpractice actions under § 516.100 demonstrate that the courts approach the accrual of actions against attorneys on a case-by-case basis for purposes of determining the application of the statute of limitations. The holdings in the various cases are not easy to reconcile. But as a general rule, the more aware the client is of the injury from the attorney's alleged malpractice, the more likely the cause of action will be held to have accrued for purposes of the statute of limitations.

In *Dixon*, the Supreme Court of Missouri held that the statute of limitations began to run as soon as the client suffered some damage. The attorney informed his clients in January 1973 that he had mistakenly advised them to sign a contract containing an oppressive clause that he had failed to note. *Dixon*, 649 S.W.2d at 437. In February 1973, the clients retained new counsel, and in 1975, suit was brought by other parties to the contract. *Id.* In May 1978, the clients filed a legal malpractice claim against the first attorney. *Id.*

On appeal, the Supreme Court held that the statute of limitations began to run no later than February 1973. *Id.* at 438. The Court explained that, as of February 1973, the clients were aware of a substantial claim against them and suffered damage to the extent that they had to hire new counsel. *Id.*

The court of appeals has summarized the holding of the Supreme Court in *Dixon* in these terms: “The lesson of *Dixon* is that the statute of limitations on a malpractice claim against a lawyer begins running when the clients become aware of the facts constituting the alleged malpractice, realize they are facing the claim by reason thereof, and sustain damage.” *Bormaster v. Baldrige*, 723 S.W.2d 533, 540 (Mo. App. S.D. 1987). Thus, when the client expends money for attorney fees in realization that the client is subjected to harm or exposed to a claim, the statute of limitations for a malpractice action begins to run. *Wilson v. Lodwick*, 96 S.W.3d 879, 884 (Mo. App. W.D. 2002).

But the “capable of ascertainment” test is applied in a different manner when a layperson-expert relationship exists. *Anderson*, 684 S.W.2d at 862. In malpractice cases, the courts have refused to hold that an action has accrued when the client’s ignorance of the cause of action against the attorney is caused by the action or inaction of the attorney on whom the client is relying. *Id.* at 861; *M & D Enters., Inc.*, 923 S.W.2d at 397.

In *Anderson*, the attorney argued that the client’s malpractice action accrued when a default judgment was entered against the client. *Anderson*, 684 S.W.2d at 861. But the court held that the malpractice action accrued much later, namely, when the client first learned of the default judgment at the time his wages were garnished. *Id.* at 862. The court pointed out that on seven occasions the attorney had received papers from the trial court or opposing counsel and failed to contact his client. *Id.* at 861. Unlike the clients in *M & D Enters., Inc.* and *Dixon*, the client in *Anderson* was unaware that he had been injured as a direct result of the attorney’s actions.

In *Delp v. Doe*, 895 S.W.2d 91 (Mo. App. E.D. 1995), the court held that a malpractice cause of action did not accrue for purposes of the statute of limitations until actual damages were sustained. There, the client’s personal injury action was dismissed without prejudice for failure to prosecute in June 1988. *Id.* at 93–94. Under the savings statute, § 516.230, RSMo 2000, the statute of limitations for her claim expired in June 1989. *Delp*, 895 S.W.2d 93–94. The plaintiff filed a malpractice action against her attorneys in August 1993. *Id.*

The court held that the client's cause of action for legal malpractice accrued when her time for filing the personal injury claim under the savings statute expired. *Id.* The court explained that the client's payment of court costs associated with the dismissal of her claim in June 1988 was not sufficient to begin the running of the statute of limitations on her malpractice claim. *Id.* Instead, the court held that the client first suffered damages when the time for filing her personal injury claim lapsed under the savings statute. *Id.* at 94.

Consider also *Day v. DeVries & Assocs., P.C.*, 98 S.W.3d 92, 93–94 (Mo. App. W.D. 2003), in which the attorneys met with their client on October 14, 1998. At the meeting, the client signed a statement at the attorneys' request confirming that he had falsified a key document in his lawsuit and that his attorneys were unaware that the document was falsified when they submitted it to the trial court. *Id.*

At the meeting, the attorneys also informed the client that they were immediately removing themselves from the case, despite the fact that there was a hearing scheduled the next day. *Id.* The attorneys did agree to negotiate a settlement before the hearing, and the client signed the settlement the next day. *Id.* But the settlement's terms did not favor the client and required the client to terminate all litigation against the underlying defendant. *Id.*

The court of appeals held that the client's malpractice action accrued when he signed the incriminating statement and the attorneys informed him that they would be withdrawing from the case. *Id.* at 95–96. The court explained that the attorneys' withdrawal on the day before the hearing compromised the status of the client's litigation, leaving him only the choice of securing new counsel within the day or agreeing to unfavorable settlement terms. *Id.* at 96. This, the court found, was less than the full benefit of the attorneys' service for which the client had bargained. *Id.* The court characterized the client's subsequent settlement of the claims as an aggravation of the legal injury suffered at the initial meeting with his attorneys. *Id.*

Other examples illustrating when damages have been held capable of ascertainment in legal malpractice cases are as follow:

- *Lehnig v. Bornhop*, 859 S.W.2d 271 (Mo. App. E.D. 1993)—damages capable of ascertainment when the clients received a letter from the Internal Revenue Service disallowing their tax deduction after their attorney had recommended an investment in a tax shelter

- *Chicago Title Ins. Co. v. Jackson, Brouillette, Pohl & Kirley, P.C.*, 930 S.W.2d 22 (Mo. App. W.D. 1996)—damages capable of ascertainment when the recipient of a law firm’s opinion letter learned it had a possible claim for negligent misrepresentation and incurred attorney fees as a result
- *Klemme v. Best*, 941 S.W.2d 493 (Mo. banc 1997)—damages capable of ascertainment when the client became aware that his attorney was not working for the result desired and, therefore, hired another attorney
- *Jordan v. Willens*, 937 S.W.2d 291 (Mo. App. W.D. 1996)—damages capable of ascertainment when the client learned that the time to appeal had lapsed following the attorney’s failure to file an appeal
- *Laiben v. Roberts*, 936 S.W.2d 220 (Mo. App. E.D. 1996)—damages capable of ascertainment when the client knew there was a claim for damage for some amount

B. (§2.24) Instances in Which the Statute of Limitations May Be Tolled

The statute of limitations may be tolled in certain circumstances. Unlike actions against healthcare providers, in actions against attorneys the existence of an ongoing attorney-client relationship does not toll the statute. *Zero Mfg. Co. v. Husch*, 743 S.W.2d 439, 441–42 (Mo. App. E.D. 1987). But imprisonment and fraudulent concealment have been held to do so.

In *Jepson v. Stubbs*, 555 S.W.2d 307 (Mo. banc 1977), the Supreme Court held that the statute of limitations for a legal malpractice claim was tolled while the client was imprisoned. *Id.* The client sued his attorney for legal malpractice in the course of the attorney’s representation of the client against a charge of violating the Military Selective Service and Training Act. *Jepson*, 555 S.W.2d at 309. The attorney advised the client that there were no defenses to the charges and, as a result, the client pleaded guilty. *Id.* The client served 18 months in prison. *Id.* Three years after his release, the client consulted another attorney, who informed him that there were viable defenses to the charges. *Id.* Six years after his release from prison, and 2 years after he learned of the original attorney’s malpractice, the client filed a malpractice action against the first attorney. *Id.*

The Supreme Court held that: “One actually imprisoned or physically restrained is deprived of freedom of action. He cannot look after his affairs. It would be a denial of the equal protection of the law if one so restrained were not exempted from the operation of the general statute of limitations.” *Id.* at 310–11. But the client’s imprisonment did not toll the statute of limitations for a sufficient period of time to permit his malpractice action to proceed. *Id.* at 311. Once the client was released from prison, his damages were capable of ascertainment, regardless of whether he actually knew of the damage at that time; thus, the tolling of the statute of limitations ended on the date he was released from prison. *Id.* at 312–13.

Fraudulent concealment may also toll the statute of limitations for legal malpractice actions. *M & D Enters., Inc. v. Wolff*, 923 S.W.2d 389, 394 (Mo. App. S.D. 1996). This tolling factor is derived from § 516.280, RSMo 2000, which provides: “If any person, by absconding or concealing himself, or by any other improper act, prevents the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented.”

Fraudulent concealment is inapplicable if the client knows or should have known of the cause of action’s existence. *Id.*; *see also Carr v. Anding*, 793 S.W.2d 148, 150 (Mo. App. E.D. 1990) (holding that the client’s ignorance of the cause of action against the attorney may toll the statute of limitations if the client’s ignorance is solely because of the attorney’s action or non-action upon which the client relies).

In addition, an attorney may be estopped from claiming the statute of limitations as a defense if the attorney induced the client to delay in bringing a malpractice claim until after the statute’s expiration. *M & D Enters., Inc.*, 923 S.W.2d at 400. But courts will seldom hold a party estopped to plead the statute of limitations unless that party has made positive efforts to avoid the bringing of a suit or to mislead the claimants. *Id.*

V. (§2.25) Other Defenses

Attorneys have available to them all of the defenses that would have been available to the defendant in the underlying action. *Lewis v. Barnes Hosp.*, 685 S.W.2d 591, 594 (Mo. App. E.D. 1985). An overview of other defenses available to attorneys in malpractice actions follows.

A. (§2.26) Alternative Remedy Doctrine

In a malpractice action based on the attorney's conduct of the client's litigation matter, the client must plead and prove that the attorney's negligence proximately caused damages in the underlying action. *Mogley v. Fleming*, 11 S.W.3d 740, 747 (Mo. App. E.D. 1999). Damages in such cases are calculated on the basis of what the client would have received in the underlying action but for the attorney's alleged malpractice. *Baldrige v. Lacks*, 883 S.W.2d 947, 954 (Mo. App. E.D. 1994).

When the underlying action remains pending, the client's malpractice action is "premature." *Bray v. Brooks*, 41 S.W.3d 7, 16 (Mo. App. W.D. 2001); *Eddleman v. Dowd*, 648 S.W.2d 632, 633 (Mo. App. E.D. 1983). In such cases, there is no way to ascertain the client's damages. The client may yet be successful in the underlying action and never suffer any damages because of the attorney's alleged malpractice. *Cain v. Hershewe*, 760 S.W.2d 146, 149 (Mo. App. S.D. 1988).

In *Cain*, the client charged his attorneys with malpractice for their alleged failure to pursue a claim against two other attorneys. As the client had brought his own lawsuits against the two attorneys, which remained pending at the time of his malpractice action, the trial court entered summary judgment for the attorneys. The court of appeals affirmed, explaining:

There is a second reason why the defendants cannot now be held liable for failing to pursue the claim against Wilson and Scott. The record before us indicates that the underlying suits against Wilson and Scott remain pending. Cain may yet recover in those suits and may never suffer any damages. Thus, Cain cannot presently prove any damages flowing from the defendants' professional negligence and his suit against these defendants is premature.

Id. at 149; *see also Smith v. Chatfield*, 797 S.W.2d 508, 510 (Mo. App. W.D. 1990) (legal malpractice action will not lie when a will contest provides a complete remedy); *Williams v. Bryan, Cave, McPheeters, McRoberts*, 774 S.W.2d 847, 848–49 (Mo. App. E.D. 1989) (accord).

Note, however, that the alternative remedies doctrine will not afford a complete defense in every case. If the remedy is incomplete and would serve only to mitigate the client's damages, a cause of action against the attorney may be stated. *Bross v. Denny*, 791 S.W.2d 416, 419 (Mo. App. W.D. 1990).

The alternative remedies doctrine does not give an attorney a right of intervention in the underlying action or the right to exercise the client's alternative remedy. *Lewis v. Barnes Hosp.*, 685 S.W.2d 591, 594 (Mo. App. E.D. 1985). Thus, an attorney has no right to intervene to bring an appeal from an adverse judgment against the client when the client has elected not to do so. *Id.*

B. (§2.27) Comparative and Contributory Fault

The defense of contributory negligence may be available in legal malpractice actions when economic damages are claimed. The court of appeals has held that comparative fault does not apply in economic loss cases. *See*:

- *Roskowske v. Iron Mountain Forge Corp.*, 897 S.W.2d 67, 73 (Mo. App. E.D. 1995)
- *Chicago Title Ins. Co. v. Mertens*, 878 S.W.2d 899, 902 (Mo. App. E.D. 1994)
- *Murphy v. City of Springfield*, 738 S.W.2d 521, 530 (Mo. App. S.D. 1987)

For example, in *Miller v. Ernst & Young*, 892 S.W.2d 387, 388 n.1 (Mo. App. E.D. 1995), an accounting malpractice case, the court of appeals held that, in cases involving only economic damages, contributory negligence remains an absolute defense.

Attorneys in legal malpractice actions have raised the defense of contributory fault. But the Supreme Court of Missouri has yet to decide the issue.

In *London v. Weitzman*, 884 S.W.2d 674, 678 (Mo. App. E.D. 1994), and *Williams v. Preman*, 911 S.W.2d 288, 303–04 (Mo. App. W.D. 1995), attorneys argued that their clients' contributory negligence was a complete bar to the malpractice claims against them, but the issue was not reached by the appellate court in the two cases. In *Blackstock v. Kohn*, 1998 WL 726263 (Mo. App. E.D. 1998) (not reported in S.W.2d), the court held that contributory fault was a complete bar in a legal malpractice case when only economic losses were claimed. But on transfer, the Supreme Court affirmed the trial court's judgment for the attorney on other grounds and, thus, did not reach the issue. *Blackstock v. Kohn*, 994 S.W.2d 947, 951 (Mo. banc 1999); *see also Tureen v. Ziercher & Hocker, P.C.*, 92 S.W.3d 159 (Mo. App. E.D. 2002) (trial court did not abuse its discretion in submitting contributory negligence instruction in a legal malpractice action).

C. (§2.28) Attorney Is Not Liable for Unsuccessful Trial Strategy

Courts will not hold an attorney liable based on a trial strategy, even if the attorney's strategy later proved ineffective. In *In re I.B.*, 48 S.W.3d 91, 100 (Mo. App. W.D. 2001), the court held that an attorney was not liable for failing to take action that the client's father repeatedly requested her to take because the attorney reasonably believed that the requested action would be imprudent.

D. (§2.29) Attorney Is Not Liable for an Error in Judgment on a Controverted Point of Law

"A lawyer is not liable in damages to his client for a mere error in judgment on a legal proposition concerning which enlightened legal minds may fairly differ." *Williams v. Preman*, 911 S.W.2d 288, 304 (Mo. App. W.D. 1995) (citing *James Carr's Executrix v. Glover*, 70 Mo. App. 242, 247 (E.D. 1897)); see also *Gabbert v. Evans*, 166 S.W. 635, 638 (Mo. App. S.D. 1914) (an error of judgment upon controverted, uncertain, or doubtful points of law does not render a lawyer liable for damages resulting from the error). The appropriate test is whether the services that the lawyer provided were of the same degree of diligence that is required of other lawyers. *Williams*, 911 S.W.2d at 304.

VI. Other Theories of Attorney Liability

A. (§2.30) Malicious Prosecution

Malicious prosecution claims against attorneys fall under the "exceptional circumstances" rule discussed in §2.8 above. *Romeo v. Jones*, 86 S.W.3d 428, 432 (Mo. App. E.D. 2002). Non-clients are permitted to bring actions against attorneys for malicious prosecution, but they must meet higher standards of proof to maintain their claims than they would in cases against nonattorney defendants. In particular, the law treats the requisite elements of lack of probable cause, malice, and termination of the earlier litigation differently in malicious prosecution actions against attorneys.

As a general rule, attorneys, when acting on their clients' behalf, are not subject to malicious prosecution claims unless they possess *actual knowledge* that their client's claims are groundless. *Henderson v. Cape Trading Co.*, 289 S.W. 332, 336 (Mo. 1926). If attorneys act on

facts given to them by their client, believing those facts to be true, and if those facts, if true, would constitute probable cause for instituting the action, the attorneys are free from liability as a matter of law. *Linn v. Moffitt*, 73 S.W.3d 629, 634 (Mo. App. E.D. 2002). Similarly, attorneys who act after conducting their own investigation are not liable for malicious prosecution if their acts are performed in good faith and they have an honest purpose of protecting their client's interests. *Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co.*, 931 S.W.2d 166, 180 (Mo. App. W.D. 1996).

1. (§2.31) Elements of a Malicious Prosecution Action

The law disfavors malicious prosecution actions. Courts require “strict and clear proof” of all elements that make up the cause of action. *Holley v. Caulfield*, 49 S.W.3d 747, 750 (Mo. App. E.D. 2001); *Zahorsky v. Griffin, Dysart, Taylor, Penner & Lay, P.C.*, 690 S.W.2d 144, 151 (Mo. App. W.D. 1985). In a malicious prosecution case, the plaintiff has the burden to plead and prove the following six elements:

1. The commencement of an earlier suit or prosecution
2. Instigation of the suit or prosecution by the defendant
3. Absence of probable cause
4. Malice
5. Termination of the earlier action in the plaintiff's favor
6. Damage to the plaintiff

See:

- *State ex rel. Police Ret. Sys., St. Louis v. Mummert*, 875 S.W.2d 553, 555 (Mo. banc 1994)
- *Burnett v. Griffith*, 769 S.W.2d 780, 783–84 (Mo. banc 1989)
- *Linn v. Moffitt*, 73 S.W.3d 629, 633 (Mo. App. E.D. 2002)
- *Holley*, 49 S.W.3d at 750–51
- *Joseph H. Held & Assocs., Inc. v. Wolff*, 39 S.W.3d 59, 62–63 (Mo. App. E.D. 2001)
- *Muegler v. Berndsen*, 964 S.W.2d 459, 462 (Mo. App. E.D. 1998)

2. (§2.32) Statute of Limitations for a Malicious Prosecution Action

The statute of limitations for filing a malicious prosecution action is two years from the date the cause of action accrues. Section 516.140, RSMo 2000; *Linn v. Moffitt*, 73 S.W.3d 629, 633 (Mo. App. E.D. 2002); *Buch v. Holliday*, 803 S.W.2d 56, 59 (Mo. App. E.D. 1990). The action accrues at the termination of the underlying lawsuit. *Id.* “Termination is effected by a final judgment on the merits, a dismissal by the court with prejudice, or by abandonment of the action.” *Linn*, 73 S.W.3d at 633 (quoting *Arana v. Reed*, 793 S.W.2d 224, 226 (Mo. App. W.D. 1990)).

3. (§2.33) Commencement of Earlier Suit or Prosecution

The underlying action is considered to be “commenced” for purposes of a malicious prosecution claim where the “original action was begun by civil summons alone, where the process results in some damage, even if only the expense of defense.” *Koury v. Straight*, 948 S.W.2d 639, 641–42 (Mo. App. W.D. 1997) (holding that no action commenced when the court denied a motion for leave to file counterclaim out of time because no counterclaim was filed). In the case of ordinary civil litigation, “commencement” means an action begun by a summons served under the requirements of the law. *Id.*

4. (§2.34) Initiated by Defendant

The plaintiff in a malicious prosecution case must prove that the defendant initiated the underlying lawsuit or prosecution. *See*:

- *Burnett v. Griffith*, 769 S.W.2d 780, 783–84 (Mo. banc 1989)
- *Langdon v. Wight*, 861 S.W.2d 723, 725–25 (Mo. App. E.D. 1993)
- *Bellington v. Clevenger*, 228 S.W.2d 817, 821–22 (Mo. App. W.D. 1950)

The plaintiff must prove that the defendant “stimulated, promoted or encouraged the specific action taken.” *Burnett*, 769 S.W.2d at 784. “Mere passive knowledge of or acquiescence in the acts of another is not sufficient.” *Id.*

5. (§2.35) Without Probable Cause

The plaintiff in a malicious prosecution action must prove that the defendant instigated the underlying lawsuit without probable cause. *Haswell v. Liberty Mut. Ins. Co.*, 557 S.W.2d 628, 633 (Mo. banc 1977); *Henderson v. Cape Trading Co.*, 289 S.W. 332, 334 (Mo. 1926). The Supreme Court of Missouri has defined probable cause as: “a belief in the facts alleged, based on sufficient circumstances to reasonably induce such belief by a person of ordinary prudence in the same situation, plus a reasonable belief by such person that under such facts the claim may be valid under the applicable law.” *Haswell*, 557 S.W.2d at 633; *see also*:

- *State ex rel. Police Ret. Sys. of St. Louis v. Mummert*, 875 S.W.2d 553, 555 (Mo. banc 1994)
- *Linn v. Moffitt*, 73 S.W.3d 629, 634 (Mo. App. E.D. 2002)
- *Jim Toyne, Inc. v. Adams*, 916 S.W.2d 381, 382 (Mo. App. W.D. 1996)
- *J. E. Dunn Jr. & Assocs., Inc. v. Total Frame Contr., Inc.*, 787 S.W.2d 892, 895 (Mo. App. W.D. 1990)
- *Zahorsky v. Griffin, Dysart, Taylor, Penner & Lay, P.C.*, 690 S.W.2d 144, 151–52 (Mo. App. W.D. 1985)

The defendant in a malicious prosecution case is responsible for the facts known when initiating the lawsuit as well as for all other pertinent facts that could have been ascertained through due diligence. *Haswell*, 557 S.W.2d at 634. But probable cause is not dependent on what may have ultimately been proved in the underlying case. *Holley v. Caufield*, 49 S.W.3d 747, 751 (Mo. App. E.D. 2001). If it appears that a reasonably prudent person would have acted similarly under the circumstances, the existence of probable cause is established. *Id.*

Similarly, a judgment or finding for the plaintiff in the underlying action is conclusive evidence of probable cause and bars a malicious prosecution action as a matter of law. *Joseph H. Held & Assocs., Inc. v. Wolff*, 39 S.W.3d 59, 63 (Mo. App. E.D. 2001). But the converse is not always true. “A bare showing that defendants voluntarily dismissed the civil suit or prosecution complained of, without other facts in evidence tending to show the existence of want of probable cause does not discharge plaintiff’s burden of proof, . . .” *Henderson*, 289 S.W. at 335.

The standard of proof differs when an attorney is the defendant in a malicious prosecution action. An attorney is allowed to act on the statement of facts provided by the client. *Id.* Therefore, the attorney is not required to search for additional information. *Buch v. Holliday*, 803 S.W.2d 56, 60 (Mo. App. E.D. 1990); *Zahorsky v. Griffin, Dysart, Taylor, Penner & Lay, P.C.*, 690 S.W.2d 144, 154 (Mo. App. W.D. 1985).

The Supreme Court of Missouri has held that, when the existence of an attorney-client relationship is shown and it appears that the attorney acted with the client's authority, solely in the client's interest, and without knowledge of fraud, collusion, or sinister intent to injure or deceive a third party, the attorney should not be held liable for malicious prosecution, except on proof that the attorney has actual knowledge that the underlying action was groundless. *Henderson*, 289 S.W. at 336; *Linn*, 73 S.W.3d at 634–35; *Zahorsky*, 690 S.W.2d at 153. The existence of evidence contrary to the position taken by the attorney is not sufficient to support the inference that the attorney was unreasonable in the belief that the claim was valid. *Linn*, 73 S.W.3d at 635.

In *Zahorsky*, the court held that, while the definition of probable cause in *Haswell* applies to all defendants, including attorneys, evidence that would be sufficient to establish want of probable cause for the client would not necessarily establish want of probable cause for the client's attorneys. *Zahorsky*, 690 S.W.2d at 154 (citing *Henderson*, 289 S.W. at 336). The *Zahorsky* court explained that the reasonableness of an attorney's belief is measured by whether the attorney has actual knowledge that the claim is groundless. *Zahorsky*, 690 S.W.2d at 154.

6. (§2.36) With Malice

The malice required to support a malicious prosecution claim against an attorney differs from the malice required in an action against a non-attorney. *Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co.*, 931 S.W.2d 166, 179 (Mo. App. W.D. 1996). Unlike a claim against a non-attorney defendant, which requires a showing of "malice in law," a malicious prosecution action against an attorney defendant requires proof of "legal malice." *Id.* at 179–80.

Legal malice refers to bad faith conduct, *malo amino*, general wickedness, and a depraved inclination to do harm. *Burnett v. Griffith*, 769 S.W.2d 780, 786 (Mo. banc 1989). Restated, in cases

requiring proof of legal malice, the attorney must have initiated the action for a purpose other than securing the proper adjudication of the client's claim. *Proctor v. Stevens Employment Servs., Inc.*, 712 S.W.2d 684, 686 (Mo. banc 1986); *Macke Laundry Serv. Ltd. P'ship*, 931 S.W.2d at 180.

In contrast, a malicious prosecution claim against a non-attorney requires only a showing of malice in law, which can be inferred from the facts establishing a lack of probable cause. *Proctor*, 712 S.W.2d at 686–87. Malice in law exists when there is proof of an act intentionally done without the honest belief that it was lawful when done. *Macke Laundry Serv. Ltd. P'ship*, 931 S.W.2d at 180.

The distinction between the two types of malice—malice in law and legal malice—is significant. *Id.* at 180. A malicious prosecution action against an attorney requires proof of the attorney's mental state and a showing of improper motives. *Id.*

The test to establish legal malice on an attorney's part depends on whether the attorney acted on the statement of facts provided by the client or independently obtained the necessary information. *Id.* at 179–80. When the attorney acted solely on the facts provided by the client, malice is shown when the attorney knew that:

- there was no probable cause for the prosecution; and
- the client was acting solely through improper motives.

Id. at 180.

In contrast, when the attorney did not rely on information from the client, malice is established when the attorney:

- knew that there was no probable cause for the prosecution; and
- was acting through improper motives.

Id. Thus, attorneys who act after their own investigation are not liable for malicious prosecution if their acts are performed in good faith and they have an honest purpose of protecting their clients' interests. *Id.*; see also *Henderson v. Cape Trading Co.*, 289 S.W. 332, 335–36 (Mo. 1926).

7. (§2.37) Terminated in Plaintiff's Favor

The underlying lawsuit must be terminated in the malicious prosecution plaintiff's favor. "Termination in favor of the party bringing the malicious prosecution action means the final disposition of the cause forming the basis of the action in favor of the party against whom the original action was brought and adversely to the party bringing the original action." *Joseph H. Held & Assocs., Inc. v. Wolff*, 39 S.W.3d 59, 63 (Mo. App. E.D. 2001). When a suit is dismissed without prejudice because of the underlying plaintiff's desire to abandon the claim, the underlying suit is considered to be terminated in the malicious prosecution plaintiff's favor. *Zahorsky v. Barr, Glynn & Morris, P.C.*, 693 S.W.2d 839, 843 (Mo. App. W.D. 1985). This rule is based on the premise that meritorious claims are not usually abandoned. *Id.*

But when the defendant in a malicious prosecution action is an attorney, the courts treat this element differently. As a matter of law, attorneys cannot be held liable for malicious prosecution when their clients decide to abandon a claim. *Id.*

B. (§2.38) Abuse of Process

In an abuse of process claim, a plaintiff must plead and prove that:

- the defendant made an illegal, improper, perverted use of process, a use neither warranted nor authorized by the process;
- the defendant had an improper purpose in exercising such illegal, perverted, or improper use of process; and
- damages resulted.

See:

- *Duvall v. Lawrence*, 86 S.W.3d 74, 84–85 (Mo. App. E.D. 2002)
- *Romeo v. Jones*, 86 S.W.3d 428, 532–34 (Mo. App. E.D. 2002)
- *Teefey v. Cleaves*, 73 S.W.3d 813, 818 (Mo. App. W.D. 2002)
- *Muegler v. Berndsen*, 964 S.W.2d 459, 462 (Mo. App. E.D. 1998)
- *Brown v. Mullarkey*, 632 S.W.2d 507, 510 (Mo. App. E.D. 1982)

If the action is confined to its regular and legitimate function in relation to the cause of action at issue, there is no abuse of process, even if the plaintiff in the underlying action had an ulterior motive in bringing the action or if the plaintiff knowingly brought the suit on an unlawful claim. *Duwall*, 86 S.W.3d at 84–85.

The test is whether the process has been used to accomplish some unlawful end or to compel the opposite party to take collateral action the party could not be compelled to do legally. *Duwall*, 86 S.W.3d at 85. In other words, “no abuse of process occurs in the beginning of a lawsuit if the suit is confined to its regular and legitimate function of pursuing the cause of action pleaded in the petition; it is where the suit is brought for a collateral purpose that there is abuse of process.” *Id.* (quoting *R. Rowland & Co. v. Smith*, 698 S.W.2d 48, 51 (Mo. App. E.D. 1985)).

C. (§2.39) Partnership Liability

When the partners of a law partnership sign a contract, each partner becomes personally liable under the contract. *8182 Md. Assocs., L.P. v. Sheehan*, 14 S.W.3d 576, 582 (Mo. banc 2000). The liability of a partner who signed the contract is not terminated by withdrawal from the partnership before the contract’s breach. *Id.* Moreover, dissolution of the partnership does not in itself discharge the existing liability of any partner. *Id.* Withdrawing partners retain personal liability after their withdrawal, even for contingent obligations. *Id.*

The same principles govern malpractice liability. In *Thompson ex rel. Thompson v. Gilmore*, 888 S.W.2d 715, 716 (Mo. App. S.D. 1994), the court held that the defendant attorneys remained liable to the plaintiff even though their firm had dissolved and some of the firm’s members had formed a new law firm. *Id.* The plaintiff who sued the partnership for negligent misrepresentation in the plaintiff’s underlying tort action could therefore sue the members of the new law firm who were involved in the underlying claim. *Id.*

In *Eisenberg v. Redd*, 38 S.W.3d 409 (Mo. banc 2001), the Supreme Court held that, when a client releases a law firm from future actions for negligent misrepresentation, the release does not necessarily protect all attorneys within the firm from personal liability. The Court explained that a partnership does not exist separate from the individual partners. *Id.* at 411. Therefore, the Court construed the release to include only those partners of the law firm who were members of the firm at the time the release was signed. *Id.* The Court

held that the release did not include two attorneys involved in the case—one who had resigned from the firm before the release was signed, and another who was “of counsel” rather than a partner in the firm. *Id.*

These rules of partnership liability demonstrate the importance of the business form utilized by attorneys practicing in a law firm. Alternative organizational structures are available that eliminate vicarious liability, including professional corporations and limited liability companies.

Attorneys practicing in a professional corporation are not liable for the conduct of other law firm employees in which they did not personally participate, unless they were negligent in appointing, supervising, or participating in the activity in question with the culpable employee. Section 356.171.1, RSMo 2000. In addition, the liability of shareholders in a professional corporation is no greater than that of shareholders of a corporation organized under Missouri’s general corporation law, Chapter 351, RSMo. Section 356.171.3.

The liability of attorneys practicing law in limited liability companies is also limited. Under § 347.065, RSMo 2000, a lawyer who is a member or a manager, or both, of a limited liability company is not liable—solely by reason of being a member or manager—for the company’s liability, whether arising in contract or tort or for the acts or omissions of any other member or manager of the company.