

**ON BEING AN  
EXPERT WITNESS  
IN  
LEGAL MALPRACTICE CASES**

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## INTRODUCTION

The expert witness can be the most important witness in a legal malpractice case. Just as the plaintiff can get to the jury on the strength of his expert's opinions, the defendant can prevent that from ever happening and thereby win a summary judgment--on the strength of his expert's report.

In the nearly 40 years that I have been a practicing lawyer, I have had the privilege of serving as an Affidavit of Merit, Consulting and/or Testifying Expert in more than 1,000 cases involving the law governing lawyers. I have appeared on behalf of defendants and their professional liability carriers and on behalf of plaintiffs. By far, most of those cases have involved issues of legal malpractice and legal ethics. I have also had the good fortune of serving as attorney of record defending and, sadly, prosecuting many lawyers and law firms accused of malpractice and ethics violations. With that experience, I have also had the pleasure of serving on the faculty of Hofstra University School of Law where, since 1990, I have taught advanced law students how *not* to practice law in a full semester course called "Lawyer Malpractice". Most recently, I have developed with my law students and other experienced colleagues The "Legal Malpractice Law Review", a growing internet based archive of summaries of legal malpractice decisions which the New Jersey Law Journal has called "cutting edge"; "a 'blawreview'—part blog, part law review...[that] includes lawyers on all sides of the malpractice wars...". You can visit it at <[www.legalmalpracticelawreview.com](http://www.legalmalpracticelawreview.com)>

In 1997, I was part of a panel in an ICLE presentation called "Understanding Legal Malpractice". I distributed a course outline for those that attended called, "Expert Witnesses in the Legal Malpractice Case: The New Jersey Experience". Since then, much has happened in this area of law. What follows is an effort to update and expand the scope of that outline. In addition, in order to illustrate the important role of experts in legal malpractice litigation, I have appended actual examples of an Affidavit of Merit, plaintiff and defense expert reports, and expert trial testimony in a couple of cases I have participated in as an expert.

But there is another purpose for this piece. To its credit, ICLE has recognized the need for a definitive practice handbook in what has become a newly recognized substantive area of practice—legal malpractice. Kudos to those who have spearheaded this effort. Since I entered this field three decades ago, more and more lawyers and law firms, who would never have thought of taking on such cases are now doing so. As distasteful as that might seem to some, the fact is that holding bad lawyers accountable for malpractice makes us all better lawyers and, as important, helps our clients. But I've also noticed that many meritorious cases are unnecessarily dismissed because the expert's opinion falls short of what it must be. So, what follows is an effort to explain my understanding of the law in this area, to highlight some essential practice pointers and to set out what I believe is required of all lawyers and their legal malpractice experts on both sides of the litigated battle.

One young lawyer, Melissa Kanbayashi, Esq. who has assisted me in this effort, deserves my special thanks for her fine work. And so, we introduce you to three kinds of expert witnesses in the legal malpractice case.

## I. The Affidavit of Merit Expert

### Legislative History:

The Affidavit of Merit statute [N.J.S.A. 2A:53A-26, 27] was enacted in 1995 as part of a comprehensive package of tort reform bills passed in an effort to “bring common sense and equity to the state’s civil litigation system”. See Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 228 (1998) (quoting Office of the Governor, News Release 1 (June 29, 1995)).

The legislative history pertinent to the Affidavit of Merit supports the conclusion that its purpose was to require plaintiffs in malpractice cases to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early stage of litigation.

See Petition of Hall By and Through Hall, 147, N.J. 379 (1997). See also Peter Verniero, Chief Counsel to Governor, Report to the Governor on the Subject of Tort Reform (Sept. 13, 1994).

The stated purpose of the Affidavit of Merit expert is to limit the number of frivolous lawsuits filed against professionals by requiring a “threshold showing by a knowledgeable professional that such claim is meritorious, [that is, that] there exists a reasonable probability that the care, skill or knowledge exercised by the professional being sued fell outside acceptable professional standards.” Cornblatt v. Barow, 153 N.J. at 218. See also Fink v. Thompson, 167 N.J. 551 (2001) and Galik v. Clara Maass Med. Ctr., 167 N.J. 341 (2001). In other words, the Affidavit of Merit expert’s opinion is focused on the liability aspect of the malpractice cause of action. The New Jersey statute, unlike in other states, does not require the Affidavit of Merit expert to express any opinion relating to the proximate cause or damages elements of a malpractice cause of action.

As the Court held in Petition of Hall, failure to provide the statutory threshold showing that a malpractice claim is meritorious constitutes a failure to state a cause of action against that defendant. See Petition of Hall, 147 N.J. 379, 390 (1997). See also N.J.S.A. 2A:53A-29 (If plaintiff fails to provide an affidavit or a statement in lieu thereof, it shall be deemed a failure to state a cause of action.) Therefore, where a plaintiff fails to comply with the filing requirements of the statute, a motion to dismiss should be granted “with prejudice in all but extraordinary circumstances.” See Cornblatt v. Barow, 153 N.J. 218, 242 (1998). Thus, the consequences of failing to follow the procedure of furnishing an affidavit of merit from an appropriate expert can result in a dismissal with prejudice on the merits.

Lastly, the Affidavit of Merit Statute applies only to those cases where the underlying legally-significant facts happen, arise, or take place on or after the effective date of the statute, June 29, 1995. See Cornblatt, supra, at 236.

A. **Statutory Requirement- N.J.S.A. 2A:53A-27**

In any action for damages for personal injuries, wrongful death or property damages resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint fell outside acceptable professional or occupation standards or treatment practices.

B. **Who is considered a licensed person?**

A licensed person has been defined by N.J.S.A. 2A:53A-26 as any person who is licensed as:

- a. an accountant
- b. an architect
- c. **an attorney admitted to practice law in New Jersey**
- d. a dentist
- e. an engineer
- f. a physician in the practice of medicine or surgery
- g. a podiatrist
- h. a chiropractor
- i. a registered professional nurse
- j. a health care facility
- k. a physical therapist
- l. a land surveyor
- m. a registered pharmacist
- n. a veterinarian
- o. an insurance producer

**C. Requirements of a Licensed Person**

1. In Legal Malpractice and all other non-medical Professional Malpractice cases:

The person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least 5 years. The person shall have no financial interest in the outcome of the case under review. See N.J.S.A. 2A:53A-27.

2. In a Medical Malpractice Case:

In a medical malpractice case, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in N.J.S.A. 2A:53A-41 which generally requires that the affidavit of merit expert be board certified in the same specialty as the defendant doctor.

**D. Time Period for Furnishing the Affidavit of Merit.**

While Plaintiff is required to "provide each defendant" with the Affidavit within 60 days of the date Defendants answer the Complaint, the Court may grant no more than one additional period, not to exceed 60 days, to file the affidavit upon a finding of good cause. See N.J.S.A. 2A:53A-27. While the statute does not define "good cause", case law has provided some guidance. In Familia v. University Hosp. of University of Medicine and Dentistry, 350 N.J. Super. 563 (2002), the Court opined that decisions whether to grant an extension of time to file an affidavit of merit in medical malpractice and the appropriate amount of time a party should be afforded are discretionary determinations. "Inadvertence of counsel may justly be deemed to constitute good cause where the delay does not prejudice the adverse party and a rational application under the circumstances present favors a determination that provides justice to the litigant." See Burns v Belfasky, 166 NJ 466, 478 (2000), citing Burns v. Belafsky, 326 N.J. Super. 462, 471 (App. Div. 1999)

The Court noted in Fink v. Thompson, 167 N.J. 551 (2001) that attorneys in malpractice cases should not rely on an intention to conduct later discovery to excuse non compliance with the affidavit of merit statute. Rather, attorneys should begin discovery promptly when facts are needed to comply with the requirements of the statute. Id. Attorneys should time their discovery, with court intervention if necessary, so that facts necessary to comply with the statute are available by the statutory deadlines. See Id. at 552. The statute does not require Plaintiff to file the Affidavit of Merit with the Court, although some practitioners nonetheless do so to show that it was timely provided to the defendant. The better practice though has been that Plaintiff attach the Affidavit of Merit to the Complaint and file it with the Court and serve it on the Defendants at the same time. This practice eliminates the possibility of overlooking the statutory time limit within which the Affidavit of Merit must be served.

**E. Sworn Statement in Place of an Affidavit is Permitted**

Where a defendant has failed to provide plaintiff with records that are essential for the Affidavit of Merit expert to review before furnishing his Affidavit of Merit, under N.J.S.A. 2A:53A-28, Plaintiff may provide a sworn statement in lieu of an Affidavit. The statement shall set forth the following:

1. The defendant has failed to provide plaintiff with medical records or other records or information having a substantial bearing on preparation of the affidavit;
2. a written request therefore along with, in necessary, a signed authorization by the plaintiff for release of the medical records or other records or information requested, has been made by certified mail or personal service; and
3. at least 45 days have elapsed since the defendant received the request.

This provision has generally applied in medical malpractice cases, but it has also been seen in legal malpractice cases when the prospective defendant lawyer withholds release of the client's file to subsequent counsel. In this regard, Frenkel v. Frenkel, 252 N.J. Super. 214 (App. Div. 1991) holds that there is no justification – even the assertion of a retaining lien, to withhold a client's file after it is requested.

**F. Substantial Compliance Doctrine:**

N.J.S.A. 2A:53A-29 provides that if a plaintiff fails to provide an affidavit or sworn statement in place of an affidavit of merit, it shall be deemed a failure to state a cause of action. However, the Court in Cornblatt permitted the limited application of the doctrine of substantial compliance to avoid technical defeats of a valid claim. See Cornblatt v. Barow, 153 N.J. 218 (1998). The Court opined that “despite the legislature’s clear language requiring an affidavit, there is nothing reflective in the objectives of the Affidavit of Merit Bill or its history that suggests the legislature intended to foreclose [this doctrine]”. Cornblatt, supra, at 240. The Court recognized that in certain circumstances, a certification could satisfy the purpose of the affidavit requirement as well as the general purpose of the statute. Id.

The Supreme Court expanded the application of the doctrine of substantial compliance in 2001 holding that service of an expert report may substantially comply with the Affidavit of Merit statute. In Galik v. Clara Maass Medical Ctr., the executrix of patient's estate brought a medical malpractice action against physicians for failure to timely diagnose a fractured cervical spine. The question posed to the Court on appeal from the trial court's decision to dismiss the complaint is whether the plaintiff's conduct, *i.e.* serving two detailed expert reports on the insurance company for the defendants prior to filing suit, was sufficient in attempting to satisfy the Affidavit of Merit Statute. Galik v. Clara Maass Medical Ctr., 167 N.J. 341, 345 (2001). The Supreme Court reversed the trial court's dismissal, opining that the Court's decision in Cornblatt did not intend to restrict the power of our courts in their application of the doctrine of substantial compliance when appropriate. See Galik, supra, at 355. The Court then set out five

elements to be considered in a fact sensitive analysis of whether the plaintiff has substantially complied with the Affidavit of Merit statute:

1. the lack of prejudice to the defending party;
2. a series of steps taken to comply with the statute involved;
3. a general compliance with the purpose of the statute;
4. a reasonable notice of petitioner's claim; and
5. a reasonable explanation as to why there was not a strict compliance with the statute.

Id. at 353.

The Court noted that establishing these “substantial compliance” elements could well impose a heavy burden. Id. at 358. However, the Court concluded that while Plaintiff's service of the expert reports prior to filing suit was in substantial compliance with the Affidavit of Merit statute, going forward, attorneys should file a timely and substantively appropriate Affidavit of Merit in every case to avoid unnecessary litigation and to avoid dismissal of meritorious cases. See Id. at 358.

#### **G. Is an Affidavit of Merit Required in a Case of Common Knowledge?:**

In the case of Hubbard v. Reed, 168 N.J. 387 (2001), the Supreme Court held that an Affidavit of Merit is not required in a common-knowledge case when an expert will not be called to testify regarding the care, skill or knowledge of the professional fell outside acceptable professional or occupational standards or treatment practices. See Id. at 387. In Hubbard, Plaintiff filed suit against his dentist, for extracting the wrong tooth. The Plaintiff did not serve an Affidavit of Merit since it has a common knowledge case. The case was dismissed by the trial court for failure to serve an Affidavit of Merit and one Appellate Court affirmed such ruling. The Supreme Court, however, opined that in common knowledge cases, an expert is not needed to demonstrate that a defendant breached a duty of care. Hubbard, supra, at 394.

The Court noted that, as observed by the Appellate Division, “the Affidavit of Merit statute is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint, but whether there is some objective threshold merit to the allegations. See Hubbard, supra, 331 N.J. Super. 283, 292-293 (App. Div. 2000). The Court further states that to demonstrate the objective threshold merit, the statute requires plaintiffs to provide an expert opinion, given under oath, that a duty of care existed and same was breached. Yet, by definition, in common knowledge cases, an expert is not needed to demonstrate that the defendant breached a duty of care. Hubbard, 168 N.J. 387, 395 (2001). The Court again warned that while an Affidavit of Merit is not required in common knowledge cases, the wise course of action in all malpractice cases would be for plaintiffs to provide affidavits even when they do not intend to rely on expert testimony at trial. Id. at 397. (emphasis added)

## **H. The “Ferreira” Case Management Conference**

In Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144 (2003), the Supreme Court reversed the dismissal of a malpractice complaint where Plaintiff’s attorney, through pure inadvertence, had failed to timely serve an Affidavit of Merit, although he had received one from an appropriate expert within ten (10) days after the defendant had served an Answer to the Complaint. Recognizing that it would be inequitable if an otherwise meritorious complaint were dismissed under such circumstances, the Supreme Court exercised its equitable powers, and established a procedure that requires an accelerated mandatory case management conference to make sure that the dual purpose of the Affidavit of Merit statute be fulfilled: First, to eliminate frivolous malpractice claims and second, to make sure that meritorious cases are shepherded expeditiously toward trial. With such a mandatory conference held within the statutory 120 day period for serving the Affidavit of Merit, there would be adequate time permitted for plaintiff to still serve the Affidavit if one had not yet been. In addition, in those cases where the Affidavit has already been served, the defendant must come forward to voice any objections to the Affidavit or the expert furnishing it so those objections can be speedily resolved. This accelerated case management conference thus permits meritorious claims to proceed and eliminates the “sideshow” to discovery that Affidavit of Merit compliance had become.

See **Appendix A** for a sample of an Affidavit of Merit with appropriate attachments of the expert’s qualifications and the documents reviewed in support of the Affidavit. Notice that in New Jersey, the Affidavit of Merit is limited to the issue of whether the defendant has deviated from the applicable standard of care. Unlike other states, such as Pennsylvania, there is no requirement that the Affidavit of Merit expert opine on proximate cause or damages.

## II. The Testifying Expert in a Legal Malpractice Case:

### Background – Establishing Legal Malpractice

From a substantive perspective, an attorney is obligated to exercise the degree of reasonable knowledge, skill and care that lawyers of ordinary ability and skill possess and exercise. See St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden, 88 N.J. 571, 588 (1982). In order to establish a legal malpractice claim, a plaintiff must establish that:

- 1) there existed an attorney-client (or foreseeable relying non-client) relationship that gives rise to a duty of care on the part of the attorney;
- 2) a definition of the specific duty and how the attorney breached it;
- 3) that the defendant/attorney's breach was a proximate cause of plaintiff's injury; and
- 4) that the plaintiff suffered actual damages.

See, e.g., Froom v. Perel, 377 N.J. Super. 298, 313 (2005). See also Conklin v. Hannoeh Weisman, 145 N.J. 395, 416-420 (1996) and Albright v. Burns, 206 N.J. Super. 625, 632 (App. Div. 1986).

The legal malpractice plaintiff client bears the burden of proof by a preponderance of competent credible evidence that injuries were suffered as a proximate consequence of the attorney's breach of duty. See Sommers v. McKinney, 287 N.J. Super. 1, 10 (App. Div. 1996). To establish the requisite causal connection between a defendant's negligence and plaintiff's harm, plaintiff must present evidence to support a finding that defendant's negligent conduct was a "substantial factor" in bringing about plaintiff's injury, even though there may be other concurrent causes of harm. Conklin v. Hannoeh Weisman, 145 N.J. 395 (1996), Froom v. Perel, *supra*, at 313. See also, 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 487-488 (App. Div. 1994).

It is up to the expert to establish what the applicable standard of care (i.e., the attorney's duty) is and how the defendant attorney or law firm departed from that standard. The malpractice expert usually expresses an opinion on proximate cause and damages too, but, depending on the unique particulars of each case, these elements can be established by other witnesses, both lay and expert.

### A. When Do you Need an Expert Witness?

Generally, to prove each element of the legal malpractice cause of action:

1. Standards of Care:

The sources for standards of care applicable to attorneys include:

- a. Statutory law (state and federal)

- b. Rules of Court (Rules of Civil Practice, Criminal Practice, Appellate Practice, etc.;
  - c. Rules of Professional Conduct (i.e., Fiduciary Duties);
  - d. Accepted (or Acceptable) Practice in all areas of law;
  - e. Retainer Agreements (generally to define the scope of the lawyer’s responsibility;
  - f. Client-defined objectives of legal representation from specific engagement and prior representation;
  - g. Specialization of lawyer
2. Deviation (Breach of Duty)
- a. The expert must prove how the conduct of the defendant lawyer or law firm failed to comply with accepted standards of practice (i.e., the applicable standard of care).
3. Causation
- a. The expert must testify that the defendant’s deviation was a “substantial factor” in causing the plaintiff’s damages. Vort v. Hollander, 257 N.J. Super. 56, 61 (App. Div. 1992) (Conklin v. Hannoeh Weissman, 145 N.J. 395, 678 A.2d 1060 (1996).
  - b. *Litigation malpractice: Suit within a suit* – need to prove the underlying claim would have been successful. Generally requires experts that would normally be required to prove the elements in the underlying case – i.e., non-lawyer witnesses. However, there have been significant changes on how to prove the underlying case. Now, instead of actually calling all witnesses who would have been called, an expert witness can be called to testify on what the likely outcome would have been had the case been tried. See, Lieberman v. Employers Ins. Of Wausau, 84 N.J. 325, 344 (1980) and Garcia v. Kozlov, Seaton, Romanini & Brooks, PC 179 N.J. 343 (2004). (Hoppe v. Ranzini, 158 N.J. Super. 158 (App. Div. 1978).
- Lieberman v. Employers of Wausau 84 N.J. 325, 344 (1980): (“Another option [to the suit within the suit approach], is to proceed through the use of expert testimony as to what as a matter of reasonable probability would have transpired at the original trial.”) See also Ziegelheim v. Apollo, 128 N.J. 250, 262 *et seq.* (1992).

- c. *Underlying transactional matters* – need to show that alternative transaction could have been structured differently so as to protect client’s interests. (*2175 Lemoine Ave. Corp. v. Finco, Inc.*, 272 N.J. Super. 478, 640 A.2d 346 (1994). Where the claim is that the defendant attorney did not include a clause in a contract that would have protected the client, the client plaintiff must show that the underlying adverse party in the transaction would have agreed to the clause. *Froom v. Perel*, 377 N.J. Super. 298 (2005).

4. Damages

- a. If required to prove the suit within the suit, then use the type of experts that would have been used in the underlying suit. If the claim is that the client had to take an inadequate settlement, then the value of the underlying suit, if handled properly, would be well within the expertise of a trial lawyer.
- b. Consider using experts such as economists, accountants, appraisers, and the like.
- c. The legal malpractice expert can testify to the value of the underlying case if it went to trial or its settlement value. *Kelly v. Berlin*, 300 N.J. Super. 256 (App. Div. 1997).

(“...the trial court properly concluded that laypersons do not have the knowledge, from their common experience, to evaluate and determine damages in a case of this kind, this is, to determine the difference between the amount plaintiff actually received in his settlement and the amount he would have received [but for his lawyer’s malpractice].

(“An expert in the settlement of claims, such as an experience torts attorney or an experienced claims adjuster, is necessary to explain the various factors which are taken into consideration in the settlement of a case of this kind. Such as expert could explain which factors are relevant and how they affected this matter to enable the jury to determine whether the defendant [lawyer’s] negligence caused plaintiff to settle for a lower amount than he otherwise would have, and, if so, the amount of damages plaintiff sustained as a result.”)

**B. Pertinent Rules:**

1. N.J.R.E. 702<sup>1</sup>

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<sup>1</sup> The corresponding federal rule is FRE. 702 which states that “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

2. N.J.R.E. 703<sup>2</sup>

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field forming opinion or inferences upon the subject, the facts or data need not be admissible in evidence.

**When is expert testimony necessary/not necessary?**

To be admissible, expert testimony (1) must concern a subject matter beyond the knowledge of the average juror, (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. See State v. Reeds, 197 N.J. 280 (2009).

The party asserting malpractice must present expert testimony that establishes the standard of care against which the attorney's actions are to be measured. See Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo M.D., 345 N.J. Super. 1, 12 (App. Div. 2001). See also Brizak v. Needle, 239 N.J. Super. 415, 431-432 (App. Div. 1990). Expert testimony is required in cases of professional malpractice where the matter to be addressed is sufficiently esoteric that the average juror could not form a valid judgment as to whether the conduct of the professional was reasonable. See Sommers, supra, at 10. If the adequacy of an investigation or the soundness of an opinion is the issue, a jury will usually require the assistance of an expert opinion. See Aldrich v. Hawrylo, 281 N.J. Super. 201, 214 (App. Div. 1995); Brizak v. Needle, 239 N.J. Super. 415 (App. Div. 1990).

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as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

<sup>2</sup> The corresponding federal rule FRE 703 states that “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.”

Only in rare cases is expert testimony **not required** in a legal malpractice action. One instance, where expert testimony may not be required is where a duty of care to the client is so basic that it may be determined by the court as a matter of law. See Brizak v. Needle, 239 N.J. Super. 415 (App. Div. 1990) (attorney failed to protect a client's claim against the running of the statute of limitations); See also Sommers, *supra*, 287 N.J. Super., 8-12 (lawyer failed to submit a legal argument in the client's defense). Expert testimony may also not be necessary to establish proximate cause in every legal malpractice case, particularly where the causal relationship between the attorney's legal malpractice and the client's loss are so apparent that the trier of fact can resolve the issue as a matter of common knowledge. See 2715 Lemoine Ave. Corp., *supra*, at 490. See also Aldrich v. Hawrylo, 281 N.J. Super. 201, 214 (App. Div. 1995).

In Sommers, plaintiff asserted a legal malpractice claim against her attorney for allegedly failing to submit a legal argument to support her claim and misrepresented the state of the case to her. Plaintiff claimed that no work was done to advance her case and that her attorney knew the shortcomings of the defendant's case but misrepresented the strength of the defense in an effort to induce Plaintiff to settle the case and collect his fee. See Id. at 11. The Court in Sommers concluded that Plaintiff was not required to have an expert opine that (1) her attorney should have briefed an issue and that failure to do so was a breach of the duty to plaintiff; (2) her attorney was required to report the settlement discussions accurately and recommend a disposition of the case based on an accurate rendition of each party's position; or (3) if she were told that the defendant had no defense to her claim, she would have changed her settlement position. See Id. at 12. The Court held that these allegations could have been resolved by the trier of fact as a matter of common knowledge. See Id. However, to the extent that Plaintiff challenges the quality of work done on her behalf, the Court opined that the motion judge properly dismissed her claim because of her failure to submit an expert report.

In Brizak v. Needle, 239 N.J. Super. 415 (App. Div. 1990), the court ruled that expert testimony is not required to prove that an attorney acted unreasonably when he failed to conduct any investigation of his client's claims. But, if he conducted some investigation, expert testimony is required to determine whether the investigation that was conducted complied with accepted standards of care and was thus reasonable.

### **1. Res Ipsa Loquitur and Common Knowledge Cases.**

Experts are not needed to establish the appropriate professional standard of care where either the doctrine of *res ipsa loquitur* or the doctrine of common knowledge applies.

*Res ipsa loquitur* applies where

- (a) the occurrence itself ordinarily bespeaks negligence;
- (b) the instrumentality was within the defendant's exclusive control;  
and
- (c) there is no indication in the circumstances that the injury was the result of plaintiff's own voluntary act or neglect.

See Kelly v. Berlin, 300 N.J. Super. 256, 265 (App. Div. 1997). See also Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 269 (1958).

The *res ipsa* doctrine permits a jury to infer negligence, although the jury is free to accept or reject the inference. See Kelly, supra, at 265. The common knowledge doctrine applies when the facts are such that the common knowledge and experience of a lay person enables a jury to conclude, without expert testimony, in a malpractice case that a duty of care has been breached. See Id. “Usually, the common knowledge doctrine will be applied where the carelessness of defendant is readily apparent to anyone of average intelligence and ordinary experience.” Id.

The Supreme Court made a distinction between the two doctrines, explaining that in *res ipsa loquitur* cases, plaintiff need only prove injury and need not prove a standard of care or specific act or omission, while the common knowledge doctrine is applied in malpractice cases after the plaintiff proves his injury and a causally related act or omission by the defendant. See Sanzari v. Rosenfeld, 34 N.J. 128, 141 (1961).

In Jerista v. Murray, 185 N.J. 175 (2005), the underlying claim that a supermarket’s automatic door malfunctioned, thus injuring the plaintiff, could not be proved because the evidence of malfunction was spoliated due to the plaintiffs’ attorney negligence in the underlying case. Then, when plaintiff sued her attorney for malpractice, that case was dismissed because she could not prove the underlying case as a result of the unavailable evidence of lack of maintenance or malfunction. The Supreme Court held that in such a case, the plaintiff was entitled to prove the proximate cause element of the legal malpractice cause of action (i.e., that she would have prevailed in the underlying case against the supermarket) with the benefit of *res ipsa loquitur*. Her legal malpractice expert needed only to testify about the lawyer’s deviations from the standards of care applicable to the mishandling of the case, but as to whether she would have prevailed on the liability aspects (the malfunctioning of the automatic door) in the underlying case, no expert testimony was necessary.

1. “Common Knowledge Doctrine” and *Res Ipsa Loquitur*
2. Statute of Limitations  
(Fuschetti v. Bierman, 128 N.J. Super 290 (Law Div., 1974))
3. Complete failure to investigate a client’s claim  
(Brizak v. Needle, 239 N.J. Super. 415 (App. Div. 1990))
4. Where attorney admits fault and causation in the underlying case  
(Briggs v. King, 714 S.W. 2d 694 (Mo. App., 1986))
5. Egregious conduct on the part of the attorney  
(Aldrich v. Hawrylo, 281 N.J. Super. 201 (App. Div. 1995))
6. Obvious casual link  
(2175 Lemoine Avenue Corp. v. Finco, Inc., 272 N.J. Super. 478 (1994)); Vort v. Hollander, 257 N.J. Super. 56 (1994))
7. Where attorney used unclear and ambiguous language in contracts

(*Belfer v. Leckstein*, Dkt#A-4372-96T3; Superior Court of NJ, App. Div., decided 10/17/97 – unpublished thus far.)

**A. The Net Opinion Rule:**

An expert's opinion must be based on facts, data or another expert's opinion, either perceived by or made known to the expert, at or before trial. See N.J.R.E. 703; *Froom*, *supra*, at 317. The net opinion rule makes an expert's opinion consisting of bare conclusions that are unsupported by competent factual evidence inadmissible. *Id.* The rule often focuses on the failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom. See *Kaplan v. Skoloff & Wolfe, P.C.*, 339 N.J.Super. 97,102 (App. Div. 2001). An expert must give the why and wherefore of his or her opinion, rather than simply a mere conclusion. *Id.* at 102.

In *Kaplan*, plaintiff's expert offered no evidential support that established the existence of a standard of care in a legal malpractice action, other than standards that were personal to the expert. *Id.* Plaintiff's expert failed to reference any written document or unwritten custom accepted by the legal community that would support its claim that the property settlement agreement plaintiff entered into was less than she should have received. Rather, the plaintiff's expert provided his own personal view, rather than the standard of the profession in general. This is the equivalent of a net opinion. See *Id.* at 103. Plaintiff's expert failed to render a comparison of similar property settlement agreements and failed to provide an analysis of how legal issues would have affected the settlement amount. *Id.* at 104. The Court held that the "net opinion" rule precluded the admission of testimony by client's expert on the issue of liability and affirmed the trial court's grant of summary judgment.

In *Celucci v. Bronstein*, 277 N.J. Super. 506 (App. Div. 1994), a law professor's expert testimony was "untenable" because it ignored uncontroverted factual evidence, and was based on criticizing the Defendant lawyer for "an error of judgment" rather than a deviation from the standard of care. Errors in judgment however, are not generally recognized to be malpractice.

In *Froom v. Perel*, 377 N.J. Super. 298 (App. Div 2005), a former appellate judge from New York who served as Plaintiff's expert confused proximate cause with liability since there were no facts to establish proximate cause. His opinion was not allowed to support Plaintiff's verdict below and the Appellate Division dismissed the legal malpractice cause of action.

By contrast, in *Carbis Sales, Inc. v. Eisenberg, et al.* 397 N. J. Super 64 (App. Div. 2007), where the defendant appealed a jury verdict on the basis of a net opinion offered by plaintiff's expert, the Court stated:

Defendants contend that Wasserman's opinion was nothing more than a net opinion because he "failed to reference, in either his report or at trial, any written document or unwritten custom accepted by the legal community recognizing the standards that he claimed to exist." We disagree. In his report, Wasserman specifically referenced extensive case law, as well as *R.P.C.* 1.3, establishing that an attorney has an obligation to carefully investigate his case and diligently pursue his or her client's

claims before formulating legal strategies. He also cited to cases and treatises indicating that an attorney cannot be held liable for an erroneous judgment call unless that judgment was not properly informed...[W]asserman then went on to identify the deficiencies he perceived in Eisenberg's preparation of the case and the resulting ill-informed judgments defendant made as to the presentation of Carbis' defense to the jury. Such deviations, he opined, constitute a violation of the tenets of the Rules of Professional Responsibility and of the general duty to exercise that degree of care, knowledge, judgment and skill that a reasonably prudent lawyer of ordinary ability would have exercised in the same or similar circumstances.

We are satisfied that Wasserman's opinion is clearly based on factual evidence of record, to which he applied generally accepted standards of care as reflected in both our case law and Rules of Professional Conduct. *St. Pius X House of Retreats v. Diocese of Camden*, 88 N.J. 571 (588), 443 A.2<sup>nd</sup> 1052 (1982). As such, and contrary to defendants'... contention, we find the expert opinion as to defendants' violation of these rules to be competent evidence of legal malpractice, sufficient to support the jury's verdict.

#### **B. Disclosure of the Expert**

The discovery rules require that the substance of a testifying expert's opinion be conveyed to the adversary prior to trial. According to R. 4:10-2(d)(1):

A party may through interrogatories require any other party to disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness....The interrogatories may also require, as provided for by R. 4:17-4(a) the furnishing of a copy of that person's report.

By declaring that an expert witness will be produced at trial and providing his/her identity and opinion to another party, the original proponent is waiving his/her claim that the information is privileged. Therefore, a party may call an adversary's expert when the expert has been designated a "testifying expert" without a showing of exigent circumstances. See Fitzgerald v. Stanley Roberts, 186 N.J. 286, 302 (2006).

**C. The Expert's Report:**

a. Expert Report Rule.

According to R. 4:17-4(e), an expert report shall contain:

A complete statement of that person's opinions and basis therefore; the facts and data considered in forming the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; and whether compensation has been or is to be paid for the report and testimony and, if so, the terms of the compensation.<sup>3</sup>

b. Structure of the Expert's Report:

The experts report should contain:

1. A statement as to whether the report is preliminary or final – No final report without review of all pertinent discovery.
2. A section listing "Documents Reviewed" which distinguishes those in the legal malpractice case and those in the underlying case or transaction.
3. Section called "Factual Summary which is supported by references to specific documents listed in "Documents Reviewed".
4. Section called "Opinions and Analysis" wherein the specific standard or a statement thereof is contained, discussed and how the factual evidence shows deviation or compliance. If a specific standard is at issue, such as an RPC quote it. If, however, a general duty is at issue it is generally best not to cite to cases. If you do, the report then becomes a brief and the expert becomes your client's advocate, which should be avoided.

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<sup>3</sup> Federal counterpart to the N.J. Court Rule is F.R.C.P. Rule 26(a)(2)

(A) ... a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703 of the Federal Rules of Evidence.

(B) ... this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case on whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as, a summary of or support for the opinions; the qualifications of the witness, within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

5. Section called “Conclusion”. The expert should state that the factual evidence demonstrates that the defendant lawyer did (or did not) deviate from the standard of care. This is NOT an opinion. It should then contain the “magic words”: “It is my opinion, which I base on reasonable probability (or certainty) that the defendant lawyer’s conduct was (or was not) a substantial factor in causing the damages alleged by plaintiff.
- c. Time limit for producing a report:

The time for furnishing a report must be reasonable both in respect of the obligation of the party furnishing it and the fixing of a trial date. See Pressler, Comments to New Jersey Court Rules, R. 4:17-4(e), at Section 5.1 (2009). An Appellate Division Court ruling opined that it may be an abuse of discretion for a court to refuse to consider a late report sought to be submitted in opposition to a motion for summary judgment, particularly if the motion was made prior to the expiration of the time allowed for the completion of discovery. See Baldyga v. Oldman, 261 N.J. Super. 259 (App. Div. 1993).

### **III. The Non Testifying (Consulting) Expert:**

New Jersey Court Rule 4:10-2(d)(3)<sup>4</sup> states that:

A party may discover facts known or opinions held by an expert...who has been retained or specially employed by another party in anticipation of litigation or preparation of trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means.

The rule is intended to provide protection for work performed by consulting experts who will not testify at trial but who aid the attorney in preparing for trial. See Fitzgerald v. Roberts, 186 N.J. 286, 300 (2006). The work performed as a proposed expert for trial is subject to discovery while that performed as a non testifying adviser is not. See Franklin v. Milner, 150 N.J. Super. 456 (App. Div. 1977). And the manner in which a consultant has performed his or

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<sup>4</sup> Federal Counterpart to this New Jersey Rule is F.R.C.P. 26(b)(4)(B), which provides that “a party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only...upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means.” Federal Courts have noted that this rule is designed to “promote fairness by precluding unreasonable access to an opposing party’s diligent trial preparation, to prevent a party from building his own case by means of his opponent’s financial resources, superior diligence and more aggressive preparation, and more specifically, to prevent one party from utilizing the services of the opponent’s experts by means of a deposition.” See Eliassen v. Hamilton, 111 F.R.D. 396 (N.D. Ill. 1986). See also In Re Long Branch, 388 N.J. Super. at 262.

her consulting functions may remove the protections generally afforded by the rule. See In re Long Branch Manufactured Gas Plant, 388 N.J. Super. 254, 269 (Law. Div. 2005). See also ABA Formal Ethics Opinion 97-407, May 13, 1997 (“A lawyer serving as an expert witness to testify on behalf of a party who is another law firm’s client, as distinct from an expert consultant, does not thereby establish a client-lawyer relationship with the party or provide a “law related service” to the party within the purview of Model Rule 5.7<sup>5</sup> such as would render his services as a testifying expert subject to the MRPC. However, to avoid any misunderstanding the testifying expert should make his limited role clear at the outset.”)

The Court held in Graham v. Gielchinsky, 126 N.J. 361 (1991) that in the absence of exceptional circumstances, as defined by R. 4:10-2(d)(3), courts should not allow the opinion testimony of an expert originally consulted by an adversary.(emphasis added). Communications between an attorney and consulting expert are protected as part of the attorney’s work product under R. 4:10-2(c), receiving only qualified protection and are discoverable upon a showing of (1) substantial need of the materials in preparation of the case and (2) inability without undue hardship to obtain the substantial equivalent of the materials by other means. However, even if a party establishes this type of showing, mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation remain protected. See Franklin v. Milner, 186 N.J. 286 (2006). Even though certain documents may be discoverable in unusual circumstances, the opinions of other representatives of a party, including experts, remain privileged.

The exceptional circumstances test is difficult to meet and rarely satisfied. See Graham, *supra*, at 361. See also In re Long Branch Manufactured Gas Plant, 388 N.J. Super. 254, 261 (Law Div. 2005). The high burden of proving “exceptional circumstances” promotes fairness by precluding unreasonable access to an opposing party’s diligent trial preparation. See In re Long Branch Manufactured Gas Plant, *supra*, at 261. The inquiry into whether there are exceptional circumstances turns to the fact of whether it is impracticable to obtain information on the same subject by alternative means. Id.

“Calling someone a non testifying consulting expert does not mean that he or she is automatically and absolutely shielded from discovery on issues that the party knowingly has injected into the case; as to those issues, the expert is nothing more than an ordinary fact witness.” See In re Long Branch, 388 N.J. Super, at 256. Furthermore, the non testifying expert disclosure rules were not intended to immunize consultant experts from discovery when they

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<sup>5</sup> Model Rule 5.7 states

- (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services to clients; or
  - (1) By the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients; or
  - (2) By a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.
- (b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

have played other roles in a controversy, i.e. when the expert consultant acts as a public spokesperson for a company, those actions are not consultative, and therefore not protected by the consulting expert privilege rule. See Id.

### **REFLECTIONS ON CHOOSING YOUR EXPERT WITNESS**

#### **For the Affidavit of Merit Expert:**

1. Make sure he or she has at least five (5) years of practice experience in the substantive area of law of the underlying case and in legal malpractice.
2. Make sure he or she has no financial interest in the outcome of the case.
3. Be aware that the Affidavit of Merit Expert need not be the same as your Testifying Expert.

### **THE TEN COMMANDMENTS (give or take) OF SELECTING YOUR TESTIFYING EXPERT WITNESS**

1. Effective Writer.
  - a. Experienced in how to write a winning report;
  - b. Report must be consistent with theory of liability or defense.
2. Effective Verbal Communication Skills – choose an expert who is comfortable in the courtroom and who knows how to effectively communicate with the Jury.
  - a. Talks in plain language;
  - b. Talks *with*, not down to the jury;
  - c. Uses plain and simple language and is able to explain complex cases in an understandable way.
3. Credibility – choose an expert who has testified for both Plaintiffs and Defendants.
  - a. Willing to testify for the client wronged by the attorney;
  - b. Willing to testify for the attorney where he is in the right;
  - c. No bias for or against the client or the attorney;
  - d. Should not testify that certain conduct is malpractice when in fact it is not (e.g. errors of judgment – *Celucci v. Bronstein*, 277 N.J. Super. 506, *certif. denied* 139 NJ 441 (1995)).

4. Competence – choose an expert who is fully familiar with accepted standard of care applicable to the underlying case or matter and with the law of legal malpractice.
  - a. Carefully review expert’s CV;
  - b. Specialization?
  - c. Review expert’s publications – will always be used to try to trip him;
  - d. Choose an expert with practice, academic, consulting, testifying and publishing credentials.
5. Reliability.
  - a. Check out references – get names of other attorneys for whom expert has worked; name of Judges before whom expert testified. Try to get copies of former reports and deposition testimony. Get reported decisions which evaluate the expert’s opinions.
  - b. Is the expert available for consultations with counsel? Does he comply with requests to schedule depositions on dates requested of him? Is he available for trial?
  - c. Choose an expert whose opinions have been upheld in reported decisions.
6. Reasonable charges – NO CONTINGENCY FEES!
7. Make sure your expert has a clean ethics record and not reported decisions where the Court has criticized the expert. (*Celucci v. Bronstein*, 277 N.J. Super. 506; *Froom v. Perel*, 377 N.J. Super. 298 (2005).
  - a. Require your proposed expert to do a “conflicts check”.
8. Shy away from purely or primarily academic experts. They probably do not have expertise in accepted standards of practice and may very well not be qualified by the Court. (See, e.g., *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W. 2d 400 (Tenn. 1991)) The ideal expert has a balance of both practice and academic experience.
9. The expert should be objective and point out the weaknesses of your claim or defenses. He should also recommend ways to correct or strengthen your position.
10. The legal malpractice expert must be self-confident and committed to the notion that what he does is for the betterment of the legal profession. He should have an abiding faith in our adversary system of justice and that through it legal malpractice suits will serve to better our profession.