# **Index**

#### **ABANDONMENT**

Medical malpractice, § 2.7

### ACCOUNTANTS MALPRACTICE

Generally, § 18.1-18.12

As to clients

Generally, § 18.6-18.10

Damages issues, § 18.8

Fiduciary status, § 18.7

In pari delicto defense, § 18.10

Other defenses, § 18.10

Statute of limitations, § 18.9

Unresolved issues, § 18.6

As to non-clients

Chapter 93A liability, § 18.3, 18.12

Negligent misrepresentation, § 18.11

Basic principles, § 18.2, 18.3

Chapter 93A liability, § 18.3, 18.12

Compared to legal malpractice, § 18.3

Damages issues, § 18.8

Defenses, § 18.10

Discovery rule, § 18.9

Fiduciary status, § 18.7

In pari delicto defense, § 18.10

Joint and several liability, § 18.8

M.G.L.A. c. 93A liability, § 18.12

Negligent misrepresentation, § 18.11

Peer review, § 18.8

Profession, accountant as, § 18.1

Quasi judicial immunity defense, § 18.10

Statute of limitations, § 18.9

Unfair or deceptive practices, § 18.12

Unresolved issues, § 18.6

Willful ignorance of information, § 18.11

### ACCRUAL OF CAUSE OF ACTION

Discovery Rule, this index

# **ACTUARIAL TABLES**

Medical malpractice damages calculation, § 11.4

#### **ACUPUNCTURISTS**

Malpractice, § 12.17

#### **ADMISSIONS**

Medical malpractice, § 2.6, 4.1, 10.14

### ADVERTISING LEGAL SERVICES

Legal malpractice, § 14.14, 16.31, 17.4

### AGENTS AND AGENCY

Agency principles applicable to legal malpractice, § 15.1, 15.6, 16.1, 16.15, 16.54, 17.1, 17.2

Medical malpractice liability, § 9.1, 9.7

### **AMBULANCE**

Jury damages instruction, necessary ambulance expenses, § 10.14

Screening tribunal non-coverage, § 5.2

Special jury verdict instruction, § 11.8

Verdict itemization, necessary ambulance expenses, § 11.2

### AMERICAN HOME ASSURANCE CO., DE VAUX v.

De Vaux v. American Home Assurance Co., this index

#### **ANIMALS**

Veterinarian malpractice, § 12.19

#### ANTI-DUMPING ACT

Medical malpractice, § 9.11

### APPARENT OR OSTENSIBLE AUTHORITY

Medical malpractice, § 9.7

# **APPEAL**

Medical malpractice screening tribunal decision, § 5.12, 5.13, 5.15

# **APPRAISERS**

Generally, § 18.20

Accountant's appraisal of stock, § 18.10

#### **ARCHITECTS**

Design Professionals Malpractice, this index

### ASSIGNMENT

Legal malpractice claim, § 16.24

# ATTORNEY-CLIENT RELATIONSHIP

Generally, § 16.1, 16.2, 16.18

Achieving professional conscientiousness, § 14.15

Adversary system of justice, generally, § 14.9

Advertising legal services, § 14.14, 16.31, 17.4

Bankruptcy, effect of, § 16.12

Business entities as clients, § 16.8

Cacciola v. Nellhaus, § 15.11

Canons of Ethics, relationship to attorney's duty of care, § 15.7, 15.8, 16.37

Case method thinking of attorneys, § 15.3

Changes in society and culture, § 14.11

Changes in the legal profession, § 14.14

Index-2

#### INDEX

#### ATTORNEY-CLIENT RELATIONSHIP—Cont'd

Changing attitudes toward the legal system, § 14.11

Class actions, § 16.17

Close corporations as clients, § 16.8

Competitiveness, § 14.13, 14.14

Complexity of the law, § 14.5, 14.13

Complexity of the lawyer's role, § 14.6

Consultations

Another attorney, § 16.16

Another attorney on client's behalf, § 16.16

Potential client inquiries, § 16.5, 16.14

Contingent fee agreements, medical malpractice cases, § 11.7

Continued decline in individual responsibility, § 14.11

Continuing representation doctrine, § 16.74

Contractual relationship, § 16.3 et seq.

Corporations as clients, § 15.11, 16.8, 16.20, 17.2

De Vaux v. American Home Assurance Co., § 15.6

Death, extinction (non-survival) of cause of action by, § 16.86, 17.5

Decedents' estates, § 16.11

Decline in individual responsibility, continued, § 14.11

Decline in respect for institutions, § 14.11

Demands for immediate analysis and response about legal problem, § 14.12

Devastation of professional life by malpractice claim, § 14.15

Divorce proceedings, § 16.14, 16.20

Dual representation

Business entities, § 16.8

Insurance defense, § 16.9

Duty of zealous representation, § 14.6, 14.9

Engagement by written agreement, § 16.3

Estate planning, § 16.10, 16.20, 16.23

Ethical standards

Breach of duty of care, § 16.37

Liability for violations, § 17.6

Express contract, § 16.3

Fees. Attorney's Fees, this index

Fiduciary liability, § 17.1

Fishman v. Brooks, § 15.7

Guarantee of favorable results, § 16.3

Implied contract, § 15.6, 16.4, 16.5, 16.14

Informal discussions, § 16.5, 16.14

Insurance defense, § 16.9

Judgmental immunity (lawyer's judgment), § 15.1, 16.33, 16.80

Legal Malpractice, this index

Limiting objectives of representation, § 16.6

Media's promotion and distortion of public perception, § 14.11, 14.12

M.G.L.A. c 93A, liability under, § 17.3-17.5

Miller v. Mooney, § 15.10

Mortgage transactions, § 16.13, 16.20

#### ATTORNEY-CLIENT RELATIONSHIP—Cont'd

Non-engagement letters, § 16.5

Origin of attorney's duty of care, § 16.2

Partnership as client, § 16.8, 16.20

Preliminary consultations with attorney, § 16.5, 16.14

Promising specific result, § 16.3

Prospective clients, implied contract with, § 16.5, 16.14

Ratification of unauthorized acts, § 16.84

Referrals to another attorney for assistance, § 16.15

Reliance on existence of, § 15.6, 16.4, 16.19-16.21

Role of lawyers, historically, § 14.2

Scope of representation, § 16.6

Self image, § 14.2

Specialists, knowledge and skill

Generally, § 14.5

Enhanced standard of care, § 16.30-16.32

Fishman v. Brooks, § 15.7, 15.8

Terminating, § 16.6

Transformation from learned profession with high ethical standards to a commercial activity, § 14.14

Trusts. Wills and trusts, below

Vicarious liability, § 17.2

Who is the client, § 16.7 et seq.

Wills and trusts, § 16.10, 16.11, 16.20, 16.23

Worker's compensation claimants, § 16.20

Written agreement, advantages and disadvantages of, § 16.3

# ATTORNEY'S DUTY TO COURT

Attorney's oath, § 14.6, 17.6

#### ATTORNEY'S FEES

Legal malpractice

Burden of proof, billing disputes, § 16.3

Damages, § 14.9, 16.61, 16.66

Enhancing risk of malpractice claim, § 14.14, 15.7

Fee-splitting, § 16.15

Medical malpractice, § 11.7

### **BANKRUPTCY**

Attorney-client relationship, effect on, § 16.12

#### **BATTERY**

Medical malpractice, § 3.8, 3.11

### **BEST JUDGMENT RULE**

Medical malpractice, standard of care, § 10.11

#### **BIAS**

Expert witnesses, § 7.5, 10.7

Index-4

#### **BLOOD SHIELD STATUTE**

Generally, § 13.5

### **BONDS**

Medical malpractice screening tribunal. Medical Malpractice, this index

### **BREACH OF CONTRACT ACTIONS**

Design professionals malpractice, § 18.15 Legal Malpractice, this index Medical Malpractice, this index

# **BRONCHOPROVOCATION TEST**

Consent form, § 3.14

### BROOKS, FISHMAN v.

Fishman v. Brooks, this index

#### **BURDEN OF PROOF**

Legal Malpractice, this index Medical Malpractice, this index

### **BUSINESS CONSULTANTS**

Malpractice conduct, generally, § 18.22

### **BUSINESS PRACTICE OR CUSTOM**

Medical malpractice, § 3.10

#### CACCIOLA v. NELLHAUS

Legal malpractice, § 15.11

### **CAUSATION**

Legal Malpractice, this index Medical Malpractice, this index

### **CHARITABLE IMMUNITY**

Medical malpractice defense, § 8.12-8.14

### CHARITABLE ORGANIZATION

Employees of, § 8.14 Immunity, § 8.12-8.14 Qualifying as, § 8.13

#### **CHIEF OF MEDICAL STAFF**

Medical malpractice liability, § 9.5

### **CHILDREN OR MINORS**

Legal malpractice, statute of limitations, § 16.75 Medical Malpractice, this index

# **CHIROPRACTORS**

Malpractice, § 12.12

#### **CLASS ACTIONS**

Attorney-client relationship, § 16.17

#### **CLERGY**

Generally, § 18.23

# **CLOSE CORPORATIONS**

Legal Malpractice, this index

### **COLLATERAL BENEFITS RULE**

Medical malpractice, § 11.6

### **COLLATERAL ESTOPPEL**

Legal malpractice defense, § 16.85

### COLLECTIBILITY OF UNDERLYING JUDGMENT OR SETTLEMENT

Legal malpractice, § 16.47, 16.52

# COLUCCI v. ROSEN, GOLDBERG, SLAVET, LEVENSON & WEKSTEIN P.C.

Legal malpractice, § 15.8

### **COMPARATIVE NEGLIGENCE**

Legal malpractice, § 15.1, 16.63, 16.78 Medical malpractice, § 8.11, 10.14

#### **COMPETITIVENESS**

Legal malpractice, § 14.13, 14.14

#### **COMPLAINT**

Medical Malpractice, this index

### **COMPLEXITY OF THE LAW**

Generally, § 14.5, 14.13

### COMPLEXITY OF THE LAWYER'S ROLE

Generally, § 14.6

### **COMPUTERS**

Legal malpractice, computer use competency, § 16.32

#### **CONCEPTION**

Medical malpractice, duty owed to child not yet conceived, § 2.6, 2.8

### CONFIDENTIAL INFORMATION, DISCLOSURE OF

Legal malpractice, § 17.1

Medical malpractice, § 2.6

#### CONSENT

Informed consent doctrine. Medical Malpractice, this index

#### **CONSULTANTS**

Attorney, legal malpractice

Another attorney, attorney consulting with, § 16.16

Potential client consultations, § 16.5, 16.14

Referral to another attorney for assistance, § 16.15

Business consultants, malpractice conduct, generally, § 18.22

Medical malpractice, consultants, negligence and duty of care, § 2.7

Index-6

### CONSUMER PROTECTION, M.G.L.A. C. 93A CLAIMS

Accountants malpractice, § 18.12 Legal malpractice, § 16.76, 17.3-17.5 Medical malpractice, § 2.11

### CONTRACTS

Breach of Contract Actions, this index Legal Malpractice, this index

#### **CONTRIBUTION**

Jury instruction, recommended form, § 10.14
Reduction in damages, legal malpractice, § 16.65
Screening tribunal for medical malpractice, non-consideration of issue, § 5.2

#### COPIES

Medical records, § 6.1, 10.2

### **CORPORATE LIABILITY DOCTRINE**

Medical malpractice, § 9.8

### **CORPORATIONS**

Legal malpractice liability for corporate negligence, § 15.11, 16.8, 16.20, 17.2 Medical malpractice liability for corporate negligence, § 9.4, 9.7, 9.8 Sexual harassment, corporate liability for, § 9.8 Shareholders liability for corporate conduct, § 9.4, 15.11, 17.2

#### **CRIMINAL CONDUCT**

Legal malpractice, criminal defendant below as plaintiff, § 15.1-15.2, 16.46 Medical malpractice, physician's criminal conduct's effect on causation, § 4.4

### **CULTURAL AND SOCIETAL CHANGES**

Legal malpractice risk, creating, § 14.11

### **CUMULATIVE (DUPLICATIVE) DAMAGES**

Legal malpractice, § 16.62

#### **DAMAGES**

Accountants malpractice, § 18.8
Approximation, § 16.49
Arguing dollar amounts to the jury, § 10.11
Attorney's fees, legal malpractice, § 14.9, 16.61, 16.66
Avoidable consequences rule, § 16.64
Breach of contract

Legal malpractice claims, § 16.49 Medical malpractice claims, § 2.10

Charitable immunity, cap on damages, § 8.12-8.14

Comparative Negligence, this index

Contribution

Legal malpractice, § 16.65
Medical malpractice, § 5.2
Cumulative (duplicative) damages, § 16.62
Defense of the action, mishandling, § 16.53

#### DAMAGES—Cont'd

Double damages, § 16.58

Duplicative (cumulative) damages, § 16.62

Emotional distress, § 14.8, 16.60

EMTALA cause of action, § 9.11

ERISA claims, § 9.10

Exemplary damages, § 16.58

Expert testimony, § 16.51

Financial transactions, mishandling, § 16.55

Future damages

Jury instructions, recommended, § 10.14

Proving, § 3.5

Verdict itemization, § 11.2, 11.4

Genetic counseling claims, § 2.8

Governmental immunity, cap on damages, § 8.15

Joint and several liability, § 4.5

Jury instruction, recommended form, § 10.14

Legal Malpractice, this index

Loss of consortium

Arguing dollar amounts to jury, § 10.11

Cap on damages, § 8.12

Jury instruction, recommended form, § 10.14

Sample complaint for negligence and loss of consortium, form, § 2.14

Specific verdict requirement, § 11.1

Statute of limitations, § 8.2

Sterilization procedures claims, § 2.8

Lost profits, § 16.55

Medical Malpractice, this index

M.G.L.A. c. 93A claims, § 17.5

Mitigation of damages, § 10.14, 16.64, 16.79

Negligent legal advice, § 16.56, 16.80

Negligent misrepresentation, § 16.49

Nominal damages, legal malpractice, § 16.57

Pain and Suffering, this index

Postjudgment interest, § 16.59

Prejudgment interest, § 11.5, 16.59

Proof of damages, legal malpractice, § 16.51

Property transactions, mishandling, § 16.55

Prosecution of the action, mishandling, § 16.52

Remote, § 16.49

Settlement, mishandling, § 16.54

Speculative, § 16.49

Sterilization procedures claims, § 2.8

Treble damages, § 16.58

Trial within a trial, § 16.51

#### DE VAUX v. AMERICAN HOME ASSURANCE CO.

Legal malpractice, § 15.6

Index-8

#### **DEATH**

Legal malpractice, extinction (non-survival) of cause of action by death, § 16.86, 17.5

Medical malpractice cases. Medical Malpractice, this index

### **DECEDENTS' ESTATES**

Attorney-client relationship, § 16.11

### **DEFENSES**

Generally, § 16.77

Charitable immunity, § 8.12-8.14

Collateral estoppel, § 16.85

Comparative negligence

Legal malpractice, § 15.1, 16.63, 16.78

Medical malpractice, § 8.11

Death, extinction (non-survival) of cause of action by, § 16.86, 17.5

Emergency and other exemptions from liability, § 8.16, 12.9

Failure of plaintiff to mitigate, § 16.64, 16.79

Governmental immunity, § 8.15

**Immunity** 

Charitable immunity, § 8.12-8.14

Governmental immunity, § 8.15

Judgmental immunity, § 15.1, 16.33, 16.80

Nurse immunities, § 12.9

Qualified immunity, § 8.18

Search warrant, § 8.18

Immunization program defense, § 8.17, 12.9

In pari delicto defense

Accountants malpractice, § 18.10

Legal malpractice defense, § 15.1, 16.82

Judgmental immunity, § 15.1, 16.33, 16.80

Judicial estoppel, § 15.1, 16.24, 16.81

Legal Malpractice, this index

Medical Malpractice, this index

Mitigate, failure of plaintiff to, § 16.64, 16.79

Nurse immunities, § 12.9

Psychiatrists and psychologists immunities, § 12.13

Qualified immunity, § 8.18, 12.9

Ratification, § 16.84

Releases

Legal malpractice, § 15.1, 16.83

Medical malpractice, § 8.19

Res judicata, § 16.85

Search warrant to search vagina, § 8.18

Statute of Limitations, this index

#### **DENTISTS**

Malpractice, § 8.16, 10.3, 12.2

#### **DEPOSITION TO PERPETUATE TESTIMONY**

Medical malpractice, § 6.1

# DESIGN PROFESSIONALS MALPRACTICE

Generally, § 18.13

Basic principles, § 18.1-18.3

Compared to legal malpractice, § 18.3

Contract limitations on professional's duty, § 18.15

Duty of reasonable care, § 18.13, 18.15

Economic loss rule, § 18.16

Negligent misrepresentation, § 18.16, 18.17

Non-client third parties, § 18.17

Statute of limitations, § 18.14

Statute of repose, § 18.14

Third parties, as to non-client, § 18.17

### **DIRECTOR OF HEALTH SERVICES**

Medical malpractice liability, § 9.6

#### DISCLOSURE

Legal malpractice, disclosure of confidential information, § 17.1 Medical Malpractice, this index

#### **DISCOVERY**

Medical Malpractice, this index

#### **DISCOVERY RULE**

Accountants malpractice, § 18.9

Legal malpractice, § 15.4, 15.9, 16.72

Medical malpractice, § 8.3 et seq.

Stockbrokers (investment broker-dealer), § 18.21

### **DISMISS**

Legal malpractice, motions to dismiss, § 16.69

### **DIVORCE**

Legal Malpractice, this index

#### **DOUBLE DAMAGES**

Legal malpractice, § 16.58

### **DRUGS**

Medical Malpractice, this index

### **DUPLICATIVE (CUMULATIVE) DAMAGES**

Legal malpractice, § 16.62

# **ECONOMIC LOSS RULE**

Design professionals malpractice, § 18.16

#### **EDUCATORS**

Generally, § 18.23

Index-10

### INDEX

### ELY, WILLIAMS v.

Williams v. Ely, this index

### **EMERGENCY**

Medical Malpractice, this index

### **EMOTIONAL DISTRESS**

Legal Malpractice, this index

### **EMTALA**

Medical malpractice cause of action, § 9.11

### **ENGINEERS**

Design Professionals Malpractice, this index

#### **ERISA**

Medical malpractice claims, § 9.10

#### **ESTATE PLANNING**

Legal Malpractice, this index

### **ESTOPPEL**

Collateral estoppel defense, § 16.85 Judicial estoppel defense, § 15.1, 16.24, 16.81

### **EVIDENCE**

Medical Malpractice, this index

### **EXEMPLARY DAMAGES**

Legal malpractice, § 16.58

#### **EXPERT WITNESSES**

Legal Malpractice, this index Medical Malpractice, this index

### **EXPRESS ATTORNEY-CLIENT CONTRACT**

Legal malpractice, § 16.3

### **EXTENDED CARE FACILITIES**

Malpractice, § 12.18

### **FEDERAL ACTIONS**

Medical malpractice cases referred to state court for tribunal screening, § 5.14

### FEDERAL PREEMPTION

Medical Malpractice, this index

### FIDUCIARY STATUS

Accountants, § 18.7

Attorneys, § 16.76, 17.1

Business consultants, § 18.22

Insurance brokers/agents, § 18.18

Stockbrokers (investment broker-dealer), § 18.21

#### FINANCIAL INTEREST OF HEALTH CARE PROVIDER

Disclosing, § 3.4

#### FINANCIAL TRANSACTIONS

Legal malpractice, § 16.55

### FIRST AMENDMENT

Advertising legal services, § 14.14

### FISHMAN v. BROOKS

Legal malpractice, § 15.7, 15.8, 16.48, 17.6

### FRAUDULENT CONCEALMENT

Legal malpractice cause of action, § 16.75 Medical malpractice cause of action, § 8.3, 8.10

### **FUTURE DAMAGES**

Damages, this index

### GASTROINTESTINAL ENDOSCOPIC PROCEDURES

Consent form, § 3.13

#### **GENETIC COUNSELING CLAIMS**

Damages, § 2.8

### GI ENDOSCOPIC PROCEDURES

Consent form, § 3.13

### GLIDDEN v. TERRANOVA

Legal malpractice, § 15.5

### GOOD FAITH AND UTMOST LOYALTY

Legal malpractice, § 17.1, 17.4

### GOOD FAITH BUT MISTAKEN JUDGMENT OF ATTORNEY

Legal malpractice, § 15.1, 16.33, 16.80

### **GOVERNMENTAL IMMUNITY**

Medical malpractice defense, § 8.15

#### **GUARANTEE**

Legal malpractice, guarantor of favorable results, § 16.3

### **HEALTH CARE PROXY**

Medical malpractice, § 8.16

#### **HEALTH MAINTENANCE ORGANIZATION (HMO)**

Medical Malpractice, this index

### **HEARSAY**

Medical records, hearsay in, § 10.2 Medical reports, hearsay in, § 10.3, 10.4

# HELICOPTER TRANSPORTATION SERVICES

Screening tribunal non-coverage, § 5.2

#### HENDRICKSON v. SEARS

Legal malpractice, § 15.4

Index-12

### INDEX

#### **HMO**

Medical Malpractice, this index

### HYPOTHETICAL QUESTIONS

Medical malpractice actions, § 7.3, 7.4

#### **IMMEDIACY**

Legal malpractice, demands for immediate analysis and response about legal problem, § 14.12

#### **IMMUNITY**

Defenses, this index

#### **IMMUNIZATION PROGRAM**

Medical malpractice defense, § 8.17, 12.9

### IMPARTIAL MEDICAL EXAMINATION

Medical malpractice actions, § 5.7, 6.3

#### **IMPEACHMENT**

Expert witnesses, medical malpractice, § 7.5

### IMPLIED ATTORNEY-CLIENT RELATIONSHIP

Generally, § 15.6, 16.4, 16.5, 16.14

#### **IMPLIED WARRANTIES**

Blood, § 13.5

# IN PARI DELICTO DEFENSE

Defenses, this index

#### INCAPACITATED PERSONS AS PLAINTIFFS

Legal malpractice, § 16.75

Medical malpractice, § 8.5

#### **INDIGENTS**

Emergency medical care, transfer to another facility, § 9.11

### INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Legal malpractice, § 16.46

#### INFORMAL DISCUSSIONS

Legal malpractice, § 16.5, 16.14

### INFORMED CONSENT DOCTRINE

Medical Malpractice, this index

#### **INSPECTIONS**

Medical records, § 6.1

### **INSURANCE**

Brokers/agents, § 18.18

Charitable organizations, employees of, § 8.14

Collateral benefits rule, § 11.6

Dual attorney-client representation, § 16.9

#### INSURANCE—Cont'd

Legal malpractice

Having professional malpractice insurance, § 14.14

Insurance defense to attorney-client relationship and duty of care owed, § 16.9

Medical Malpractice, this index

Relationship between expert witnesses and insurer, § 7.5, 10.7

### **INSURANCE BROKERS/AGENTS**

Malpractice, generally, § 18.18

### INTEREST ON MONEY

Legal malpractice damages, § 16.59 Medical malpractice damages, § 11.5

# INTERVENING CAUSES

Legal malpractice actions, § 16.39

Medical malpractice actions, § 4.4

### JOINT AND SEVERAL LIABILITY

Medical malpractice, § 4.5

### JUDGMENTAL IMMUNITY

Legal malpractice defense, § 15.1, 16.33, 16.80

### JUDICIAL ADMISSIONS

Medical malpractice, § 7.8

### JUDICIAL ESTOPPEL

Legal malpractice defense, § 15.1, 16.24, 16.81

#### **JURISDICTION**

Medical Malpractice, this index

### **JURY INSTRUCTIONS**

Medical Malpractice, this index

#### **JURY VERDICT**

Medical Malpractice, this index

### LABORATORY REPORTS OF TEST RESULTS

Medical malpractice, § 6.1

### LEARNED INTERMEDIARY DOCTRINE

Medical malpractice, § 12.14, 13.2

#### **LEARNED TREATISES**

Medical Malpractice, this index

#### LEGAL MALPRACTICE

Generally, § 14.1 et seq.

Achieving professional conscientiousness, § 14.15

Adversary system of justice, generally, § 14.9

Advertising legal services, § 14.14, 16.31, 17.4

Advice, negligent legal, § 16.56, 16.80

Annotated primer, § 16.1 et seq.

# LEGAL MALPRACTICE—Cont'd Appellate malpractice, § 15.2 Appreciable harm requirement, § 16.72 Assignability of legal malpractice claim Equitable subrogation, § 16.24 Attorney's fees, § 16.61, 16.66 Avoidable consequences rule, § 16.64 Bankruptcy, effect of, § 16.12 Beginning or novice attorneys, § 14.7, 16.28 Breach of contract cause of action Generally, § 15.1, 16.1 De Vaux v. American Home Assurance Co., § 15.6 Death, extinction (non-survival) of cause of action by, § 15.1, 15.4, 16.86, 17.5 Miller v. Mooney, § 15.10 Promising specific result in representation of client, § 16.3 Breach of duty of care. Duty of reasonable care owed by attorney, below Breach of fiduciary duty, § 17.1 Burden of proof Generally, § 15.1, 16.1, 16.44 Billing disputes, § 16.3 Causation, § 16.39 Collectibility of underlying judgment or settlement, § 16.47 Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein P.C., § 15.8 Criminal defendant below, § 16.46 Damages amount, § 16.49 Fiduciary breach claim, § 17.1 Glidden v. Terranova, § 15.5 Implied attorney-client relationship, § 16.4 Ineffective assistance of counsel claims, § 16.46 M.G.L.A. c. 93A claims, § 17.4, 17.5 Plaintiff as criminal defendant below, § 16.46 Plaintiff was defendant below, § 16.45 Summary judgment motions, § 16.70 Third-party beneficiary claims, § 16.23 Unfair or deceptive practices, § 17.4, 17.5 When plaintiff was defendant below, § 16.45 Williams v. Ely, § 15.9 Business entities as clients, § 16.8 But for, causation, § 16.39 Cacciola v. Nellhaus, § 15.11 Canons of Ethics, relationship to attorney's duty of care, § 15.7, 15.8, 16.37 Case method thinking of attorneys, § 15.3 Cases, survey of, § 15.3 et seq. Causation Generally, § 16.39 et seq. Burden of proof, § 15.1, 15.5, 16.39, 16.44-16.46

Causation—Cont'd

But for, § 16.39

Collectibility of underlying judgment or settlement, § 16.47, 16.52

Evidentiary issues, § 16.42

Expert testimony, use of, § 15.5, 16.41

Intervening, § 16.39

Loss of chance (lost opportunity) doctrine, § 16.48

M.G.L.A. c. 93A claims, § 17.5

Proving, generally, § 16.39 et seq.

Questionable alternative theory of causation, settlement value, § 16.48

Settlement value, § 16.48

Superseding, § 16.39

Transactional situations, § 16.43

Trial within a trial, § 16.40-16.43

Changes in society and culture, § 14.11

Changes in technology, § 14.12

Changes in the law, § 14.13

Changes in the legal profession, § 14.14

Changing attitudes toward the legal system, § 14.11

Children or minors as plaintiffs, statute of limitations, § 16.75

Choice of theory, § 15.1

Class actions, § 16.17

Close corporations

As clients, duty of reasonable care owed by attorney, § 16.8 Shareholder liability, Cacciola v. Nellhaus, § 15.11, 17.2

Collateral estoppel, § 16.85

Collectibility of underlying judgment or settlement, § 16.47, 16.52

Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein P.C., § 15.8

Comparative negligence

Damages reduction, § 16.63

Defense, § 15.1, 16.78

Comparing similarities and differences with other professions, § 18.3

Competitiveness, § 14.13, 14.14

Complexity of the law, § 14.5, 14.13

Complexity of the lawyer's role, § 14.6

Computer use competency, § 16.32

Concealment of cause of action, fraudulent, § 16.75

Consultants, this index

Consumer protection conduct. Unfair or deceptive practices, below

Continued decline in individual responsibility, § 14.11

Continuing representation doctrine, § 16.74

Contracts

Attorney-client contract, § 16.3

Breach of contract cause of action, above

Damages in breach contract cases, proving, § 16.49

Differences between ordinary contracts and attorney-client contracts, § 16.3

Express attorney-client contract, § 16.3

Contracts—Cont'd

Implied attorney-client contract, § 15.6, 16.4, 16.5, 16.14

Third-party beneficiary claims, § 16.23

Contribution, § 16.65

Corporations as clients, § 15.11, 16.8, 16.20, 17.2

Criminal defendant below, plaintiff as, § 15.1, 15.2, 16.46

Cumulative (duplicative) damages, § 16.62

Damages

Generally, § 16.49 et seq.

Advice, negligent legal, § 16.56, 16.80

Approximation, § 16.49

Attorney's fees, § 14.9, 16.61, 16.66

Avoidable consequences rule, § 16.64

Breach of contract, § 16.49

Burden of proof regarding amount, generally, § 16.49

Comparative negligence, § 16.63, 16.78

Contribution, § 16.65

Cumulative (duplicative) damages, § 16.62

Defense of the action, mishandling of, § 16.53

Double damages, § 16.58

Duplicative (cumulative) damages, § 16.62

Emotional distress, § 14.8, 16.60

Exemplary damages, § 16.58

Expert testimony, § 16.51

Financial transactions, mishandling of, § 16.55

Interest on judgment, § 16.59

Lost profits, § 16.55

M.G.L.A. c. 93A claims, § 17.5

Mitigation, § 16.64, 16.79

Negligent legal advice, § 16.56, 16.80

Negligent misrepresentation, § 16.49

Nominal damages, § 16.57

Postjudgment interest, § 16.59

Prejudgment interest, § 16.59

Proof of damages, § 16.51

Property transactions, mishandling of, § 16.55

Prosecution of the action, mishandling of, § 16.52

Reduction

Attorney's fees, § 16.61, 16.66

Comparative negligence, § 16.63, 16.78

Contribution, § 16.65

Mitigation, § 16.64, 16.79

Remote, § 16.49

Rule of avoidable consequences, § 16.64

Settlement, mishandling of, § 16.54

Speculative, § 16.49

# LEGAL MALPRACTICE—Cont'd Damages-Cont'd Treble damages, § 16.58 Trial within a trial, § 16.51 Types of cases, § 16.50 et seq. De Vaux v. American Home Assurance Co., § 15.6 Death, extinction (non-survival) of cause of action by, § 16.86, 17.5 Decline in individual responsibility, continued, § 14.11 Decline in respect for institutions, § 14.11 Defense of the action, mishandling of, § 16.53 Defenses Generally, § 15.1, 16.67 et seq. Appreciable harm requirement, § 16.72 Children or minors as plaintiffs, § 16.75 Collateral estoppel, § 16.85 Comparative negligence of plaintiff, § 15.1, 16.63, 16.78 Continuing representation doctrine, § 16.74 Death, extinction (non-survival) of cause of action by, § 16.86, 17.5 Failure of plaintiff to mitigate, § 16.64, 16.79 Fraudulent concealment of cause of action, § 16.75 In pari delicto, § 15.1, 16.82 Incapacitated persons as plaintiffs, § 16.75 Judgmental immunity, § 15.1, 16.33, 16.80 Judicial estoppel, § 15.1, 16.24, 16.81 Other defenses, generally, § 16.77 Procedural defenses Generally, § 16.68 Dismiss, motions to, § 16.69 Summary judgment motions, § 16.70 Ratification, § 16.84 Release, § 15.1, 16.83 Res judicata, § 16.85 Statute of limitations, below Unfair or deceptive practices, § 16.76, 17.5 Delegation of law-related tasks, § 15.6 Demands for immediate analysis and response about legal problem, § 14.12 Description of "practice of law," § 14.14 Devastation of professional life by malpractice claim, § 14.15 Disclosure of confidential information, § 17.1 Discovery rule Generally, § 16.72 Hendrickson v. Sears, § 15.4 Williams v. Ely, § 15.9 Dismiss, motions to, § 16.69 Divorce proceedings Duty of reasonable care owed by attorney, § 16.14, 16.20 Settlements, Meyer v. Wagner, § 15.12

Double damages, § 16.58

Dual representation

Business entities, § 16.8

Insurance defense, § 16.9

Duplicative (cumulative) damages, § 16.62

Duty of reasonable care owed by attorney

Generally, § 15.2, 16.1 et seq.

Assignment of malpractice claim, § 16.24

Attorney-client relationship, generally, § 16.1, 16.2, 16.18

Bankruptcy, effect of, § 16.12

Breach of duty of care

Generally, § 15.2, 16.1, 16.35 et seq.

Ethical violation as, § 16.37

Expert testimony, need for, § 15.5, 16.38

Proving, § 16.38

Settlements, § 15.1, 16.36

Variety of breaches, § 16.35, 16.36

Business entities as clients, § 16.8

Cacciola v. Nellhaus, § 15.11

Canons of Ethics' relationship to, § 15.7, 15.8, 16.37

Class actions, § 16.17

Close corporations as clients, § 16.8

Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein P.C., § 15.8

Consultations, this index

Contractual relationship, § 16.3 et seq.

Corporations as clients, § 16.8, 16.20, 17.2

De Vaux v. American Home Assurance Co., § 15.6

Decedents' estates, § 16.11

Divorce proceedings, § 16.14, 16.20

Dual representation

Business entities, § 16.8

Insurance defense, § 16.9

Enhanced standard of care, § 16.30-16.32

Estate planning, § 16.10, 16.20, 16.23

Expert testimony

Breach of duty of care, § 15.5, 16.38

Standard of care, § 16.34, 16.38

Express contract, § 16.3

Fiduciary breach, effect on third parties, § 17.1

Fishman v. Brooks, § 15.7, 15.8, 16.48, 17.6

Good faith but mistaken judgment of attorney, § 15.1, 16.33, 16.80

Guarantor of favorable results, § 16.3

Implied contract, § 15.6, 16.4, 16.5

Informal discussions, § 16.5, 16.14

Insurance defense, § 16.9

Limiting objectives of representation, § 16.6

Measuring attorney's performance, § 16.26, 16.27

Meyer v. Wagner, § 15.12

Duty of reasonable care owed by attorney—Cont'd

Miller v. Mooney, § 15.10

Mortgage transactions, § 16.13, 16.20

Negligent misrepresentation claims, § 16.22

Non-client third parties. Third parties, below

Non-engagement letters, § 16.5

Non-litigation attorney, standard of care

applicable to, § 16.29

Origin of attorney's duty, generally, § 15.2, 16.2

Partnership as client, § 16.8, 16.20

Preliminary consultations with attorney, § 16.5, 16.14

Prospective clients, implied contract with, § 16.5, 16.14

Referrals to another attorney, § 16.15

Reliance by third party, § 15.6, 16.4, 16.19-16.21

Scope of representation, § 16.6

Standard of care

Generally, § 15.2, 16.1, 16.25 et seq.

Advertising attorney services, § 16.31

Computer use competency, § 16.32

Enhanced standard of care for specialists, § 16.30-16.32

Establishing standard in particular cases, § 16.34

Expert testimony, § 16.34, 16.38

Good faith but mistaken judgment of attorney, § 15.1, 16.33, 16.80

Judgmental immunity doctrine, § 15.1, 16.33, 16.80

Law school professor's opinion, § 15.7

Legal research competency, § 16.32

Locality component, § 16.27

Marketing of attorney services, § 14.14, 16.31, 17.4

Measuring attorney's performance, § 16.26, 16.27

Meyer v. Wagner, § 15.12

Misleading understatement of standard (''judgmental immunity''), § 16.33, 16.80

Non-litigation attorney, applicability to, § 16.29

Novel or esoteric cases, § 16.28

Novices, § 14.7, 16.28

Possible promotional enhancement for, § 16.31

Specialists, "enhanced" standard of care for, § 16.30-16.32

Statewide standard, § 16.27

Technological enhancement of, § 16.32

Terminology, § 16.26

Types of practice, § 16.29

Which attorneys are the yardstick (the "locality" issue), § 16.27

Williams v. Ely, § 15.9

Technology, enhancement of standard of care, § 16.32

Terminating, § 16.6

Third parties, below

Trusts. Wills and trusts, below

# LEGAL MALPRACTICE—Cont'd Duty of reasonable care owed by attorney—Cont'd Unsettled law, advising about, § 15.9 Who is the client, § 16.7 et seq. Williams v. Ely, § 15.9 Wills and trusts, § 16.10, 16.11, 16.20, 16.23 Worker's compensation claimants, § 16.20 Written agreement, advantages and disadvantages of, § 16.3 Duty of zealous representation, § 14.6, 14.9 Duty to further administration of justice, § 14.6 Economic pressures of young lawyers in law firms, § 14.13 Emotional distress, § 14.8, 16.60 Damages, § 16.60 Risk unavoidable, § 14.8 Emotional turmoil, § 14.8 Enhanced risk, recent causes of, § 14.10-14.14 Enhanced standard of care, § 16.30-16.32 Esoteric or novel cases, § 16.28 Estate planning Miller v. Mooney, § 15.10 Williams v. Ely, § 15.9 Wills and trusts, below Ethical standards violation As evidence of negligence principle, § 16.37 Breach of duty of care, § 16.37, 16.38 Expert witnesses, § 16.37, 16.38, 17.6 Fiduciary breach, § 17.1 Fishman v. Brooks, § 15.7, 17.6 Liability, generally, § 17.6 Transformation from learned profession with high ethical standards to a commercial activity, § 14.14 Evidentiary issues, causation, § 16.42 Exacerbated attitudes toward the legal profession, § 14.11 Exemplary damages, § 16.58 Expert witnesses Generally, § 16.38 Breach of duty of care, § 15.5, 16.38 Breach of duty of care issues, § 16.38 Causation issues, § 15.5, 16.41 Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein P.C., § 15.8 Damages, § 16.51 Ethical violations, § 16.37, 16.38, 17.6 Fiduciary breach claim, § 17.1 Fishman v. Brooks, § 15.7, 15.8, 16.48, 17.6

Glidden v. Terranova, § 15.5 Meyer v. Wagner, § 15.12 M.G.L.A. c. 93A claims, § 17.5 Standard of care, § 16.34, 16.38

Express attorney-client contract, § 16.3

Fiduciary duties, § 17.1

Financial transactions, mishandling of, § 16.55

Fishman v. Brooks, § 15.7, 15.8, 16.48, 17.6

Flood of new legislation, regulations, and judge-made law, § 14.13

Fraudulent concealment of cause of action, § 16.75

Further administration of justice, duty to, § 14.6

Glidden v. Terranova, § 15.5

Good faith and utmost loyalty, § 17.1, 17.4

Good faith but mistaken judgment of attorney, § 15.1, 16.33, 16.80

Guarantor of favorable results, § 16.3

Hendrickson v. Sears, § 15.4

Human error, § 14.3, 16.33

Human weakness, § 14.4

Immediate analysis and response about legal problem, demands for, § 14.12

In pari delicto defense, § 15.1, 16.82

Incapacitated persons as plaintiffs, § 16.75

Individual responsibility, continued decline in, § 14.11

Ineffective assistance of counsel claims, § 16.46

Informal discussions, § 16.5, 16.14

Insurance, having professional liability insurance, § 14.14

Insurance defense, § 16.9

Intentional interference with valuable opportunity cause of action, § 15.11

Interest on judgment, § 16.59

Intervening causes, § 16.39

Judgmental immunity, § 15.1, 16.33, 16.80

Judicial estoppel, § 15.1, 16.24, 16.81

Law school professor's opinion, § 15.7

Legal research competency, § 16.32

Limited liability company, vicarious liability, § 17.2

Limited liability partnership, vicarious liability, § 17.2

Locality component, § 16.27

Loss of chance (lost opportunity) doctrine, § 16.48

Lost profits, § 16.55

Loyalty, duty, § 17.1, 17.4

Marketing of attorney services, § 14.14, 16.31, 17.4

Measuring attorney's performance, § 16.26, 16.27

Media's promotion and distortion of public perception, § 14.11, 14.12

Meyer v. Wagner, § 15.12

M.G.L.A. c. 93A claims, § 17.3-17.5

Miller v. Mooney, § 15.10

Minimizing risk, § 14.15, 15.1, 16.3, 16.67

Mortgage transactions, § 16.13, 16.20

Motions

Dismiss, motion to, § 16.69

Summary judgment motions, § 16.70

Negligence cause of action

Generally, § 15.1 et seq.

Basic prerequisites, § 15.1

Burden of proof, above

Duty of reasonable care owed by attorney, above

Fiduciary liability compared, § 17.1

Negligent misrepresentation claims

Damages in breach contract cases, proving, § 16.49

Duty of reasonable care owed by attorney, § 16.22

Nominal damages, § 16.57

Non-litigation attorney, standard of care

applicable to, § 16.29

Non-malpractice bases for attorney liability

Ethical standards, liability under, § 17.6

Fiduciary liability, § 17.1

M.G.L.A. c 93A, liability under, § 17.3-17.5

Vicarious liability, § 17.2

Novel or esoteric cases, § 16.28

Novice or beginning attorneys, § 14.7, 16.28

Overview of liability

Generally, § 15.1 et seq.

Annotated primer, § 16.1 et seq.

Cacciola v. Nellhaus, § 15.11

Cases, survey of, § 15.3 et seq.

Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein P.C., § 15.8

De Vaux v. American Home Assurance Co., § 15.6

Ethical standards, liability under, § 17.6

Fiduciary liability, § 17.1

Fishman v. Brooks, § 15.7, 15.8, 16.48, 17.6

Glidden v. Terranova, § 15.5

Hendrickson v. Sears, § 15.4

Meyer v. Wagner, § 15.12

M.G.L.A. c 93A, liability under, § 17.3-17.5

Miller v. Mooney, § 15.10

Non-malpractice bases for attorney liability, § 17.1 et seq.

Survey of cases, § 15.3 et seq.

Varieties of claims, § 15.2

Vicarious liability, § 17.2

Williams v. Ely, § 15.9

Partners, liability of, § 15.9, 15.11, 17.2

Partnership as client, § 16.8, 16.20

Postjudgment interest, § 16.59

Prejudgment interest, § 16.59

Probability of stumbling into malpractice claim, § 14.15

Promising specific result in representation of client, § 16.3

Property transactions, mishandling of, § 16.55

Prosecution of the action, mishandling of, § 16.52

Prospective clients

Consultations with attorney, § 16.5, 16.14

Implied contract with, § 16.5

Proving causation, generally, § 16.39 et seq.

Public's awareness of legal matters growing, § 14.11

Public's increasingly negative attitude towards the legal profession, § 14.11

Ratification of unauthorized acts, § 16.84

Referrals to another attorney, § 16.15

Release, § 15.1, 16.83

Remote damages, § 16.49

Res judicata, § 16.85

Risk unavoidable

Generally, § 14.1 et seq.

Achieving professional conscientiousness, § 14.15

Adversary system, § 14.9

Advertising legal services, § 14.14

Beginners' mistakes, § 14.7

Changes in society and culture, § 14.11

Changes in technology, § 14.12

Changes in the law, § 14.13

Changes in the legal profession, § 14.14

Changing attitudes toward the legal system, § 14.11

Competitiveness, § 14.13, 14.14

Complexity of the law, § 14.5, 14.13

Complexity of the lawyer's role, § 14.6

Continued decline in individual responsibility, § 14.11

Decline in individual responsibility, continued, § 14.11

Decline in respect for institutions, § 14.11

Demands for immediate analysis and response about legal problem, § 14.12

Devastation of professional life by malpractice claim, § 14.15

Duty of zealous representation, § 14.6

Economic pressures of young lawyers in law firms, § 14.13

Emotional turmoil, § 14.8

Exacerbated attitudes toward the legal profession, § 14.11

Flood of new legislation, regulations, and judge-made law, § 14.13

Having professional liability insurance, § 14.14

Human error, § 14.3, 16.33

Human weakness, § 14.4

Individual responsibility, continued decline in, § 14.11

Insurance, need for having professional liability insurance, § 14.14

Intensified competition among lawyers, § 14.13

Law, changes in the law, § 14.13

Law's complexity, § 14.5

Lawyer's role, complexity of, § 14.6

Legal profession, changes in the profession, § 14.14

Limits of zealous representation, § 14.6

Looking back and forward, § 14.15

Risk unavoidable—Cont'd

Media's promotion and distortion of public perception, § 14.11, 14.12

Minimizing risk, § 14.15

Novice attorneys, § 14.7

Probability of stumbling into malpractice claim, § 14.15

Public's awareness of legal matters growing, § 14.11

Public's increasingly negative attitude towards the legal profession, § 14.11

Recent causes of enhanced risk, § 14.10-14.14

Role of the lawyer, complexity of, § 14.6

Settlements, § 14.13

Society and culture, changes in, § 14.11

Structural causes of risk. § 14.2-14.9

Technology, changes in, § 14.12

Transformation from learned profession with high ethical standards to a commercial activity, § 14.14

Role of the lawyer, complexity of, § 14.6

Settlements

Breach of duty of care, § 15.1, 15.7, 16.36

Causation issues, § 16.47, 16.48

Collectibility of underlying settlement, proving, § 16.47

Damages, mishandling settlement, § 16.54

Divorce settlements, § 15.12

Fairness of value as evidence, § 15.7

Fishman v. Brooks, § 15.7, 16.48

Meyer v. Wagner, § 15.12

Questionable alternative theory of causation, settlement value, § 16.48

Release, defense, § 15.1, 16.83

Shareholder liability, Cacciola v. Nellhaus, § 15.11, 17.2

Society and culture, changes in, § 14.11

Specialists, knowledge and skill

Generally, § 14.5

Enhanced standard of care, § 16.30-16.32

Fishman v. Brooks, § 15.7, 15.8

Speculative damages, § 16.49

Standard of care. Duty of reasonable care owed by attorney, above

Statewide standard of care, § 16.27

Statute of limitations

Generally, § 15.1, 16.71 et seq.

Accrual, § 16.72

Agreement to toll, § 16.75

Appreciable harm requirement, § 16.72

Breach of fiduciary duty, § 16.76

Children or minors as plaintiffs, § 16.75

Continuing representation doctrine, § 16.74

Fraudulent concealment of cause of action, § 16.75

Hendrickson v. Sears, § 15.4

Incapacitated persons as plaintiffs, § 16.75

Statute of limitations—Cont'd

Tolling, § 16.73-16.75

Unfair or deceptive practices, § 16.76, 17.5

Williams v. Ely, § 15.9

Summary judgment motions, § 16.39, 16.70

Superseding causes, § 16.39

Technology

Changes as making risk unavoidable, § 14.12

Computer use competency, § 16.32

Enhanced standard of care, § 16.32

Legal research competency, § 16.32

Termination of attorney-client relationship, § 16.6

Thinking like a lawyer, § 15.3

Third parties, duty owed to

Generally, § 16.18 et seq.

Assignment of claim, § 16.24

Burden of proof, § 16.23

Fiduciary breach, § 17.1

Miller v. Mooney, § 15.10

Negligent misrepresentation, § 16.22

Reliance by third parties, § 15.6, 16.4, 16.19-16.21

Third party beneficiary exception, § 16.23

Third party reliance exception, § 15.6, 16.4, 16.19-16.21

Vicarious liability, § 17.2

Williams v. Ely, § 15.9

Wills and trusts, § 16.20, 16.23

Transactional situations

Causation, § 16.43

Financial transactions, mishandling, § 16.55

Mortgage, § 16.13, 16.20

Property transactions, mishandling, § 16.55

Transformation from learned profession with high ethical standards to a commercial activity, § 14.14

Treble damages, § 16.58

Trial within a trial

Causation, § 16.40-16.43

Damages, § 16.51

Trusts. Wills and trusts, below

Types of malpractice claims, generally, § 15.2, 16.1

Unfair or deceptive practices

Generally, § 17.3-17.5

Statute of limitations, § 16.76, 17.5

Unsettled law, advising about, § 15.9

Varieties of claims, § 15.2

Williams v. Ely, § 15.9

Wills and trusts

Generally, § 16.10

Wills and trusts—Cont'd
Decedents' estates, § 16.11
Miller v. Mooney, § 15.10
Third party reliance, § 16.20, 16.23
Worker's compensation claimants, § 16.20
Zealous representation, duty of, § 14.6

#### LIENS

Medical malpractice, hospital's lien on damages, § 11.6

#### LIFE EXPECTANCY

Medical malpractice damages calculation, § 11.4 Medical malpractice damages factor, § 11.4

#### LIMITATIONS OF ACTIONS

Statute of Limitations, this index

#### LIMITED LIABILITY COMPANY

Legal malpractice, vicarious liability, § 17.2

#### LIMITED LIABILITY PARTNERSHIP

Legal malpractice, vicarious liability, § 17.2

### LOSS OF CHANCE (LOST OPPORTUNITY) DOCTRINE

Legal malpractice, § 16.48

### LOSS OF CHANCE OF SURVIVAL OR LONGER LIFE

Medical malpractice, § 4.2, 10.14

#### LOSS OF CONSORTIUM CLAIMS

Medical Malpractice, this index

#### **LOST PROFITS**

Legal malpractice, § 16.55

# LOST WAGES OR EARNING CAPACITY

Medical Malpractice, this index

### **LOYALTY**

Legal malpractice, good faith and utmost loyalty, § 17.1, 17.4

### MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT

Relevance to legal malpractice, § 14.1, 14.6-14.7, 15.2, 16.1, 16.3, 16.6, 16.8, 16.14-16.16, 16.20, 16.26, 16.28, 16.30, 16.32, 16.37, 16.54, 16.58, 16.83, 17.1-17.2, 17.4, 17.6

#### **MATERIALITY**

Medical malpractice, materiality of information about potential injury, § 3.4, 3.6

#### **MEDIA**

Promotion and distortion of public perception of legal profession, § 14.11, 14.12

### MEDICAL MALPRACTICE

Generally, § 1.1 et seq.

Abandonment of patient, § 2.7

# MEDICAL MALPRACTICE—Cont'd Accrual of cause of action, § 8.3 et seq. Actuarial tables, use of, § 11.4 Acupuncturists, § 12.17 Administrative duties of health care provider, § 2.5 Admissions, proving injury and causation, § 2.6, 4.1, 10.14 Agency law basis for liability, § 9.1, 9.7 Amendment of complaint to add new party, effect of statute of repose on, § 8.3 Anti-Dumping Act, § 9.11 Apparent or ostensible authority, vicarious liability, § 9.7 Appeal of tribunal decision, § 5.12, 5.13, 5.15 Application to health care professionals other than physicians Generally, § 12.1 et seq. Acupuncturists, § 12.17 Chiropractors, § 12.12 Dentists, § 8.16, 10.3, 12.2 Extended care facilities, § 12.18 Nurses, § 12.3-12.10 Nursing homes, § 12.18 Optometrists and opticians, § 12.11 Osteopaths, § 12.15 Pharmacists, § 12.14, 13.2 Physical therapists, § 12.17 Podiatrists, § 12.16 Psychiatrists and psychologists, § 12.13 Veterinarians, § 12.19 Apportionment of damages, joint and several liability, § 4.5 Arguing dollar amounts to the jury, § 10.11 Attorney fees, § 11.7 Battery, § 3.8, 3.11 Best judgment rule, § 10.11 Bias of expert witnesses, showing, § 7.5, 10.7 Blood transactions, standard of care, § 13.5 Bond posted for tribunal. Screening tribunal, below Breach of contract actions Generally, § 2.10 Dentists, § 12.2 Sample complaint, form, § 2.16 Bronchoprovocation test, consent form, § 3.14 Burden of proof Accrual of cause of action, § 8.3 Apportionment of damages, joint and several liability, § 4.5 Breach of contract actions, § 2.10

Emergency exception to informed consent doctrine, § 3.9

Inherently dangerous medical device, warning about, § 13.4

Incapacitation by mental illness, accrual of cause of action, § 8.5

EMTALA claims, § 9.11

Informed consent lacking, § 3.2, 3.9

#### INDEX

# MEDICAL MALPRACTICE—Cont'd Burden of proof—Cont'd Medical reports, admissibility, § 10.3 Negligence actions, § 2.6, 4.1 Nurse malpractice, § 12.3 Peer review committee privilege, § 6.2 Privilege of nondisclosure of material risks, § 3.6 Proximate cause of injuries, § 4.1 Statute of limitations, § 8.3 Business practice or custom, § 3.10 Causation Generally, § 4.1 et seq. Chance of survival or longer life, loss of, § 4.2 Intervening force, § 4.4 Joint and several liability, § 4.5 Jury instruction, recommended form, § 10.14 Loss of chance of survival or better outcome, § 4.2 Nurse malpractice, § 12.7 Proximate cause, § 4.1 Reasonable medical certainty, § 4.3 Res ipsa loquitur, § 4.1, 4.6, 7.6, 10.14 Superseding causes, § 4.4 Chance of survival or longer life, loss of, § 4.2 Charitable immunity, cap on damages, § 8.12-8.14 Chief of medical staff liability, § 9.5 Children Accrual of cause of action, statute of repose, § 8.3, 8.4 Capacity to give consent to treatment, § 3.11 Child not yet conceived, duty owed to, § 2.6, 2.8 Duty owed to child not yet conceived, § 2.6, 2.8 Genetic deformities counseling, faulty, § 2.8 Parental consent as to emergency care, § 3.11, 8.16 Parent's wrongful death damages, entitlement to, § 8.6 Statute of limitations, § 8.3, 8.4 Sterilization procedures, faulty, § 2.8 Wrongful death of parent damages, entitlement to, § 8.6 Chiropractors, § 12.12 Collateral benefits rule, § 11.6 Common knowledge, proving injury and causation by, § 2.6, 4.1, 7.6 Comparative negligence Generally, § 8.11 Jury instruction, recommended form, § 10.14 Complaints Generally, § 2.12 et seq. Amendment to add new party, effect of statute of repose on, § 8.3 Breach of contract claim form, § 2.16 Negligence claim forms Health maintenance organization, claim against, § 2.18

#### MEDICAL MALPRACTICE—Cont'd

Complaints—Cont'd

Negligence claim forms—Cont'd

Informed consent, failure to obtain, § 2.15

Long form, negligence and loss of consortium, § 2.14

Private hospital, claim against, § 2.17

Short form, § 2.13

Conception, duty owed to child not yet conceived, § 2.6, 2.8

Confidential information, disclosure of, § 2.6

Consent to treatment. Informed consent doctrine, below

Consumer protection claims, § 2.11

Contract claims. Breach of contract actions, above

Copies of medical records, § 6.1, 10.2

Court-ordered medical examinations, § 5.7, 6.3

Credentials of physician, disclosing, § 3.4

Criminal conduct of physician, effect on causation, § 4.4

Damages

Actuarial tables, use of, § 11.4

Apportionment of damages, § 4.5

Arguing dollar amounts to the jury, § 10.11

Attorney fees, limitation on, § 11.7

Breach of contract claims, § 2.10

Charitable immunity, cap on damages, § 8.12-8.14

Collateral benefits, reduction of award, § 11.6

EMTALA cause of action, § 9.11

ERISA claims, § 9.10

Future damages

Evidentiary considerations, § 11.4

Jury instructions, recommended, § 10.14

Proving, § 3.5

Verdict itemization, § 11.2

Future medical expenses, § 11.4

Genetic counseling claims, § 2.8

Governmental immunity, cap on damages, § 8.15

Itemization of elements, jury verdict, § 11.2

Joint and several liability, § 4.5

Jury instruction, recommended form, § 10.14

Jury verdict, § 11.1 et seq.

Lien by hospital, § 11.6

Life expectancy factor, § 11.4

Loss of consortium, below

Lost wages or earning capacity, below

Mitigation of damages, § 10.14

Nurse malpractice, § 12.7

Pain and suffering, below

Prejudgment interest, § 11.5

Special jury verdict instruction, form, § 11.7

Sterilization procedures claims, § 2.8

# MEDICAL MALPRACTICE—Cont'd Damages-Cont'd Wrongful death of parent damages, child's entitlement to, § 8.6 Conscious pain and suffering preceding wrongful death, recovery for, § 8.7 Injured party's death, time for bringing the surviving action, § 8.9 Reports of deceased physicians, § 10.4 Statute of limitations, § 8.6-8.9 Tortfeasor's death, effect on cause of action, § 8.8 Wrongful death actions, § 8.6, 8.7 Decision of tribunal. Screening tribunal, below Defenses Generally, § 8.1 et seq. Charitable immunity Generally, § 8.12-8.14 Employees of charitable organization, § 8.14 Qualifying as charitable organization, § 8.13 Comparative negligence, § 8.11, 10.14 Emergency and other exemptions from liability, § 8.16, 12.9 Fraudulent concealment, § 8.3, 8.10 Governmental immunity, § 8.15 Health care proxy, § 8.16 Immunization program defense, § 8.17, 12.9 Limitations of action. Statute of limitations, below Mental health commitments immunity, § 8.16 Nurse immunities, § 12.9 Psychiatrists and psychologists immunities, § 12.13 Qualified immunity, § 8.18, 12.9 Releases, § 8.19 Search warrant, § 8.18 Sophisticated user doctrine, § 13.4 Statute of limitations, below Definition Health care provider, § 5.2, 6.1, 11.1, 12.8 Judicial admissions, § 7.8 Dentists, § 8.16, 10.3, 12.2 Deposition to perpetuate testimony, § 6.1 Devices. Products and devices delivered to providers causing harm to patients, below Director of health services liability, § 9.6 Disclosure Basis of expert opinion, disclosure of, § 7.4 Credentials of physician, § 3.4 Experience of physician, § 3.4 Financial interest of health care provider, § 3.4 Information that satisfies informed consent requirement, § 3.4, 3.6 Informed consent doctrine, § 3.4, 3.6 Material risks, disclosure of, § 3.6

# MEDICAL MALPRACTICE—Cont'd Disclosure—Cont'd Nondisclosure of material risks, § 3.6 Otherwise confidential information, disclosure of, § 2.6 Privilege of nondisclosure, § 3.6 Treatment-related risk, evidence of disclosure of, § 3.10 What must be disclosed, § 3.4 Who must disclose, § 3.3 Discovery Generally, § 6.1 et seq. Accrual of cause of action, the discovery rule and statute of repose, § 8.3 After commencement of action, peer review proceedings, § 6.2 Before commencement of litigation, § 6.1 Before screening tribunal hearing, § 5.19 Court-ordered medical examinations, § 6.3 Deposition to perpetuate testimony, § 6.1 Expert witnesses, discovery regarding, § 7.5, 7.9 Fraudulent concealment of cause of action, § 8.10 Laboratory reports of test results, § 6.1 Limited discovery of expert witness, § 7.9 Medical records Inspecting and obtaining copies of, § 6.1 Peer review committee's records, § 6.2 Peer review committee proceedings, § 6.2 Psychotherapy records, inspecting and obtaining copies of, § 6.1 District and Boston Municipal court jurisdiction, § 2.4 Driving ability or impediment of patient, § 2.6 Adherence to Physicians' Desk Reference (PDR), § 10.11 Learned intermediary doctrine, § 12.14, 13.2 Pharmacists malpractice, § 12.14 Duty of care. Negligence and duty of care, below Emergency Anti-Dumping Act, § 9.11 EMTALA mandates, § 9.11 Indigent emergency patients, transfer of, § 9.11 Informed consent doctrine, § 3.8, 3.9, 8.16 Institutional and vicarious liability, § 9.11 Jury instruction, informed consent exception, § 10.14 Nursing services, § 12.9 Parental consent, § 3.11, 8.16 Privilege of nondisclosure, § 3.6 EMTALA cause of action, § 9.11 Endoscopic procedures (GI), consent form, § 3.13 ERISA's applicability, § 9.10 Evidence Generally, § 7.1 Actuarial tables, § 11.4

#### INDEX

MEDICAL MALPRACTICE—Cont'd

Admissions, § 2.6, 7.8, 10.14

Evidence-Cont'd

# Breach of contract, proving, § 2.10 Burden of proof, above Business practice or custom, § 3.10 Charitable organization status, § 8.13 Common knowledge, proving injury and causation by, § 2.6, 4.1, 7.6 Consent forms as evidence, § 3.7 Disclosure of treatment-related risk, § 3.10 Duty to preserve evidence, § 10.5 Exercise of professional judgment, inquiry about, § 10.11 Expert witnesses, below False and misleading testimony, § 10.6 Findings of tribunal, admissibility at trial, § 5.17 Habit, § 3.10 Hearsay in medical records, § 10.2 Hearsay in medical reports, § 10.3, 10.4 Informed consent claim, proving, § 3.2-3.5, 3.10 Insurance, admissibility of, § 10.7 Introducing evidence utilizing M.G.L.A. c. § 79 and 79G, § 10.2, 10.3 Judicial admissions, § 7.8 Learned treatises, below Loss of chance of survival or improvement, § 4.2 Negligence and duty of care, proving, § 2.6 Partnership status, § 9.3 Peer review committee documents, § 6.2 Photographic copies of records, § 10.2 Physicians' Desk Reference (PDR), § 10.11 Promise to effect a cure or bring about a specific result, § 2.10 Proof without an expert, generally, § 7.6 Proximate cause of injuries, § 4.1 Records of institutions and hospitals, introducing at trial, § 10.2 Redaction, § 10.2 Reports as to diagnosis or prognosis and opinion on causation, § 10.3, 10.4 Reports of deceased physicians, § 10.4 Scientific evidence, laying foundation for, § 7.1 Screening tribunal, below Spoliation, § 10.5 Treatise, use of in cross-examination of expert witness, § 10.10 What an expert witness would have done, § 10.8 What defendant should have done, § 10.9 Experience of physician, disclosing, § 3.4 Expert witnesses Generally, § 7.1 Abandonment, proving, § 2.7 Adherence to professional guidelines and standards, § 10.11 Basis of expert opinion, § 7.3, 7.4 Bias, showing, § 7.5, 10.7

#### MEDICAL MALPRACTICE—Cont'd

Expert witnesses—Cont'd

Compelling expert testimony, § 7.9

Cross-examination, treatise-based, § 10.10

Dental malpractice, § 12.2

Disbelief of testimony on good practice when there is no expert testimony on bad practice, § 7.5

Disclosure of basis of expert opinion, § 7.4

Discovering expert testimony, § 7.9

Discovering whether and for whom expert previously testified, § 7.5, 10.7

Discovery issues, § 7.5, 7.9

Evidentiary issues, § 7.5

False and misleading testimony, consequences of, § 10.6

Hypothetical questions for, § 7.3, 7.4

Impeachment of, § 7.5

Informed consent issues, § 3.5, 3.8

Insurer's relationship with expert, § 7.5, 10.7

Judicial admissions as expert testimony, § 7.8

Limited discovery of, § 7.9

Offer of proof, qualifying by letter or affidavit submitted at, § 7.2

Perjury, § 10.6

Proof without an expert, § 7.6

Proving injury and causation, generally, § 2.6

Proximate cause of injuries, § 4.1

Qualifying an expert, § 7.2

Res ipsa loquitur issues, § 4.6, 7.6

Role of expert testimony, § 3.5, 3.8

Screening tribunals, § 5.9

Standards and guidelines of profession, § 10.11

Treatise-based cross-examination of expert, § 10.10

What an expert witness would have done, trial evidence, § 10.8

What defendant physician should have done, trial evidence, § 10.9

Whether and for whom expert previously testified, discovering, § 7.5, 10.7

Extended care facilities, § 12.18

Failure to treat as cause of action under EMTALA mandates, § 9.11

Federal actions referred to state court for tribunal screening, § 5.14

Federal preemption

EMTALA actions, § 9.11

ERISA preemption, institutional and vicarious liability, § 9.10

Products liability issues peculiar to medically-related claims, § 13.3

Financial interest of health care provider, disclosing, § 3.4

Finding of tribunal. Screening tribunal, below

Foreign object left in body, statute of limitations, § 8.2-8.4

Fraudulent concealment of cause of action, § 8.3, 8.10

Future damages. Damages, above

Gastrointestinal endoscopic procedures, consent form, § 3.13

Genetic counseling claims, § 2.8

Geographic and temporal confines of duty of care, § 2.3

# MEDICAL MALPRACTICE—Cont'd GI endoscopic procedures, consent form, § 3.13 Governmental immunity, § 8.15 Habit, § 3.10 Health care proxy, § 8.16 Health maintenance organization (HMO) Apparent or ostensible authority, § 9.7 Complaint for negligence, form, § 2.18 ERISA's applicability, § 9.10 Institutional and vicarious liability, § 9.2, 9.7 Hearsay in medical records, § 10.2 Hearsay in medical reports, § 10.3, 10.4 Historical background, § 1.1 HMO. Health maintenance organization (HMO), above Hypothetical questions for expert witnesses, § 7.3, 7.4 Impartial medical examination, § 5.7, 6.3 Impeachment of expert witnesses, § 7.5 Incapacitation by mental illness, accrual of cause of action, § 8.5 Indigent emergency patients, transfer of, § 9.11 Informed consent doctrine Generally, § 3.1 et seq. Bronchoprovocation test, consent form, § 3.14 Children, § 3.11, 8.16 Complaint, failure to obtain informed consent, form, § 2.15 Consent forms. Forms, below Credentials of physician, disclosing, § 3.4 Emergencies, § 3.8, 3.9, 8.16, 10.14 Endoscopic (GI) procedures, consent form, § 3.13 Experience of physician, disclosing, § 3.4 Expert testimony, role of, § 3.5, 3.8 Failure to obtain, claims Generally, § 3.1 Consumer protection safeguards, § 2.11 Sample complaint, § 2.15 Financial interest of health care provider, disclosing, § 3.4 Forms, consent Generally, § 3.7 Bronchoprovocation test, § 3.14 Generic consent, § 3.15 GI endoscopic procedures, § 3.13 Medical, surgical and/or diagnostic procedures, § 3.12 Gastrointestinal endoscopic procedures, consent form, § 3.13 GI endoscopic procedures, consent form, § 3.13 Historical background, § 3.1 Jury instruction, recommended form, § 10.14 Materiality of information about potential injury, § 3.4 Privilege of nondisclosure, § 3.6 Proof of informed consent claim, § 3.2, 3.5

# MEDICAL MALPRACTICE—Cont'd Informed consent doctrine—Cont'd Treatment without informed consent, exceptions, § 3.8 What must be disclosed, § 3.4 Who must disclose, § 3.3 Inherently dangerous medical device, warning about, § 13.4 Inspecting and obtaining copies of medical records, § 6.1 Institutional and vicarious liability Generally, § 9.1 et seq. Agency law basis for liability, § 9.1, 9.7 Anti-Dumping Act, § 9.11 Apparent or ostensible authority, § 9.7 Chief of medical staff and supervisors liability, § 9.5 Corporate liability doctrine, § 9.8 Corporate negligence, § 9.4, 9.7, 9.8 Director of health services, § 9.6 EMTALA, liability under, § 9.11 ERISA preemption, § 9.10 Health maintenance organizations and similar managed care organizations, § 9.2 Indigent emergency patients, transfer of, § 9.11 Jury instruction, recommended form, § 10.14 Non-delegable duty, § 9.9 Nurse malpractice, § 12.10 Partners, negligence of, § 9.3 Resident's (physician in training) clinical conduct, § 9.1, 9.2 Respondeat superior, § 9.1, 12.10 Shareholders liability for corporate conduct, § 9.4 Staff privileges as basis for liability, § 9.9 Supervisors liability, § 9.5, 9.6 Insurance Collateral benefits rule, § 11.6 Employees of charitable organizations, § 8.14 Expert witnesses' relationship with insurer, § 7.5, 10.7 Partners' professional liability insurance, § 9.3 Trial evidence, § 7.5, 10.7 Interest on damages awarded, § 11.5 Intervening force, § 4.4 Joint and several liability, § 4.5 Jurisdiction EMTALA claims, § 9.11 Negligence and duty of care claims, § 2.4 Jury instructions Generally, § 10.13 Admissions, form, § 10.14 Breach of contract claims, § 2.10 Breach of duty of care, form, § 10.14

Causation, form, § 10.14

# MEDICAL MALPRACTICE—Cont'd Jury instructions—Cont'd Comparative negligence, form, § 10.14 Damages, form, § 10.14 Emergency exception to necessity of obtaining informed consent, form, § 10.14 Exercise of professional judgment, § 10.11 Foreseeability, form, § 10.14 Informed consent, form, § 10.14 Itemization of expenses as damages, form, § 10.14 Limitation on pain and suffering, form, § 10.14 Loss of chance, form, § 10.14 Loss of consortium, form, § 10.14 Medical bills and reports, form, § 10.14 Medical malpractice, form, § 10.14 Medical provider/doctor-patient relationship, form, § 10.14 Medical publications, form, § 10.14 Medical reports, form, § 10.14 Mitigation of damages, form, § 10.14 Promise to effect a cure or bring about a specific result, § 2.10 Recommended instructions, forms, § 10.14 Res ipsa loquitur, form, § 10.14 Special jury verdict instruction, § 11.8 Specific elements of damages, form, § 10.14 Standard of care, form, § 10.14 Subsequent treating physician, form, § 10.14 Vicarious liability, form, § 10.14 Laboratory reports of test results, § 6.1 Learned intermediary doctrine Generally, § 13.2 Pharmacists, extending to, § 12.14, 13.2 Learned treatises as evidence Generally, § 7.7 Cross-examination of expert witness, § 10.10 Deviation from duty of care, proving, § 2.6 Informed consent, proving elements of, § 3.5 Jury instruction, recommended form, § 10.14 Proximate cause, proving, § 4.1 Videotape regarded as learned treatise, § 7.7 Leaving foreign object in body, statute of limitations, § 8.2-8.4 Legal grounds Generally, § 2.1 et seq. Battery, § 3.8, 3.11 Consumer protection claims, M.G.L.A. c. 93A, § 2.11 Contract actions, § 2.10 Negligence and duty of care, § 2.2 et seq.

Sample complaints, § 2.12 et seq. Lien on damages, hospital's, § 11.6

# MEDICAL MALPRACTICE—Cont'd Life expectancy factor, § 11.4 Limitations of action. Statute of limitations, below Loss of chance of survival or longer life, § 4.2, 10.14 Loss of consortium claims Arguing dollar amounts to jury, § 10.11 Cap on damages, § 8.12 Jury instruction, recommended form, § 10.14 Sample complaint for negligence and loss of consortium, form, § 2.14 Specific verdict requirement, § 11.1 Statute of limitations, § 8.2 Sterilization procedures claims, § 2.8 Lost wages or earning capacity ERISA matters, § 9.10 Expert testimony, § 3.5 Jury instruction, recommended form, § 10.14 Jury verdict, § 11.1, 11.2, 11.8 Negligence claims about sterilization procedures or genetic counseling, § 2.8 Materiality of information about potential injury, § 3.4, 3.6 Medical devices. Products and devices delivered to providers causing harm to patients, below Medical records Discovery Inspecting and obtaining copies of, § 6.1 Peer review committee's records, § 6.2 Hearsay in, § 10.2 Inspecting and obtaining copies of, § 6.1 Introducing at trial, § 10.2 Peer review committee's records, § 6.2 Photographic copies, § 10.2 Medical reports. Reports, below Mental health commitments immunity, § 8.16 Mental health professionals, duty of care, § 2.6 Mentally ill persons, actions by, statute of limitations, § 8.5 M.G.L.A. c. 93A claims, § 2.11 Midwives, § 12.6 Mitigation of damages, jury instruction form, § 10.14 Negligence and duty of care Generally, § 2.2 et seq.

Abandonment of patient by physician, § 2.7

Admissions, § 2.6, 7.8, 10.14 Best judgment rule, § 10.11

Causation, above

Complaints, above Consultants, § 2.7

Administrative duties of health care provider, § 2.5

Child not yet conceived, duty owed to, § 2.6, 2.8

Activities relating to treatment of patient as determining factor, § 2.7

Neurologists, § 2.6

# MEDICAL MALPRACTICE—Cont'd Negligence and duty of care—Cont'd Continuing duty of care after ending physician-patient relationship, § 2.7 Contributory negligence, § 8.11, 10.14 District and Boston Municipal court jurisdiction, § 2.4 Driving ability or impediment of patient, § 2.6 Duration of duty, § 2.7 Exercise of professional judgment, § 10.11 Genetic counseling claims, § 2.8 Geographic and temporal confines of duty, § 2.3 Identifiable and existing non-patient plaintiff, duty owed to, § 2.6 Informed consent lacking as basis, § 3.1 Institutional and vicarious liability, above Judicial admissions, § 7.8 Jurisdiction, § 2.4 Loss of consortium Complaint form, § 2.14 Jury instruction form, § 10.14 Medical devices, duty to warn about, § 13.4 Mental health professionals, § 2.6 Neurologists, § 2.6 Non-patient, to whom duty of care is owed, § 2.6 Nurses, below Pathologists, § 2.7 Patient, to whom duty of care is owed, § 2.6 Preconception medical malpractice, child not yet conceived, § 2.6, 2.8 Proving deviations from applicable duty of care, § 2.6 Psychotherapist's and psychologist's duties to third parties not their patients, § 2.6 Question of law, whether duty of care exists, § 2.5 Radiologists, § 2.5, 2.7 Respondeat superior principle, § 9.1, 12.10 Sexual relations with patient, § 2.9 Special relationships, duties of care deriving from, § 2.6 Specialists, standard of care, § 2.2 Standard of care, below Sterilization procedures claims, § 2.8 Superior court jurisdiction, § 2.4 Termination of physician-patient relationship, § 2.7 Third parties not their patients, psychotherapist's and psychologist's duties to, **§ 2.6** To whom duty of care is owed, § 2.6 Unidentifiable but existing non-patient plaintiff, duty owed to, § 2.6 Warn about drugs, duty to, § 12.14, 13.2 Warn about medical devices, duty to, § 13.4 When duty of care arises and ends, § 2.7 Who has a duty of care, § 2.5

#### MEDICAL MALPRACTICE—Cont'd

Non-patient, to whom duty of care is owed, § 2.6

Notice

Learned treatise statements, trial use of, § 7.7

Reports of diagnosis, prognosis or opinion used at trial, § 10.3

Waiver of screening tribunal hearing, § 5.3, 5.20

Nurses

Generally, § 12.3-12.10

Advanced practice nurses, § 12.6

Burden of proof, § 12.3

Causation, § 12.7

Damages, § 12.7

Duty of care, § 12.5, 12.6

Emergency services, § 12.9

Immunities, § 12.9

Medical malpractice tribunal, § 12.8

Midwives, § 12.6

Nurse practitioners, § 12.6

Nurse-patient relationship, § 12.4

Provider of health care, nurse as, § 12.8

Respondeat superior liability, § 12.10

Vicarious liability for nurse malpractice, § 12.10

Nursing homes, § 12.18

Optometrists and opticians, § 12.11

Organ transactions, standard of care, § 13.5

Osteopaths, § 12.15

Pain and suffering

Amount limitations on damages, § 11.3

Arguing dollar amounts to jury, § 10.11

Calculation by actuarial tables, § 11.4

Conscious pain and suffering before wrongful death, § 8.7

ERISA preemption, § 9.10

Expert testimony, § 3.5

Jury instruction recommended, § 10.14, 11.3

Limitations on damages, § 11.3

Negligent sterilization procedures, § 2.8

Recovery of, § 2.10, 11.3, 11.4

Special jury verdict instruction, form, § 11.7

Verdict form, limitations on damages, § 11.3

Parental consent to emergency care of children, § 3.11, 8.16

Parent's wrongful death damages, child's entitlement to, § 8.6

Partners' professional liability insurance, § 9.3

Pathologists, § 2.7

Peer review committee, § 6.2

Perjury, witnesses, § 10.6

Pharmacists, § 12.14, 13.2

Photographic copies of records, § 10.2

Physical therapists, § 12.17

# MEDICAL MALPRACTICE—Cont'd Physicians' Desk Reference (PDR), § 10.11 Podiatrists, § 12.16 Preemption. Federal preemption, above Prejudgment interest, § 11.5 Privilege Nondisclosure of material risks, § 3.6 Peer review committee, § 6.2 Therapeutic privilege, § 3.6 Products and devices delivered to providers causing harm to patients Generally, § 13.1 et seq. Blood shield statute, § 13.5 Federal preemption, § 13.3 Implied warranties as to blood, § 13.5 Learned intermediary doctrine, § 12.14, 13.2 Leaving foreign object in body, statute of limitations, § 8.2-8.4 Sophisticated user doctrine, § 13.4 Promise to effect a cure or bring about a specific result, § 2.10 Proof. Evidence, above Provider of heath care, defined, § 5.2, 6.1, 11.1, 12.8 Proximate cause, generally, § 4.1 Psychiatrists and psychologists Generally, § 12.13 Duty to protect identifiable and existing plaintiff whom patient intended to kill, **§ 2.6** Records, inspecting and obtaining copies of, § 6.1 Sexual relations with patient, § 2.9, 8.3, 12.13 Special relationship with members of general public, § 2.6 Public employees liability, § 8.15, 9.1, 12.13 Radiologists, § 2.5, 2.7 Negligence and duty of care, § 2.5 Reasonable medical certainty as to causation, § 4.3 Records. Medical records, above Referral of federal actions to state court for tribunal screening, § 5.14 Releases, § 8.19 Reports Burden of proof, admissibility of medical reports, § 10.3 Deceased physicians, reports of, § 10.4 Hearsay in medical reports, § 10.3, 10.4 Jury instruction, recommended form, § 10.14 Laboratory reports of test results, § 6.1 Notice of reports of diagnosis, prognosis or opinion used at trial, § 10.3 Peer review committee proceedings, § 6.2 Screening tribunal decision, above Res ipsa loquitur doctrine, § 4.1, 4.6, 7.6, 10.14 Resident's (physician in training) clinical conduct, § 9.1, 9.2 Right to reject treatment, § 3.1, 3.9 Scientific evidence, laying foundation for, § 7.1

```
MEDICAL MALPRACTICE—Cont'd
  Screening tribunal
     Generally, § 5.1 et seq.
     Acupuncturists malpractice, § 12.17
     Admissibility of tribunal finding, § 5.17
     Appeal of tribunal decision, § 5.12, 5.13, 5.15
     Bond
       Generally, § 5.3, 5.12, 5.16
       Amount, § 5.16, 5.24
       Indigency, effect of, § 5.16
       Motion to reduce bond, form, § 5.24
       Obtaining payment of, § 5.12, 5.18
       Reduction in amount of, § 5.16, 5.24
     Breach of contract claims, review of, § 2.10
     Chiropractic malpractice, § 12.12
     Composition of, § 5.6
     Decision of tribunal
       Generally, § 5.11
       Admissibility at trial, § 5.17
       Adverse to defendant, § 5.13
       Adverse to plaintiff, § 5.12
       Appeal of, § 5.12, 5.13, 5.15
       Directed verdict standard of review used on appeal of, § 5.15
       Form, sample, § 5.23
     Defendant's role at hearing, § 5.10
     Discovery before hearing, § 5.19
    EMTALA claims exemption, § 9.11
    Every action, defined, § 5.1, 5.2
    Evidence
       Offer of proof, § 5.3, 5.7-5.9, 5.22, 7.2
       Outline of offer of proof, § 5.22
       Standard for evaluation of, § 5.8, 5.9
       Substantive requirements of offer of proof, § 5.9
       Sufficiency of, § 5.8, 5.9
     Expert witness, § 5.9
     Extended care facilities, § 12.18
    Federal actions, referral to state court for tribunal screening, § 5.14
    Finding of tribunal
       Admissibility of, § 5.17
       Adverse to defendant, § 5.13
    Hearing
       Defendant's role at hearing, § 5.10
       Discovery before, § 5.19
       Necessity of, § 5.4
       Timing of, § 5.5
       Waiver of, § 5.3
     Issues evaluated, § 5.2
     Malpractice, error, or mistake defined, § 5.2
```

# MEDICAL MALPRACTICE—Cont'd Screening tribunal—Cont'd Motion to reduce bond, form, § 5.24 Multiple defendants, § 5.8 Necessity of hearing, § 5.4 Notice of waiver of hearing Generally, § 5.3 Form, sample, § 5.20 Nurse malpractice, § 12.8 Nursing homes, § 12.18 Objection to panel composition, § 5.6 Obtaining payment of bond, § 5.12, 5.18 Offer of proof, § 5.3, 5.7-5.9, 5.22, 7.2 Optometrist and optician malpractice, § 12.11 Osteopaths malpractice, § 12.15 Pharmacists malpractice, § 12.14 Physical therapists malpractice, § 12.17 Podiatrists malpractice, § 12.16 Procedures, standing Order I-82, § 5.21 Provider of health care, defined, § 5.2 Psychiatrists and psychologists malpractice, § 12.13 Report. Decision of tribunal, above Scope of evaluation, § 5.2 Standard, tribunal's, § 5.8, 5.9 Standard of review, § 5.15 Standing Order I-82, § 5.21 Timing of hearing, § 5.5 Waiver of hearing Generally, § 5.3 Form, sample, § 5.20 What actions are subject to tribunal review, § 5.2 Search warrant defense, § 8.18 Sexual exploitation of patient, § 2.9, 8.3, 12.13 Sexual harassment, corporate liability for, § 9.8 Shareholders liability for corporate conduct, § 9.4 Sophisticated user doctrine, § 13.4 Special jury verdict instruction, § 11.7, 11.8 Special relationships, duties of care deriving from, § 2.6 Specialists, standard of care, § 2.2 Speedy trial, § 10.12 Staff privileges as basis for liability, § 9.9 Standard of care Acupuncturists, § 12.17 Blood, organ and tissue transactions, § 13.5 Chiropractors, § 12.12 Dentists, § 12.2 Extended care facilities, § 12.18 Jury instruction, recommended form, § 10.14

# MEDICAL MALPRACTICE—Cont'd Standard of care—Cont'd Learned treatises, § 7.7 Negligence and duty of care, § 2.2, 2.3 Nursing homes, § 12.18 Optometrists, § 12.11 Organ, blood, and tissue transactions, § 13.5 Pharmacists and pharmacy, § 12.14 Physical therapists, § 12.17 Podiatrists, § 12.16 Psychiatrists and psychologists, § 12.13 Tissue, organ, and blood transactions, § 13.5 Veterinarians, § 12.19 Standing Order I-82, § 5.21 Statute of limitations Generally, § 8.2 et seq. Accrual, the discovery rule and statute of repose, § 8.3 Discovery rule, § 8.3 EMTALA claims, § 9.11 Fraudulent concealment of cause of action, § 8.10 Injured party's death, effect on bringing surviving action, § 8.9 Leaving foreign object in body, § 8.2-8.4 Mentally ill persons, actions by, § 8.5 Minors, actions by, § 8.4 Pain and suffering before wrongful death, § 8.7 Sexual exploitation, effect of, § 8.3 Statute of repose, § 8.3, 8.4 Tortfeasor's death, § 8.8 Wrongful death, § 8.6, 8.7 Statute of repose, § 8.3-8.5 Sterilization procedures, faulty, § 2.8 Subsequent treating physician, jury instruction form, § 10.14 Superior court jurisdiction, § 2.4 Superseding causes, § 4.4 Supervisors' liability, § 9.5, 9.6 Termination of physician-patient relationship, § 2.7 Third parties not their patients, psychotherapist's and psychologist's duties to, § 2.6 Tissue transactions, standard of care, § 13.5 Transactional situations involving blood, organs, or tissues, § 13.5 Trials Generally, § 10.1 et seq. Arguing dollar amounts to the jury, § 10.11 Common trial issues, § 10.11 Deceased physicians, reports of, § 10.4 Evidence, above Introducing substantive evidence utilizing M.G.L.A. c. 233 § 79, § 10.2

# MEDICAL MALPRACTICE—Cont'd

Trials-Cont'd

Introducing substantive evidence utilizing—Cont'd

M.G.L.A. c. 233 § 79G, § 10.3

Jury instructions, above

Reports of deceased physicians, § 10.4

Screening tribunal prerequisite, § 5.1

Screening tribunal's findings, admissibility of, § 5.17

Speedy trial, § 10.12

Spoliation, § 10.5

Tribunal screening prerequisite. Screening tribunal, above

Use of treatise in cross-examination of expert witness, § 10.10

Verdicts, below

Vagina, qualified immunity as to search of, § 8.18

Verdicts

Generally, § 11.1 et seq.

Actuarial tables, use of, § 11.4

Attorney fees, limitation on, § 11.7

Collateral benefits, reduction of award, § 11.6

Interest on verdicts, § 11.5

Itemization of damages, § 11.2

Life expectancy factor, § 11.4

Pain and suffering, limitations on, § 11.3

Prejudgment interest, § 11.5

Procedural and evidentiary considerations relating to verdict requirements,

§ 11.4

Reduction of award, collateral benefits, § 11.6

Special jury verdict instruction, § 11.8

Veterinarians, § 12.19

Vicarious liability. Institutional and vicarious liability, above

Videotape regarded as learned treatise, § 7.7

Warn about drugs, duty to, § 12.14, 13.2

Warn about medical devices, duty to, § 13.4

Witnesses

Deceased physicians, reports of, § 10.4

Deposition to perpetuate testimony, § 6.1

Expert witnesses, above

Peer review committee proceedings, § 6.2

Perjury, § 10.6

#### MEDICAL PRODUCTS LIABILITY

Medical Malpractice, this index

# MENTAL HEALTH COMMITMENTS IMMUNITY

Medical malpractice, § 8.16

#### MENTAL HEALTH PROFESSIONALS

Medical malpractice, duty of care, § 2.6

#### **MENTALLY ILL PERSONS**

Incapacitated Persons As Plaintiffs, this index Medical malpractice, statute of limitations, § 8.5

# **MEYER v. WAGNER**

Legal malpractice, § 15.12

# M.G.L.A. C. 93A CLAIMS

Accountants malpractice, § 18.12 Legal malpractice, § 16.76, 17.3-17.5 Medical malpractice, § 2.11

# **MIDWIVES**

Medical malpractice, § 12.6

#### **MILLER v. MOONEY**

Legal malpractice, § 15.10

# MISREPRESENTATION, NEGLIGENT

Negligent Misrepresentation, this index

#### MITIGATION OF DAMAGES

Legal malpractice, § 16.64, 16.79 Medical malpractice, § 10.14

#### MOONEY, MILLER v.

Miller v. Mooney, this index

# MORTGAGE TRANSACTIONS

Attorney-client relationship, § 16.13, 16.20

#### **MOTOR VEHICLES**

Medical malpractice, driving ability or impediment of patient, § 2.6

#### **NEGLIGENT MISREPRESENTATION**

Accountants malpractice, § 18.11 Business consultants, § 18.22

Design professionals malpractice, § 18.16, 18.17

Insurance brokers/agents, § 18.18

Legal malpractice

Damages in breach contract cases, proving, § 16.49

Duty of reasonable care owed by attorney, § 16.22

Medical malpractice

False and misleading testimony, § 10.6

Fraudulent concealment of cause of action, § 8.3, 8.10

Real estate brokers/agents, § 18.19

# NELHAUS, CACCIOLA v.

Cacciola v. Nellhaus, this index

#### **NEUROLOGISTS**

Medical malpractice, § 2.6

#### **NOMINAL DAMAGES**

Legal malpractice, § 16.57

# NON-MEDICAL AND NON-LEGAL PROFESSIONS

Other Professions, this index

# **NOVEL OR ESOTERIC CASES**

Legal malpractice, standard of care, § 16.28

# **NOVICE OR BEGINNING ATTORNEYS**

Legal malpractice, § 14.7, 16.28

#### **NURSES**

Medical Malpractice, this index

# **NURSING HOMES**

Malpractice, § 12.18

# **OFFER OF PROOF**

Medical malpractice screening tribunal hearing, § 5.3, 5.7-5.9, 5.22, 7.2

# **OPTICIANS**

Malpractice, § 12.11

# **OPTOMETRISTS**

Malpractice, § 12.11

#### **ORGANS**

Medical malpractice, standard of care, § 13.5

# **OSTEOPATHS**

Malpractice, § 12.15

# OTHER PROFESSIONS (NON-MEDICAL AND NON-LEGAL)

Generally, § 18.1 et seq.

Academics (teachers and other educators), § 18.23

Accountants, § 18.5-18.12

Appraisers, § 18.20

Attorneys. Legal Malpractice, this index

Basic principles, § 18.2, 18.3

Business consultants, § 18.22

Clergy, § 18.23

Client relationship with professional, § 18.3

Comparing legal malpractice to other professions, § 18.3

Design professionals, § 18.13-18.17

Educators, § 18.23

Expert witness, need for, § 18.3

Insurance brokers/agents, § 18.18

Legal Malpractice, this index

Medical Malpractice, this index

Negligence defined, § 18.2

Negligent misrepresentation, § 18.3

Non-client third parties, § 18.3

# OTHER PROFESSIONS (NON-MEDICAL AND NON-LEGAL)—Cont'd

Overview, § 18.24

Real estate brokers/agents, § 18.19

Scope of what is a profession, § 18.1

Standard of care, § 18.2

State cases, generally, § 18.4 et seq.

Stockbrokers, § 18.21

Teachers and other educators, § 18.23

Terminology

Negligence, § 18.2

Profession, § 18.1

What is a "profession," § 18.1

#### PAIN AND SUFFERING

Amount limitations on damages, § 11.3

Arguing dollar amounts to jury, § 10.11

Calculation by actuarial tables, § 11.4

Conscious pain and suffering before wrongful death, § 8.7

ERISA preemption, § 9.10

Expert testimony, § 3.5

Jury instruction recommended, § 10.14, 11.3

Limitations on damages, § 11.3

Negligent sterilization procedures, § 2.8

Recovery of, § 2.10, 11.3, 11.4

Special jury verdict instruction, form, § 11.7

Verdict form, limitations on damages, § 11.3

#### **PARENTS**

Emergency care of children, parental consent as to, § 3.11, 8.16

Wrongful death damages, child's entitlement to, § 8.6

#### **PARTNERS**

Legal Malpractice, this index

Medical malpractice liability, § 9.3

#### **PATHOLOGISTS**

Medical malpractice, § 2.7

# PDR

Physicians' Desk Reference (PDR), this index

# PEER REVIEW COMMITTEE

Medical malpractice, § 6.2

#### **PERJURY**

Medical malpractice cases, § 10.6

# **PHARMACISTS**

Malpractice, § 12.14, 13.2

#### PHYSICAL THERAPISTS

Medical malpractice, § 12.17

# PHYSICIANS' DESK REFERENCE (PDR)

Medical malpractice standard of care, § 10.11

#### **PODIATRISTS**

Medical malpractice, § 12.16

#### POSTJUDGMENT INTEREST

Legal malpractice, § 16.59

#### **PREEMPTION**

Medical Malpractice, this index

# PREJUDGMENT INTEREST

Legal malpractice damages, § 16.59

Medical malpractice damages, § 11.5

#### **PRIVILEGE**

Medical malpractice, privilege

Nondisclosure of material risks, § 3.6

Peer review committee records, § 6.2

#### PRODUCTS LIABILITY RELATING TO MEDICAL DEVICES

Generally, § 13.1 et seq.

Blood shield statute, § 13.5

Federal preemption, § 13.3

Learned intermediary doctrine, § 13.2

Sophisticated user doctrine, § 13.4

# PROSECUTION OF THE ACTION, MISHANDLING OF

Legal malpractice, § 16.52

# PROXIMATE CAUSE

Medical malpractice, expert witness testimony, § 4.1

#### PSYCHIATRISTS AND PSYCHOLOGISTS

Medical Malpractice, this index

#### **PUBLIC EMPLOYEES**

Medical malpractice liability, § 8.15, 9.1, 12.13

# **QUALIFIED IMMUNITY**

Medical malpractice defense, § 8.18

#### **RADIOLOGISTS**

Medical malpractice, § 2.5, 2.7

# **RATIFICATION**

Legal malpractice defense, § 16.84

# **REAL ESTATE BROKERS/AGENTS**

Malpractice, generally, § 18.19

#### REASONABLENESS

Medical malpractice, reasonable degree of medical certainty as to causation, § 4.3

#### **RECORDS**

Medical Malpractice, this index

# REDACTION

Evidence, § 10.2

#### **REFERRALS**

Consultants, this index

Legal malpractice, referrals to another attorney for assistance, § 16.15 Medical malpractice, referral of federal actions to state court for tribunal screening, § 5.14

#### RELEASES

Legal malpractice, § 15.1, 16.83 Medical malpractice, § 8.19

# **RELIGIOUS PERSONS**

Generally, § 18.23

#### REMOTE DAMAGES

Legal malpractice, § 16.49

#### REPORTS

Medical Malpractice, this index

# RES IPSA LOQUITUR DOCTRINE

Jury instruction, recommended form, medical malpractice, § 10.14 Medical malpractice, § 4.1, 4.6, 7.6, 10.14

#### **RES JUDICATA**

Legal malpractice defense, § 16.85

#### RESEARCH

Legal malpractice, legal research competency, § 16.32

# RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS

Relevance to legal malpractice, § 14.1, 16.8-16.9, 16.20, 16.30, 16.37, 16.54, 16.61, 17.1, 17.6, Appx A

# RISK OF COMMITTING LEGAL MALPRACTICE

Legal Malpractice, this index

# ROSEN, GOLDBERG, SLAVET, LEVENSON & WEKSTEIN P.C., COLUCCI v.

Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein P.C., this index

# **SANCTIONS**

Spoliation of evidence, § 10.5

# SCIENTIFIC EVIDENCE

Laying foundation for, § 7.1

#### **SCREENING TRIBUNAL**

Medical Malpractice, this index

#### **SEARCH WARRANTS**

Medical malpractice defense, § 8.18

# SEARS, HENDRICKSON

Hendrickson v. Sears, this index

# **SETTLEMENTS**

Legal Malpractice, this index

# SEXUAL EXPLOITATION OF PATIENT

Medical malpractice, § 2.9, 8.3, 12.13

# SEXUAL HARASSMENT

Corporate liability for, § 9.8

#### **SHAREHOLDERS**

Accountant's appraisal of stock, § 18.10 Legal malpractice, liability, § 15.11, 17.2 Medical malpractice, liability, § 9.4

# **SOCIAL WORKERS**

Health care provider, not as a, § 5.2

#### SOCIETAL AND CULTURAL CHANGES

Legal malpractice risk, creating, § 14.11

#### SOPHISTICATED USER DOCTRINE

Medical malpractice, § 13.4

#### **SPECIALISTS**

Legal Malpractice, this index Medical malpractice standard of care, § 2.2

# SPECULATIVE DAMAGES

Legal malpractice, § 16.49

# **SPEEDY TRIAL**

Medical malpractice, § 10.12

# SPOLIATION OF EVIDENCE

Medical malpractice, § 10.5

# STANDARD OF CARE

Legal Malpractice, this index Medical Malpractice, this index

# STATUTE OF LIMITATIONS

Accountants malpractice, § 18.9
Design professionals malpractice, § 18.14
Legal malpractice, § 15.1, 15.4, 15.9, 16.71-16.76
Medical malpractice, § 8.2-8.10
Stockbrokers (investment broker-dealer), § 18.21

#### STATUTE OF REPOSE

Generally, § 8.3

#### STATUTE OF REPOSE—Cont'd

Children, actions by, § 8.3, 8.4

Design professionals malpractice, § 18.14

Mentally ill persons, actions by, § 8.5

# STERILIZATION PROCEDURES CLAIMS

Damages, § 2.8

#### **STOCK**

Accountant's appraisal of stock, § 18.10

# **STOCKBROKERS**

Malpractice, generally, § 18.21

# **SUMMARY JUDGMENT**

Legal malpractice motions, § 16.70

# **SUPERSEDING CAUSES**

Legal malpractice, § 16.39

Medical malpractice, § 4.4

# **SUPERVISORS**

Medical malpractice liability, § 9.5, 9.6

# **TEACHERS**

Generally, § 18.23

# **TECHNOLOGY**

Legal Malpractice, this index

#### **TERMINATION**

Attorney-client relationship, § 16.6

Physician-patient relationship, § 2.7

# **TERMINOLOGY**

Negligence, § 18.2

Practice of law, § 14.14

Profession, § 18.1

Standard of care, § 16.26, 18.2

# TERRANOVA, GLIDDEN v.

Glidden v.Terranova, this index

# THIRD PARTIES, DUTY OWED TO

Design professionals malpractice, § 18.17

Legal Malpractice, this index

Medical malpractice, health care provider's duties to third parties not their patients, § 2.6

Other professions (non-medical and non-legal), § 18.3

# TISSUE, BODY

Medical malpractice, standard of care, § 13.5

#### TRANSACTIONAL SITUATIONS

Legal Malpractice, this index

# TRANSACTIONAL SITUATIONS—Cont'd

Medical malpractice situations involving blood, organs, or tissues, § 13.5

#### TREBLE DAMAGES

Legal malpractice, § 16.58

# TRIAL WITHIN A TRIAL

Legal Malpractice, this index

# **TRIALS**

Legal Malpractice, this index Medical Malpractice, this index

#### **TRUSTS**

Legal Malpractice, this index

# UNFAIR OR DECEPTIVE PRACTICES

Accountants malpractice, § 18.12 Legal malpractice, § 16.76, 17.3-17.5 Medical malpractice, § 2.11

# UNIFORM COMMERCIAL CODE

Blood, organ and tissue transactions, § 13.5

# **VERDICTS**

Medical Malpractice, this index

# **VETERINARIANS**

Malpractice, § 12.19

#### VICARIOUS LIABILITY

Attorneys, § 17.2

Medical malpractice, this index

## **VIDEOTAPE**

Regarded as learned treatise, § 7.7

# WAGNER, MEYER v.

Meyer v. Wagner, this index

#### **WARNINGS**

Drugs, duty to warn about, § 12.14, 13.2 Medical devices, duty to warn about, § 13.4

# WARRANTIES

Blood, implied warranties, § 13.5

#### WILLFULNESS

Accountants malpractice, willful ignorance of information, § 18.11

# WILLIAMS v. ELY

Legal malpractice, § 15.9

#### **WILLS**

Legal Malpractice, this index

# PROFESSIONAL MALPRACTICE

# WORKER'S COMPENSATION

Attorney-client relationship with claimants, § 16.20

# **ZEAL**

Duty to represent client zealously, § 14.6