

5.51 LEGAL MALPRACTICE (Approved 6/79)

A. General Duty Owing

An action brought against an attorney alleging negligence in the practice of law is referred to as a malpractice action. In this action plaintiff contends that defendant did not comply with the standard care which the law imposes upon him/her while attending to the legal needs of his/her client, the plaintiff. Plaintiff contends that as a result of defendant's malpractice plaintiff suffered injury for which damages are sought.

To decide this case properly, you must know the standard of care imposed by law against which defendant's conduct as an attorney should be measured.

A person who is engaged in the general practice of law (or who is engaged as a specialist in a given area of law)¹ represents that he/she has the degree of knowledge and skill ordinarily possessed and used by others engaged in the general practice of law (or as a specialist, as the case may be). The required knowledge and skill must be judged by the standard legal practice at the time the

¹ Caveat: With the exception of *R. 1:39 (Certification of Attorneys as Trial Attorneys)*, the Supreme Court has not promulgated rules authorizing attorneys to represent themselves as specialists. However, while there is no case law on the subject, the Committee is of the opinion that a charge imposing the duties of a specialist may be appropriate in a particular matter where the attorney has represented or held himself/herself out to the client as a specialist in such matters. Such charge would also of course be appropriate in a matter involving an attorney certified as a trial attorney pursuant to *R. 1:39*.

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attorney represented the client. An attorney who undertakes to attend to the legal needs of a client represents also that he/she will use such knowledge, skill and care which attorneys of ordinary ability and skill possess and exercise. The law, therefore, imposes upon an attorney the duty or obligation to have and to use that degree of knowledge and skill which attorneys of ordinary ability and skill possess and exercise in the representation of a client, such as the plaintiff in this case. This is the standard by which to judge the defendant (a general practitioner or a specialist) in his/her representation of plaintiff in this case.

The law does not require that an attorney guarantee a favorable result. The law recognizes that the practice of law according to standard legal practice will not necessarily prevent a poor result. If the attorney has brought and applied the required knowledge and skill to his/her client, he/she is not liable simply because a favorable result has not been achieved or simply because bad results have occurred. The attorney is not an insurer, nor is he/she liable for every error in judgment or mistake. On the one hand, he/she is not to be held accountable for the consequences of every act which may be held to be an error by a court. On the other hand, he/she is not immune from responsibility if he/she fails to employ in the work he/she undertakes that degree of reasonable knowledge and skill exercised by attorneys of ordinary ability and skill.

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Where, according to standard legal practice, the work involves matters to be subjected to the judgment of the attorney, an attorney must be allowed the exercise of that judgment and he/she cannot be held liable if, in the exercise of that judgment, he/she has, nevertheless, made a mistake or an error in judgment. Where judgment must be exercised, the law does not require of the attorney infallible judgment. An attorney cannot be held liable for malpractice so long as he/she employs such judgment as is allowed by the standards of accepted legal practice. If, in fact, in the exercise of his/her judgment, an attorney selects one of two or more courses of action, each of which in the circumstances has substantial support as proper practice by the legal profession, he/she cannot be found guilty of malpractice if the course chosen produces a poor result.

But an attorney who departs from standard legal practice cannot excuse himself/herself from the consequences by saying it was an exercise of his/her judgment. If the exercise of an attorney's judgment causes him/her to do that which standard legal practice forbids, the attorney would be guilty of malpractice. Similarly, an attorney whose judgment causes him/her to omit doing something which in the circumstances is required by standard legal practice is also guilty of malpractice.

Thus, the obligation or duty of care which the law imposes upon defendant is to bring to his/her client that degree of knowledge and skill which are ordinarily possessed and exercised in similar situations by attorneys or ordinary skill and ability. The attorney is obliged to use his/her knowledge, skill and judgment in an effort to perform the work he/she undertakes according to standard legal practice.

If you find that the defendant has complied with this standard, he/she is not liable to plaintiff, regardless of the result. On the other hand, if you find that defendant has departed from this standard of care, resulting in injury or damage, then you should find defendant liable for his/her malpractice.

Cases:

For definition and discussion of the scope of the duties of an attorney to client, *see Sullivan v. Stout*, 120 N.J.L. 304 (E.&A. 1938); *Morris v. Muller*, 113 N.J.L. 46 (E. & A. 1934); *McCullough v. Sullivan*, 102 N.J.L. 381 (E. & A. 1925); *Stewart v. Sbarro*, 142 N.J. Super. 581 (App. Div. 1971); *Passanante v. Yormack*, 138 N.J. Super. 233 (App. Div. 1975). The duties of attorney to client have been equated with those of physician to patient; thus, the charges on legal malpractice are similar in several respects to those on medical malpractice (*see* Chapter 5). *See Stewart v. Sbarro, supra*, quoting from the language of *McCullough v. Sullivan, supra*, 102 N.J.L. 381 at 385, to the effect that the duties and liabilities between an attorney and client are the same as those between a physician and patient.

New Jersey does not follow any version of the "locality" rule, and has imposed a standard measured by the profession without geographic consideration. *See Stewart v. Sbarro, supra*. The same is true with respect to medical malpractice. *See Carbone v. Warburton*, 11 N.J. 418 (1953).

While in a particular case the court may determine violation of the standard of care as a matter of law (*see, e.g., Stewart v. Sbarro, supra*, where the Appellate Division held that no expert testimony was required to support plaintiff's claim and that as a matter of law the defendant attorney was negligent, and also the situation referred to in *Fuschetti v. Bierman*, 128 N.J. Super. 290 (Law Div. 1974), where the court held that the failure of an attorney to commence an action within the period of the statute of limitations would ordinarily be considered neglect), usually the standard of care must be established by expert testimony with the trier of fact deciding the question of whether the attorney violated it. *See, e.g., Wright v. Williams*, 47 Cal. App.3d, 802, 121 Cal. Rptr. 194.

For the procedure involving in certain instances a "trial-within-a-trial," *see Fuschetti v. Bierman, supra*, which involved a legal malpractice claim for failure of an attorney to file a personal injury action within the period of the statute of limitations.

B. Specialist, Duty of ²

A specialist in a given area of law is one who devotes special study and attention to the practice of a particular field of the law. An attorney who holds himself/herself out as a specialist in a particular field of law represents that, with regard to his/her specialty, he/she has and will employ not merely the knowledge and skill of a general practitioner but that he/she has and will employ that special degree of knowledge and skill (ordinarily) (normally) possessed and used by the average specialist in his/her field. Accordingly, when an attorney holds himself/herself out as a specialist and undertakes as such work for a client, the law

² Caveat: *See* the caveat concerning a charge imposing the duty of a specialist set forth at Part A, *supra*.

imposes the duty upon that attorney to have and to use that degree of knowledge and skill which is (normally) (ordinarily) possessed and used by the average attorney who specializes in the practice of that particular field of law.

C. Expert Testimony to Prove Standard Of Care

Negligence is conduct which falls below a standard of care required by law for the protection of persons or property from foreseeable risks of harm. In the usual negligence case, it is not necessary for plaintiff to prove the standard of care by which defendant's conduct is to be measured. In the usual case, such as an automobile negligence action, it is sufficient for plaintiff to prove what the defendant did or failed to do, and what the circumstances were, and then it is for the jury to determine whether the defendant exercised such care as a reasonably prudent person would have exercised for the safety of others. The standard of care is reasonable prudence to avoid injury to another, and the jury, in effect, supplies that standard by deciding what a reasonably prudent person would have done in the circumstances.

In the usual legal malpractice case, however, jurors are not qualified to supply the standard of care by which to measure the defendant's conduct. Based upon their common knowledge alone, without technical training, jurors normally cannot know what conduct constitutes standard legal practice. Therefore,

ordinarily, when an attorney is charged with negligence in the representation of a client, the standard of practice by which his/her conduct is to be judged must be furnished by expert testimony, that is to say, by the testimony of persons who by knowledge, training or experience are deemed qualified to testify and to express their opinions on legal subjects.

Where the subject matter of the claim is such that jurors cannot determine the standard of conduct and any departure therefrom on the basis of their common knowledge as laypersons, then as jurors they should not speculate or guess about the standards by which the average attorney should conduct himself/herself in the circumstances. In a case such as this, you as jurors must determine what is standard legal practice from the testimony of the expert witnesses who have been heard in this case. After deciding what the standard of care is, what standard legal practice is in the circumstances of this case, you as jurors must then determine whether defendant has conformed with or whether defendant has departed from that standard of care.

Cases:

See in this regard the cases concerning expert testimony set forth in Part A, *supra*. If the failure of attorney performance is so clear that professional negligence may be found without the aid of expert testimony, this instruction is unnecessary. *Wright v. Williams*, 47 Cal. App.3d, 802, 121 Cal. Rptr. 194. Besides the question of the necessity of expert testimony to establish the standard of care, an ancillary question concerns the issue of admissibility of expert testimony on

damages. *See, e.g., Fuschetti v. Bierman*, 128 N.J. Super. 290 (Law Div. 1974) where expert testimony concerning the reasonable settlement value of a personal injury claim was ruled inadmissible.

D. Common Knowledge May Furnish Standard of Care

Negligence is the failure to comply with the standard of care required by law to protect a person from foreseeable risks of harm. Negligence in an attorney's legal practice, which is called malpractice, is the attorney's failure to comply with the standard of care required by law in the representation of his/her client. Usually it is necessary to establish the standard of care by expert testimony, that is, by testimony of persons how are qualified by their training, study and experience to give their opinions on subjects not generally understood by persons who lack such special training or experience. In the usual case, standard legal practice by which to judge defendant's conduct cannot be determined by the jury without the assistance of expert legal testimony.

However, in some cases, such as the case at hand, the jury may determine from its common knowledge and experience the standard of care by which to judge defendant's conduct. In this case, plaintiff contends that defendant violated the duty of care he/she owed to plaintiff by doing _____/by failing to do _____. In this case, therefore, it is for you, as jurors, to determine, based upon common knowledge and experience, what skill and care the

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average attorney practicing in defendant's field would have exercised in the same or similar circumstances. It is for you as jurors to say from your common knowledge and experience whether defendant did something which the average member of his/her profession would not have done or whether defendant failed to do something or failed to take some measure which the average member of his/her profession would have done or taken in the circumstances of this case in the representation of the plaintiff.

[Where there has been expert legal testimony as to the standard of care but the standard is one which can also be determined by the jury from its common knowledge and experience, the jury should determine the standard of care after considering all the evidence in the case, including the expert legal testimony, as well as its own common knowledge and experience.]

After determining the standard of care required in the circumstances of this case, you should then consider the evidence to determine whether defendant has complied with or departed from that standard of care. If you find that defendant has complied with that standard of care, he/she is not liable to plaintiff, regardless of the result. If you find that defendant has not complied with the standard of care, resulting in injury or damage to plaintiff, then you should find defendant guilty of malpractice and return a verdict for plaintiff.