

When Is It Needed?

By Jeffrey M. James

With increasing frequency, plaintiffs are attempting to bypass the procedural hurdle requiring expert testimony by asking the court to apply the “common sense exception.”

Expert Testimony in Legal Malpractice Cases

At some point in every legal malpractice case, a defense attorney expects to receive a disclosure of the plaintiff’s expert witnesses and the witnesses’ opinions. Often, this is the stage of the litigation when the issues are clearly out-

lined, and the defense is told exactly “what went wrong.”

But what happens when a plaintiff’s attorney does not disclose a liability expert? As lawyers, we tend to think that a jury, usually consisting of laypersons, cannot determine the standard of care that an attorney should have followed when the alleged malpractice occurred. Does a plaintiff’s attorney absolutely have to present expert witness testimony at trial to get the case to the jury? Oddly enough, sometimes the answer is no.

This article will examine the current state of the law and answer the following question: Under which circumstances is expert testimony optional in a legal malpractice lawsuit, rather than mandatory? The answer to this question is important in analyzing a case’s susceptibility to a summary judgment or a directed verdict at trial.

- An employment relationship existed between the plaintiff as a client and the defendant as his or her attorney;
- This relationship created a duty, and the attorney breached that duty when representing the client;
- The client suffered damages that were proximately caused by the attorney’s breach of the duty.

Larson & Larson, P.A. v. TSE Industries, Inc., 22 So. 3d 36, 39 (Fla. Dist. Ct. App. 2009).

The first element of a malpractice claim—the employment relationship—generally is not established by expert testimony. Rather, it is usually established by the existence of a retainer agreement or, at least, the plaintiff’s testimony that he or she believed that the defendant was representing him or her.

The Elements of Legal Malpractice

Generally, at a trial, a plaintiff must prove the following elements to establish a claim for legal malpractice:

The Use of Expert Testimony

A plaintiff generally employs an expert witness to address the second element of a malpractice claim—an attorney’s breach



■ Jeffrey M. James is a shareholder with the law firm of Banker Lopez Gassler P.A. in Tampa, Florida. His practice focuses on products liability, professional malpractice, and other litigation. Mr. James is admitted to practice in all state and federal courts in Florida. He is AV-rated with Martindale-Hubbell and was included as a Rising Star in 2009 by Florida Super Lawyers magazine. Mr. James is a member of DRI and its Professional Liability Committee.

of a duty, which is normally defined as the applicable standard of care. This actually entails a two-step process. First, an expert witness must describe the standard of care for practitioners under the same circumstances as a defendant's. Next, a plaintiff's expert must explain to the factfinder why the attorney's actions failed to meet the standard of care. *Teltschik v. Williams & Jensen, PLLC*, F. Supp. 2d, 2010 WL 481312, at *13 (D.D.C. 2010) (holding that "expert testimony most often is necessary to establish the applicable standard of care and breach thereof in legal malpractice claims"); *Pereira v. Thompson*, 217 P.3d 236, 247 (Or. Ct. App. 2009) ("To prove that breach, a jury often requires expert evidence setting forth the appropriate standard of care owed by a reasonable attorney and how the defendant failed to uphold that standard").

What Is the Standard of Care?

Since the expert first explains the standard of care to a jury before establishing how he or she breached it, identifying that standard of care is important in each particular case. Sometimes a statute prescribes the standard of care, clearly explaining the standard an expert must consider in determining whether an attorney breached it. In Alabama, for example, the legislature has specified that a plaintiff suing a legal service provider has the burden of proving that the provider breached the applicable standard of care in ALA. CODE §6-5-580. Subsection (1) of the statute even defines the standard of care as "such reasonable care and skill and diligence as other similarly situated legal service providers in the same general line of practice in the same general area ordinarily have and exercise in a like case." Subsection (2) elaborates further, stating that if an attorney publishes the fact that he or she is certified as a specialist in a particular area of law, the applicable standard of care in a claim for damages resulting from the practice of that specialty is the reasonable care, skill and diligence displayed by other attorneys with the same specialty. This suggests that an expert employed by a plaintiff to render an opinion that a defendant breached the applicable standard of care in representing the plaintiff would practice in the same specialty or area of law as the defendant.

Some states without statutes outlining the standard of care in legal malpractice claims nevertheless provide guidance through specialized jury instructions. Connecticut civil courts employ a very detailed instruction laying out the three elements of a malpractice claim. CONN. CIV. JURY INSTRUCTION 3.8-5. The instruction provides an excellent explanation of the issues that a jury must determine in laymen's terms. It also specifically explains the purpose of expert testimony:

Malpractice is really professional negligence. Because jurors are probably unfamiliar with legal procedures, methods, and strategies, you obviously cannot be expected to know the demands of proper legal representation. It is for this reason that expert testimony is required to define the standard of care or the duty owing from the lawyer to his client, whether that duty has been breached, and whether that breach of duty caused the damages the plaintiff claims, so that you can reasonably and logically conclude what the proper standard of professional care was, whether or not it was violated, and whether that violation was a legal cause of harm to the plaintiff.

Though the instruction informs the jury that the purpose of expert testimony is to establish the standard of care owed by a lawyer to his or her client, the instruction also defines the applicable standard of care: "The test in this case for determining what constitutes sufficient knowledge, skill, and diligence on the part of the defendant is that which attorneys ordinarily have and exercise in similar cases. That means that the law does not expect from an attorney the utmost care and skill obtainable or known to the profession."

Certainly, Connecticut's jury instruction is one of the most detailed and descriptive instructions on legal malpractice. More often, pattern legal malpractice instructions tend to restate a court's definition of the standard of care, as in Alaska, or simply repeat the standard definition of negligence, as in Florida. *Compare* ALASKA CIVIL PATTERN JURY INSTRUCTION 8.10 ("An attorney is negligent in the representation of a client if the attorney fails to use the skill prudence and diligence that other attorneys commonly possess and would exercise under similar circum-

stances.") *with* FLORIDA STANDARD (CIVIL) JURY INSTRUCTION 402.5 ("Negligence is the failure to use reasonable care. Reasonable care on the part of [an attorney] is the care that a reasonably careful [attorney] would use under like circumstances. Negligence is doing something that a reasonably careful [attorney] would not do under like circumstances or failing to do something that a reasonably careful [attorney] would do under like circumstances").

On the other end of the spectrum, many states do not have either a statute or jury instruction outlining the applicable standard of care. Courts in these states generally will exercise discretion in deciding the type of expert testimony to allow in a trial, and if it is required. Most likely a trial court will use the standard definition of negligence in an instruction for a jury, unless an attorney requests a special instruction based on the testimony in evidence, and the court grants that request.

When Is Expert Testimony Unnecessary?

What happens, though, when a plaintiff seeks to proceed to trial without intending to offer expert testimony regarding the standard of care and the defendant's breach of that standard? Interestingly enough, expert testimony is not always necessary to establish that an attorney breached a standard of care. At first blush, this seems counterintuitive. How will a jury, consisting of laypersons, identify the appropriate standard of care for an attorney in a particular situation?

The Common Sense Exception

Courts in jurisdictions across the country have held that if an attorney's breach is so clear that even a layperson can determine that it fails to meet the appropriate standard of care, a court may permit a plaintiff to proceed to trial without presenting expert testimony to establish the requisite standard of care or that an attorney breached the standard. This is often called the "common sense exception," though different jurisdictions use different terms to describe it. *See, e.g., Keeney v. Osborne*, S.W.3d, 2010 WL 743671, *4 (Ky. Ct. App. Mar. 5, 2010) ("sufficiently apparent"); *Davis v. Enget*, 779 N.W.2d 126, 129 (N.D. 2010) ("egregious and obvious"); *Byrne v. Grasso*, 985 A.2d 1064, 1067 (Conn.



App. Ct. 2009) (“obvious and gross want of care”); *Storey v. Leonas*, 904 N.E.2d 229, 238 (Ind. Ct. App. 2009) (“grossly apparent”); *Bowman v. Doherty*, 686 P.2d 112, 120 (Kan. 1984) (“clear and obvious”); *Hughes v. Malone*, 247 S.E.2d 107, 111 (Ga. Ct. App. 1978) (“clear and palpable”).

Whatever the name for the common sense exception in your jurisdiction, it is

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essential that you realize that it may come up even in malpractice cases that do not present “sufficiently apparent” negligence. Because judges determine whether the exception applies on a case-by-case basis, you cannot definitively rule out the issue at the outset when a former client asserts a claim. In practice, the fact that courts use broad, flexible terms, such as “sufficiently apparent” and “common sense,” provides little guidance about when and how courts will apply the exception. The variability of legal malpractice claims amplifies the unpredictability. As practitioners in this field know, every case is unique in some way, so you always face a chance that a court will apply the common sense exception in a legal malpractice case.

Because the terminology used to describe the common sense exception is often vague, defense attorneys should understand the situations in which courts have applied the exception and held that an attorney’s conduct was so negligent that the breach of the standard of care was clear enough to render expert testimony unnecessary. Courts and commentators usually point to an instance in which an attorney failed to meet a statute of limitations deadline as the prototypical example of clear negligence. To be sure, laypersons likely can understand that an attorney missed a deadline that compromised his or her former client’s ability to sue someone or some entity without an expert witness explaining it to them. Generally,

however, juries do not hear these cases very often because the parties settled them early, unless the damages issues are contested.

In reality, therefore, the most important question is, how can we make sense of the “common sense” exception? Though courts have noted that the exception should only apply in “rare and exceptional” cases, *Fontaine v. Steen*, 759 N.W.2d 672, 677 (Minn. Ct. App. 2009), numerous courts in jurisdictions around the country have applied the exception in numerous cases in a variety of situations. Based on a review of case law, the situations in which courts have applied the common sense exception generally fell into three categories: (1) failure to file; (2) failure to communicate; and (3) failure to follow instructions. However, as the cases discussed below illustrate, legal malpractice cases often involve more than one of these three situations, which creates more reason for a court to find an apparent breach of the standard of care.

Failure to File

Various courts have held that if an attorney failed to file a critical pleading or other document that damaged a client’s rights, such an act of omission clearly breached the standard of care. As mentioned above, the most egregious example of this type of breach is if an attorney has failed to file a complaint within the applicable statute of limitations period. Courts have also found that when an attorney failed to file a response to a complaint, which led to a default judgment against his or her former client, the attorney breached the standard of care. *See, e.g., McGrath v. Everest Nat. Ins. Co.*, 668 F. Supp. 2d 1085, 1116–17 (N.D. Ind. 2009).

However, other types of documents fall within this category as well. In *Valentine v. Watters*, 896 So. 2d 385 (Ala. 2004), a former client sued her attorney for failing to file the necessary registration papers to have the client included in a class action lawsuit regarding breast implant defects. The evidence suggested that the defendant had (1) misrepresented his past experience with breast implant class action litigation; (2) failed to file timely registration papers so that the client would be included in the class; and (3) repeatedly told the client that he had in fact sent in the papers, but the court clerk had misplaced them. The late filing by the attorney caused the client to be classified as a “late

registrant” in the class action, which meant that she was not entitled to the same level of benefits as a “current registrant.” The trial court entered a summary judgment for the defendant when the plaintiff did not produce expert testimony about whether the defendant’s conduct constituted a breach of the standard of care.

On appeal, the Supreme Court of Alabama reversed the summary judgment, holding that whether the former client would have prevailed in the class action was a question within the understanding of the jury. *Id.* at 394. The court likened the situation to an attorney violating a statute of limitations time frame. *Id.* Interestingly, the court also held that expert testimony was not required to establish that the defendant had breached the applicable standard of care in misrepresenting his qualifications to the former client. *Id.* at 394–95. In *Valentine*, the defendant’s circumstance really fell within two common sense exception situations. He initiated his problems by failing to file the proper paperwork with the court, and then he compounded them by failing to communicate truthfully with his client, which is discussed further in the next section.

Failure to Communicate

Next, courts are likely to find an apparent breach of the standard of care when a client is harmed by an attorney’s failure to communicate fully and honestly with the client. One such situation is a failure to discuss settlement offers with a client. In *Joos v. Auto-Owners Insurance Co.*, 288 N.W.2d 443 (Mich. App. 1979), the court reversed a dismissal that was based on the plaintiff’s failure to produce expert testimony. In that case, the former client, Avery, was sued by various people injured in an automobile accident that Avery allegedly caused. Avery’s automobile insurance company hired the defendant, the attorney, to represent Avery in the case. All claimants settled prior to trial except for Joos. Joos had offered to settle her claim with Avery within her remaining policy limits on several occasions, but the evidence showed that the attorney never communicated those offers to Avery or her insurance company. Avery did not become aware of the offers until the first day of trial. At that point, the defendant told Avery that

he did not have the authority to settle for the amount requested. On the following day, the defendant advised Avery that he had received authority to settle. Despite the client's willingness to settle, the defendant refused to do so because he thought he could "beat the case." *Id.* at 444. The jury returned a verdict for Joos in the amount of \$65,000, exclusive of interest and costs.

Avery and Joos, who had been assigned a portion of Avery's claim, sued the defendant for legal malpractice. The trial court dismissed the claim for failure to introduce expert testimony that the defendant had breach the standard of care by not communicating the pretrial settlement offers and failing to settle the case when he had authority to do so. The appellate court reversed, holding that "an attorney has, as a matter of law, a duty to disclose and discuss with his or her client good faith offers to settle." *Id.* at 445. In addition, the court found that it was within the knowledge of a layperson "to recognize" that "the failure of an attorney to disclose such information is a breach of the applicable standard of care." *Id.*

In *Joos*, again, the facts demonstrate the coexistence of two situations in a single case in which courts apply the "common sense" exception: failure to communicate and failure to follow instructions. The attorney also probably exacerbated his problem by *intentionally* failing to communicate and following instructions to settle, explaining that he could win if the case if he made it to the jury.

Failure to Follow Instructions

Finally, courts usually do not require expert testimony if an attorney failed to follow the express instructions of a client to the client's detriment. For example, in *Joos*, the attorney failed to settle a claim after his client told him to do so. Another case illustrating this situation was *Jarnagin v. Terry*, 807 S.W.2d 190 (Mo. App. 1991). In *Jarnagin*, the defendant represented a client in a divorce proceeding. The evidence at trial showed that the client had instructed the attorney to include as a term of the division of the marital property, and to secure the judgment of the court, that the client's husband solely undertake a particular marital debt. The evidence also proved that the attorney had agreed to this instruction and

yet failed to follow it, leading to the damages incurred by the client. The trial court, however, directed a verdict for the attorney based on a lack of expert testimony.

The appellate court approached the issue in an interesting way. Instead of analyzing it through the lens of the common sense exception, the court focused on the attorney's duty as an agent of the client to find that the breach was contractual rather than based in tort. *Id.* at 194. The court stated, "The ground of the action is not that the client was damaged by the lack of legal expertise of the lawyer, but that the lawyer did not follow the direction of the client, so that expert testimony is not needed to prove that the agent committed a breach of duty to the principal." *Id.* Other courts have also made this distinction while still applying the common sense exception. See *Asphalt Engineers, Inc. v. Galusha*, 770 P.2d 1180, 1181–82 (Ariz. App. 1989); *Olfe v. Gordon*, 286 N.W.2d 573, 577–78 (Wis. 1980).

As these cases illustrate, very often if a court holds that expert testimony is unnecessary to establish a breach of the applicable standard of care, the defendant has, through multiple acts, damaged the client's rights. While simply failing to file, failing to communicate or failing to follow a client's instructions may each alone sufficiently prompt a court to apply the common sense exception, an attorney defending a malpractice claim involving more than one of these negligent acts must certainly prepare for a former client suing an attorney to make this argument at the summary judgment stage or at trial.

Unique Rulings Relating to the Need for Expert Testimony

Sometimes when a court rules on whether a plaintiff needs expert testimony to establish the standard of care or establish a breach of a duty, it leads to a unique ruling. For instance, in one recent federal court opinion in California, the court outlined for the parties the conduct that would fall below the standard of care in that particular case. In *Ito v. Brighton/Shaw, Inc.*, 2009 WL 2960836 (E.D. Cal. Sept. 11, 2009), the court, on a motion for reconsideration, reiterated its previous ruling that the plaintiff could proceed to trial against the defendant without expert testimony if he could establish one of three "foundational facts." *Id.* at

*2. Though this opinion appears to be an outlier, it could help you to secure a compromise on the common sense exception if it seems likely that a former client will invoke the exception.

In *Yates v. Brown*, 2010 WL 58924 (Ohio Ct. App. Jan. 11, 2010), the court suggested that expert testimony was necessary in this legal malpractice claim to determine causation and apportion fault because it involved multiple attorneys. The former clients asserted that the actions of an attorney other than the defendant may have caused some of the damages attributed to the defendant. In responding to the defendant's motion for summary judgment, the former clients did not limit their arguments to the actions of the defendant. The appellate court upheld summary judgment for the defendant, stating, "When multiple attorneys were involved in the underlying representation, and when the plaintiffs have alleged negligent representation by more than one attorney, the trial court did not err by concluding that expert testimony was necessary to establish a *prima facie* case of legal malpractice in regard to an individual attorney. In fact, expert testimony would be critical under these circumstances to determining causation and either parsing or eliminating liability." *Id.* at *5. This language suggests that if the former clients had directed accusations solely against the defendant, expert testimony may not have been required.

Conclusion

In most legal malpractice cases across the country, a court—either by statute or by precedent—will require a plaintiff to offer an expert witness to testify to establish the standard of care applicable to the defendant and whether the defendant breached it. With increasing frequency, however, plaintiffs have bypassed this procedural hurdle by arguing to a court that the standard of care and the breach were so obvious that even a layperson can comprehend them without the benefit of expert testimony. In those situations, a defense attorney must know the type of conduct to which courts will apply the common sense exception. Identifying this conduct will allow you to have an argument ready to combat the exception when a plaintiff's attorney invokes it. Clearly, that is a matter of common sense. 