



Malpractice EXPERTISE

Although expert testimony in legal malpractice litigation is generally advisable, precedent demonstrates the need for a fact-based evaluation of each case



AS COURTS have held, “The general rule with respect to the liability of an attorney for failure to properly perform his duties to his client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.”¹ More particularly, the elements of a cause of action for legal malpractice are “(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney’s negligence.”² It is commonplace for plaintiffs and defendants in legal malpractice cases to call expert witnesses to either support or refute the existence of a particular duty owed by attorneys to their clients and whether the facts at issue constitute a breach of that duty.

Although it should be axiomatic that a claim for attorney legal malpractice must be supported by expert testimony in all but the most unusual of circumstances, it has also been argued that *Wright v. Williams*,³ *Wilkinson v. Rives*,⁴ *Day v. Rosenthal*,⁵ *David Welch Company v. Erskine & Tulley*,⁶ *Mirabito v. Liccardo*,⁷ and *Piscitelli v. Friedenber*⁸ hold

to the contrary. These cases, however, are clearly distinguishable and cannot stand for the proposition that a legal malpractice claim can ordinarily be proven without an expert testifying about the applicable standard of care and the breach of that duty.

In *Wright v. Williams*,⁹ the appellants bought a boat with which to operate their diving business. They consulted Williams, the respondent attorney and a specialist in maritime law, about the existence of possible liens for past repairs on the vessel. They also asked questions concerning its ownership and the matter of a mortgage upon the boat. They did not inform Williams that they intended to use the boat in a business venture and, when asked how the vessel would be used, replied, “pleasure.” The attorney arranged for the transfer of title of the vessel, removed an existing mortgage, and provided for indemnity against liens.

The documents of title for the vessel included a statement on a bill of sale that it should not be used “in the coastwise trade” pursuant to the Merchant Marine Act if, at some time, it had been owned by an alien. The term “coastwise trade” includes hauling passengers for hire between ports in the United States. The boat had once been owned

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by a Mexican national. After the appellants were cited by the Coast Guard for using the boat in violation of the Merchant Marine Act, they sued their attorney for malpractice, claiming that he had negligently represented them in the boat's purchase.

The appellants in *Wright* offered no expert testimony at trial as to their claim that the respondent had failed in the performance of

ration on the residence of the appellants. The declaration did not contain the optional affidavit provided for in the Civil Code at the time.¹³ Later on, the appellants entered into an agreement to sell the residence for \$90,000. A preliminary title report was obtained from California Land Title Company (CLTC), another respondent in the case. CLTC denied appellants title insurance

of attorney performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony,¹⁶ the court held that in the instant case expert testimony was required and affirmed the judgment.

As the court in *Wilkinson* put it, "Whether an attorney in the exercise of due care in preparing for his client a declaration of homestead should have the client sign and verify

While acknowledging that expert testimony, otherwise admissible, is not objectionable just because "it embraces the ultimate issue to be decided by the trier of fact," the appellate court in *Piscitelli* also recognized that an expert opinion, whether or not it embraces an issue of law, is not admissible if it invades the province of the jury to decide a case.

his duty of care. At the conclusion of their case in chief, the trial court granted the respondent's motion for judgment, pursuant to Code of Civil Procedure Section 631.8, because, in part, the appellants had not carried their burden of proof. On appeal, the court first cited out-of-state authority and a California legal treatise for the proposition that "In some situations, at least, expert testimony is not required...(when) the failure of attorney performance may be so clear that a trier of fact may find professional negligence unaided by the testimony of experts. Where, however, the malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against him is related to his expertise as such, then only a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met."¹⁰ The court then affirmed the judgment for the respondent because the case was one in which expert testimony was needed.

The court observed that the "[r]espondent was engaged to perform a service in the highly specialized area of admiralty law. He failed to call his clients' attention to a problem in the documentation of (the ship), the significance of which cannot be determined by reference to general knowledge. Without expert testimony that a reasonably prudent specialist in admiralty law would, under the facts as the trial court found them, have acted differently than did respondent, there is no basis to attach legal fault to his conduct."¹¹

*Wilkinson v. Rives*¹² offers a lesson similar to that of *Wright*. Rives, an attorney, prepared and recorded a homestead decla-

after a search disclosed 14 judgments and three liens against the subject property. The appellants negotiated settlements with the various judgment and lien creditors and directed the escrow holder to pay the amounts agreed upon from the sale proceeds, which the escrow holder did. Releases and satisfactions of judgment were obtained from all of the creditors. The appellants received \$3,193 upon close of escrow for the sale of the subject real property.

The appellants claimed they had lost the homestead exemption in the sale of the property because Rives had prepared an invalid exemption. The appellate court rejected the contention because the declaration had been properly signed, acknowledged, and recorded, and the appellants had never lost their homestead exemption. The court reasoned that the optional affidavit Rives had not included did not affect the validity of the homestead declaration but merely pertained to certain evidentiary presumptions that arose when the optional affidavit, properly verified, was included in the declaration.¹⁴ The court also observed that "For reasons best known to appellants they never asserted their homestead exemption as against the various judgments and liens disclosed in the preliminary title report, but instead elected to negotiate and settle with the judgment creditors outside of escrow."¹⁵

More importantly, *Wilkinson* found it critical that the appellants failed to present expert testimony that Rives was negligent in failing to have them sign and verify the optional affidavit. While recognizing that expert testimony is unnecessary if the failure

of the optional affidavit is not a matter of common knowledge. As we have seen, the optional affidavit has no effect on an otherwise valid declaration except with regard to certain evidentiary presumptions. Whether the failure of the attorney to obtain for his client the benefit of those presumptions is malpractice requires expert testimony on the standard of care and the attorney's performance in relation to that standard. Since there was no such expert testimony, there is no evidence from which the trier of fact could have found negligence on the part of respondent Rives."¹⁷

*Day v. Rosenthal*¹⁸ stands out because it involved both a well-known Hollywood personality and egregious facts. For 15 years, Jerome Rosenthal had been the attorney, accountant, business manager, investment adviser, and record keeper for Doris Day and Marty Melcher, Day's husband. After the Day-Rosenthal relationship ended, and in response to Rosenthal's breach of contract claim, Day and Melcher cross-complained for breach of fiduciary duty, legal malpractice, fraud, and abuse of process. The trial court found that Rosenthal's representation was riddled with multiple acts of self-interest, conflicts of interest, double dealing, kickbacks, incompetence, fraud, and trust account violations.

Because of the overwhelming facts, the appellate court held that no expert testimony was required to prove the claims of Day and Melcher. "It required no expert to tell the trial court that Rosenthal's perverted sense of duty to his clients, the Melchers, is attorney negligence. Expert testimony is needed when it will assist the trier of fact. It is not appro-

MCLE Test No. 248

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1. The requirement for expert testimony in any legal dispute is subject to detailed statutory analysis.
True.
False.
2. The elements of a legal malpractice claim are 1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise, 2) a breach of that duty, 3) a proximate causal connection between the breach and the resulting injury, and 4) actual loss or damage resulting from the attorney's negligence.
True.
False.
3. Expert testimony in a legal malpractice action is admissible as to the elements of the existence of a duty and breach of that duty.
True.
False.
4. The elements of a breach of fiduciary are the same as those for a legal malpractice claim.
True.
False.
5. The trial judge decides whether expert testimony is admissible.
True.
False.
6. The standards for admitting expert testimony are whether the opinion relates "to a subject that is sufficiently beyond common experience" and is "based on matter...of a type that reasonably may be relied upon by an expert in forming an opinion...."
True.
False.
7. Expert testimony in a legal malpractice case is not admissible if it invades the province of the jury to decide the case.
True.
False.
8. Expert testimony must be used in every legal malpractice case.
True.
False.
9. An expert is needed in a legal malpractice action if the attorney held himself or herself out as a legal specialist and the claim against the attorney is related to that expertise.
True.
False.
10. *Day v. Rosenthal*, because of its extraordinary facts, is an exception to the general proposition that expert testimony is required in legal malpractice cases.
True.
False.
11. An expert is not needed in a court trial, as opposed to a jury trial, regarding legal malpractice if the attorney held himself or herself out as a legal specialist and the claim against the attorney is related to that expertise.
True.
False.
12. If the attorney held himself or herself out as a legal specialist, and the claim relates to that expertise, the expert testimony should be whether a reasonably prudent specialist in that area of expertise would have acted differently or the same as did the defendant attorney.
True.
False.
13. A legal malpractice claim can ordinarily be proven without an expert testifying about the applicable standard of care and the breach of that duty.
True.
False.
14. Experts in a legal malpractice case regarding whether a legal specialist breached his or her duty of care should be knowledgeable in the same specialty.
True.
False.
15. An expert is not needed in a legal malpractice claim if the attorney's performance is so clearly contrary to established standards that a trier of fact may find professional negligence unassisted by expert testimony.
True.
False.
16. A critical finding by the trial judge whether expert testimony is required in a legal malpractice claim is the amount of the claimed loss or damages.
True.
False.
17. An expert is not required in a legal malpractice action if it is common knowledge that an attorney must perform a particular duty or act.
True.
False.
18. Expert testimony is needed in a malpractice action if the question for the trier of fact is whether an expert in admiralty law would have acted differently than did the defendant attorney.
True.
False.
19. Expert testimony is required if a client has sued the former attorney only for breach of fiduciary duty.
True.
False.
20. Expert testimony in a legal malpractice case may be used to show what a reasonable trier of fact would have done in the underlying case.
True.
False.



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priate in all cases....Where the attorney's performance is so clearly contrary to established standards that a trier of fact may find professional negligence without expert testimony, it is not required."¹⁹

Nonetheless, the court in *Day* acknowledged that expert testimony may be necessary in a legal malpractice case. Citing *Rives* and *Wright*, the *Day* court observed, "Of course, a judge may resort to expert testimony to establish the standard of care when that standard is not a matter of common knowledge, or where the attorney is practicing in a specialized field. However, Rosenthal's numerous, blatant and egregious violations of attorney responsibility were not breaches of legal technicalities for which expert testimony is required. They were violations of professional standards; standards which the trial court was compelled to notice."²⁰

In *David Welch Company v. Erskine & Tulley*,²¹ Welch, a licensed collection agency with a specialty in collecting delinquent employer contributions owed to employee-benefit trust funds, sued its former law firm, Erskine & Tulley, which, after their relationship had ended, acquired some of Welch's former benefit trust fund clients. The issue in the case was whether the law firm, in acquiring the clients, breached its fiduciary duty to Welch, its former client. After discussing an attorney's duty of loyalty towards his or her clients and related Rules of Professional Conduct, the appellate court, without any analysis, found that expert testimony was not required to find that the law firm had breached its duty of loyalty because "They were violations of professional standards; standards which the trial court was compelled to notice." The court relied on *Day* for this holding.²²

Welch, however, involved a breach of fiduciary duty and not legal malpractice, and the elements of a breach of fiduciary duty, a species of tort distinct from a cause of action for professional negligence, differ from those for legal malpractice.²³ Breach of fiduciary duty requires the existence of a fiduciary relationship, breach of that duty, and damages.²⁴ A breach of fiduciary claim, as the appellate court held, can be resolved by simply looking at the language of the applicable Rules of Professional Conduct. In contrast, attorney legal malpractice is not so clearly defined; instead, the "applicable standard of care," an ambiguous term by itself, can vary depending on a multitude of circumstances.

*Mirabito v. Liccardo*²⁵ is, in many respects, similar to *David Welch*. Mirabito was represented by Liccardo, his second cousin, regarding Mirabito's estate plans, which led to Mirabito's investing millions of dollars in Liccardo's businesses. Liccardo never advised

Mirabito to seek the advice of independent counsel regarding the investments. Mirabito sued Liccardo's estate for breach of contract, fraud, and breach of fiduciary duty. The appellate court held that the trial court did not err in allowing an expert to rely upon the Rules of Professional Conduct to explain why Liccardo had breached his fiduciary duty toward Mirabito. Citing *Day*, the court noted, "It is well established that an attorney's duties to his client are governed by the rules.... Those rules, together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his client."²⁶ Thus, like *David Welch*, *Mirabito* is about the need, or lack thereof, of expert testimony if a breach of fiduciary duty is alleged. While neither *David Welch* nor *Mirabito* is about legal malpractice, like *Day* they are illustrative of the fact-based analysis involved in the determination of whether an expert witness is needed.

*Piscitelli v. Friedenber*²⁷ differs from these preceding decisions because, unlike them, it disapproves the use of expert witness testimony to establish causation in a legal malpractice case as contrasted to the admissibility of expert opinion on the applicable standard of care and the breach of that standard. Piscitelli was a former Prudential broker who had sold defective limited partnerships to clients as well as buying some for himself. He sued Prudential in federal court to recover his own losses. A class action against Prudential for sale of the limited partnerships was filed around the same time as Piscitelli's case. Piscitelli notified Friedenber, his attorney, of the tentative settlement of the class claim. Later on, he told Friedenber that another Prudential broker had received a legal document about the class action. In response, Friedenber advised Piscitelli to check his mail for it. When Piscitelli advised Friedenber he had not received any notice, Friedenber told him not to worry. Thereafter, Piscitelli called Friedenber about the class action opt-out deadline. Friedenber responded he would take care of it. Friedenber did not obtain a copy of either the notice of the class action settlement or the settlement agreement, nor did he opt Piscitelli out of the class. He did, however, send Prudential's attorneys both Piscitelli's agreement to submit his case to arbitration and Piscitelli's statement of claim. Ultimately, a trial court agreed with Prudential that the class notice barred Piscitelli's claim.

Piscitelli sued Friedenber and several other law firms and attorneys for professional negligence, breach of fiduciary duty, constructive fraud, and negligent infliction of emotional distress. Before trial, Friedenber moved in limine to exclude expert testimony

on the ultimate result of the underlying arbitration, arguing such testimony would improperly focus on what the arbitration panel would have done (as opposed to what it should have done) and also usurp the jury's function to decide what should have been the result of the arbitration. The court denied the motion. In keeping with the court's ruling, Piscitelli's expert was asked to give an opinion on the "relative probability Mr. Piscitelli might have prevailed had the arbitration... been permitted to go forward." The expert testified, in part, that "Piscitelli would very likely have prevailed in getting...monetary relief."²⁸

The jury in *Piscitelli* found that an arbitration panel would have awarded Piscitelli \$510,824 against Prudential and an additional \$221,389,400 in punitive damages against Prudential. The trial court calculated Piscitelli's total award against Friedenber to be \$223,253,736. Friedenber moved for a JNOV and a new trial on grounds of excessive damages, insufficient evidence, legal errors, counsel misconduct, and inconsistency of the verdict. The court denied Friedenber's motion for the JNOV but granted a new trial on damages conditioned on Piscitelli's consent to a \$221,389,400 remittitur. It also ruled the punitive damages component of the compensatory damage award was not supported by the evidence, the damages were excessive, and the evidence insufficient to support the verdict. After Piscitelli refused to accept the remittitur, Friedenber appealed from the judgment and the denial of his motion for JNOV. Piscitelli appealed from the court's partial grant of a new trial.

While acknowledging that expert testimony, otherwise admissible, is not objectionable just because "it embraces the ultimate issue to be decided by the trier of fact," the appellate court in *Piscitelli* also recognized that an expert opinion, whether or not it embraces an issue of law, is not admissible if it invades the province of the jury to decide a case.²⁹ It then concluded that the trial court had abused its discretion in admitting expert opinion on the ultimate result of the arbitration.³⁰ "In ruling as it did, the [trial] court misconceived the jury's function in the legal malpractice case-within-a-case format. This format is properly employed as the method of proving the elements of causation and damages when the malpractice involves negligence in the prosecution or defense of a legal claim." The appellate court went on to hold that an expert should not be allowed to testify what a reasonable trier of fact would have done in the underlying case, whether it be to a jury or arbitration panel. Such testimony invaded the jury's province.³¹

*Lipscomb v. Krause*³² represents the more traditional view that expert testimony is gen-

erally required to establish the standard of care and breach of that duty in legal malpractice cases. In *Lipscomb*, in which appellants sued their former attorney for dismissing an underlying water pollution case without their knowledge or consent, the trial court entered judgment for the defendant lawyer after the plaintiffs rested without calling an expert as to the duty of care reasonably owed by an attorney to his or her client. On appeal, the Lipscombs argued that because, as required by Section 283 of the Code of Civil Procedure, an attorney has no authority to compromise a client's claim without the client's knowledge, there was no need to call an expert. The appellate court first distinguished the applicability of the statute in question and then, in affirming the nonsuit judgment, observed that, generally, evidence of legal malpractice "requires the testimony of experts as to the standards of care and consequences of breach."³³

Taken as a whole, *Wright*, *Rives*, *Day*, and *Lipscomb* stand for the proposition that, in all but the most unusual circumstances, a claim of legal malpractice must be supported by expert testimony. *Wright* established the principle that expert testimony is not required to prove all legal malpractice claims but found otherwise when the action is against attorneys who hold themselves out as legal specialists and the claims, themselves, relate to that expertise.³⁴ *Wilkinson*, like *Wright*, found that it was not common knowledge whether an attorney in the exercise of due care in preparing for his client a declaration of homestead should have the client sign and verify an optional affidavit. *Day* stands alone because few cases can match its facts. ("The trial judge drew the inescapable conclusion—Rosenthal was not merely negligent. His was 'the type of conduct [not] to be condoned in the legal profession.'"³⁵) The allegations in an ordinary legal malpractice case do not come close to matching those in *Day*, and but for *Day*, the above cases hold that expert testimony is required in legal malpractice claims in which the elements of duty or breach are not of common knowledge (such as those involving a specialized field) or would assist the trier of fact. Plaintiffs' counsel should not ignore these cases, even if the malpractice in question is egregious. ■

¹ *Lucas v. Hamm*, 56 Cal. 2d 583, 591 (1961); *Kirsch v. Duryea*, 21 Cal. 3d 303, 308 (1978) (quoting *Estate of Kruger*, 130 Cal. 621, 626 (Cal. 1904)).

² *Coscia v. McKenna & Cuneo*, 25 Cal. 4th 1194, 1199-2000 (2001).

³ *Wright v. Williams*, 47 Cal. App. 3d 802 (1975).

⁴ *Wilkinson v. Rives*, 116 Cal. App. 3d 641 (1981).

⁵ *Day v. Rosenthal*, 170 Cal. App. 3d 1125 (1985).

⁶ *David Welch Co. v. Erskine & Tulley*, 203 Cal. App. 3d 884 (1988).

⁷ *Mirabito v. Liccardo*, 4 Cal. App. 4th 41 (1992).

⁸ *Piscitelli v. Friedenber*, 87 Cal. App. 4th 953 (2001).

⁹ *Wright v. Williams*, 47 Cal. App. 3d 802 (1975).

¹⁰ *Id.* at 810-11.

¹¹ *Id.* at 811.

¹² *Wilkinson v. Rives*, 116 Cal. App. 3d 641 (1981).

¹³ *Id.* at n.4.

¹⁴ *Id.* at 646.

¹⁵ *Id.* at 647.

¹⁶ *Id.* (citing *Wright v. Williams*, 47 Cal. App. 3d 802 (1975)).

¹⁷ *Id.* at 648-49.

¹⁸ *Day v. Rosenthal*, 170 Cal. App. 3d 1125 (1985).

¹⁹ *Id.* at 1146-47.

²⁰ *Id.* at 1147.

²¹ *David Welch Co. v. Erskine & Tulley*, 203 Cal. App. 3d 884 (1988).

²² *Id.* at 893.

²³ *Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1086

(1995).

²⁴ *Charnay v. Cobert*, 145 Cal. App. 4th 170, 182 (2006); *Shopoff & Cavallo LLP v. Hyon*, 167 Cal. App. 4th 1489, 1509 (2008).

²⁵ *Mirabito v. Liccardo*, 4 Cal. App. 4th 41 (1992).

²⁶ *Id.* at 45.

²⁷ *Piscitelli v. Friedenber*, 87 Cal. App. 4th 953 (2001).

²⁸ *Id.* at 972.

²⁹ *Id.*

³⁰ *Id.* at 973.

³¹ *Id.*

³² *Lipscomb v. Krause*, 87 Cal. App. 3d 970 (1978).

³³ *Id.* at 976.

³⁴ *Wright v. Williams*, 47 Cal. App. 3d 802, 810-11 (1975).

³⁵ *Day v. Rosenthal*, 170 Cal. App. 3d 1125, 1149 (1985) (quoting *Betts v. Allstate Ins. Co.*, 154 Cal. App. 3d 688, 718 (1984)).



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