

1 **13-2414. Legal malpractice; measure of damages; general instruction.**

2 The damages that may be recovered in a legal malpractice action are those which the  
3 plaintiff would have [recovered] [avoided] in the absence of the lawyer’s [negligence] [and] [or]  
4 [breach of fiduciary duty]. [The damages that may be recovered also include expenses that the  
5 plaintiff incurred to avoid or reduce the loss caused by the lawyer’s [negligence] [and] [or] [breach  
6 of fiduciary duty].] You will receive additional instructions regarding how you are to determine  
7 the damages the plaintiff would have [recovered] [avoided] in the absence of the lawyer’s  
8 [negligence] [and] [or] [breach of fiduciary duty].

9 USE NOTES

10 This instruction should be used to provide the jury with an overall understanding of the  
11 appropriate measure of damages in a legal malpractice case. To the extent that it applies, the  
12 bracketed language should be included in the damages instruction.

13 [Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or  
14 after December 31, 2017.]

15 **Committee commentary.** — Generally speaking, “the measure of damages [in a legal malpractice  
16 case] is the difference between what the plaintiff’s pecuniary position is and what it should have  
17 been had the attorney not erred.” See 3 R. Mallen, *Legal Malpractice* § 21:8 at 16 (2016). The  
18 measure may vary depending upon the facts of a case, including the nature of the work that the  
19 attorney undertakes on behalf of a client. *Id.* at 16-17.

20 Ordinarily, substantive law will determine which elements of damage are recoverable in a case.  
21 The jury will need to be separately instructed on each of the elements. *Collins ex rel. Collins v.*  
22 *Perrine*, 1989-NMCA-046, 108 N.M. 714, 778 P.2d 912, illustrates those points. In that case, the  
23 plaintiffs’ lawyer negligently prosecuted and advised the plaintiffs to settle the medical

1 malpractice case that [he] [the lawyer] had filed on their behalf. The appropriate measure of  
2 damages was the amount of the judgment that the plaintiffs could have recovered in their medical  
3 malpractice case but for the lawyer’s negligence. The elements of damage on which the jury was  
4 instructed therefore included the nature, extent, and duration of the injury, pain and suffering, and  
5 loss of enjoyment of life suffered by the patient who had been injured through medical malpractice.  
6 There may be cases in which counsel will need to draft damages instructions to address a  
7 developing area of the law or a case-specific element or elements of damages.  
8 Other jury instructions that may be given to the jury may impact the actual amount of damages  
9 that a legal malpractice plaintiff recovers. Examples of such instructions include comparative fault  
10 and mitigation of damages.  
11 Consequential or special damages also may be recoverable. “Consequential damages are  
12 compensation for those additional injuries that are a proximate result of the attorney’s negligence  
13 or otherwise wrongful conduct, which do not flow directly from or concern the objective of the  
14 retention.” 3 *Mallen*, § 21:1 at 4. Ordinarily, substantive law will determine which consequential  
15 damages are recoverable. *See id.* §§ 21:17-21:24 (discussing the recoverability and non-  
16 recoverability of various types of consequential damages). [~~*First Nat’l Bank v. Diane, Inc.*~~] *First*  
17 *Nat’l Bank of Clovis v. Diane, Inc.*, 1985-NMCA-025, 102 N.M. 548, 698 P.2d 5, illustrates those  
18 points. In that case, a party named as a defendant brought a cross-action for legal malpractice  
19 against [his] their own attorney, whose negligent legal advice had resulted in an action being  
20 brought against the them. In [his] their capacity as a cross-plaintiff, absent an applicable exception  
21 to the general rule that each party must pay [his] their own legal fees, the party was not allowed to  
22 recover the attorney’s fees and costs that [he] they incurred in bringing the cross-action. In [his]

1 their capacity as a defendant, the party was allowed to recover reasonable attorney's fees that [~~he~~  
2 they had incurred in defending against litigation resulting from [~~his~~] their attorney's malpractice.  
3 [Adopted by Supreme Court Order No. 17-8300-013~~], effective for all cases pending or filed on~~  
4 ~~or after December 31, 2017~~]; as amended by Supreme Court Order No. S-1-RCR-2025-00126.]