

CHAPTER 24 Legal Malpractice

Introduction

This chapter provides basic jury instructions for the types of legal malpractice claims that most often are litigated; specifically, those sounding in negligence and breach of fiduciary duty. If a breach of contract claim is brought against an attorney, *see Leyba v. Whitley*, 1995-NMSC-066, ¶ 12, 120 N.M. 768, 907 P.2d 172, any instructions necessary to present the claim to the jury will need to be prepared. *See* Chapter 8 (Contracts).

As indicated, the law distinguishes between a legal malpractice claim based on an attorney's negligence and a legal malpractice claim based on an attorney's breach of fiduciary duty. "Legal malpractice based on negligence concerns violations of the standard of care; whereas legal malpractice based upon breach of [a fiduciary] duty concerns violations of a standard of conduct." *Richter v. Van Amberg*, 97 F. Supp. 2d 1255, 1261 (D.N.M. 2000) (quoting *Kirkpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1290 (Utah Ct. App. 1996)); *accord Spencer v. Barber*, 2013-NMSC-010, ¶ 17, 299 P.3d 388. "It is possible to have professional negligence without a breach of fiduciary duty, and vice-versa." *Richter*, 97 F. Supp. 2d at 1261.

The chapter includes instructions setting forth the elements for legal malpractice claims sounding in negligence and breach of fiduciary duty as well as corresponding duty and definitional instructions. The chapter does not include a causation instruction; in most cases UJI 13-305 NMRA should suffice to instruct the jury on that element. The chapter includes a general damages instruction, UJI 13-2414 NMRA, which provides the overall measures of damages that typically are recoverable in a legal malpractice case. As the instruction indicates, additional instructions should be given for any specific element(s) of damages that the jury is asked to consider. *See* Chapter 18 (Damages). The chapter does not include a special verdict form; forms of verdict in other UJI chapters may be used to prepare the verdict form. *See, e.g.*, Chapter 22 (Verdicts).

As the preceding considerations indicate, the instructions that should be given in a legal malpractice case are not entirely contained in this chapter. Other UJIs and non-UJIs relating to the claims and defenses in a case may be used as appropriate. *See* Rule 1-051 NMRA; *see also Mac Tyres, Inc. v. Vigil*, 1979-NMSC-010, ¶ 17, 92 N.M. 446, 589 P.2d 1037 (modified UJIs or non-UJIs may be given when no applicable instruction exists). Additionally, if a case involves the issue of whether an attorney breached a duty to a third-party beneficiary in a non-wrongful death context or the issue of collectability of damages, instructions regarding those issues will need to be prepared. The UJI-Civil Committee concluded that the law in New Mexico regarding the issues is insufficiently settled to draft UJIs that address the issues.

Sample sets of jury instructions in hypothetical legal malpractice cases appear in the appendix to the chapter. The examples are meant to serve as a guide for assembling a set of instructions in a legal malpractice case.

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