THE USE AND DEFENSE OF EXPERTS IN LEGAL MALPRACTICE CASES

Expert Testimony Is Required For A Plaintiff To Meet Its Burden of Proof


- But when is it not necessary?

In some circumstances, however, the failure of attorney performance may be so clear that a trier of fact may find professional negligence unaided by the testimony of experts. Wright v. Williams, 47 Cal. App. 3d 802 (Cal. App. 2d Dist. 1975). California has held that breach of duty and proximate cause may on occasion be resolved as matters of law, if there can be no reasonable doubt as to whether the attorney's conduct fell below the standard of care or if reasonable minds could not differ as to whether there was causation. Dawson, 109 Cal. App. 4th at 397 citing Lysick v. Walcom, 258 Cal. App. 2d 136 (Cal. App. 1st Dist. 1968.)

New York, similarly, recognizes an exception to that principle exists where the ordinary experience of the fact finder provides sufficient basis for judging the adequacy of the professional service. S & D Petroleum Co. v. Tamsett, 144 A.D.2d 849 (N.Y. App. Div. 3d Dep't 1988). The Courts in

Moreover, Texas court's have held that expert testimony is not required if the attorney's lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge. Gallagher, 2010 Tex. App. LEXIS 7027 at 12. Texas, however, does follow the principle that substantially more complex allegations require expert testimony to establish a breach of the requisite standard of care. Id. at 13. See, e.g. Longaker v. Evans, 32 S.W.3d 725, 735 (Tex. App. San Antonio 2000)(requiring expert testimony to establish breach element when client alleged malpractice based on attorney's advice on closing a trust); Francisco v. Foret, No. 05-01-00783-CV, 2002 Tex. App. LEXIS 2610, 2002 WL 535455, at *2 (Tex. App.--Dallas Apr. 11, 2002, pet. denied) (requiring expert testimony of an attorney to establish breach of standard of care regarding malpractice claim premised on attorney's alleged failure to understand medical malpractice law, mishandling of the case, and misstatements of the applicable law).
The Court’s have commonly held that an attorney’s failure to file a claim within the statute of limitations does not require expert testimony to determine the attorney deviated from the standard of care. Gallagher, 2010 Tex. App. LEXIS 7027 at 12; James V. Mazuca & Assocs. v. Schumann, 82 S.W.3d 90, 97 (Tex. App.—San Antonio 2002, pet. denied); House v. Maddox, 46 Ill. App. 3d 68 (Ill. App. Ct. 1st Dist. 1977). The following cases are examples wherein an expert witness was not required by the Plaintiff to prove the attorney deviated from the standard of care.

**NY**

- The attorney knew of the deadline for filing the notice of claim against an estate and took no steps whatsoever to even inquire as to the status of that filing. Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey, 53 A.D.3d 912 (N.Y. App. Div. 3d Dep't 2008)

- The attorney failed to comply with Workers' Compensation Law § 29 (5), that requires either the carrier's consent or judicial approval to settle a third-party action and continue receiving compensation benefits. The Court held that the attorney’s disregard or ignorance of such a clearly defined and firmly established rule fell below any permissible standard of due care. Northrop v. Thorsen, 46 A.D.3d 780 (N.Y. App. Div. 2d Dep't 2007)

- There was no need for expert testimony with respect to whether a case had been "marked off" and the attorney’s malpractice for failure to restore it. Butler v. Brown, 180 A.D.2d 406 (N.Y. App. Div. 1st Dep't 1992)


**TX**

- In an underlying personal-injury case, expert testimony on causation is not required when the evidence establishes a sequence of events providing a strong, logically traceable connection between the triggering event and the plaintiff's resulting condition. Guevara v. Ferrer, 247 S.W.3d 662, 667 (Tex. 2007).


- Opposite view – Expert testimony is required in legal malpractice suit when the underlying case involves the effect of a bankruptcy filing. F.W. Indus., Inc. v. McKeehan, 198 S.W.3d 217, 221 (Tex. App.—Eastland 2005, no pet.)
A lawyer’s failure to conduct any research on a point of law. A family law attorney failed to be aware of the changes in family law and the status and divisibility of federal pensions under federal statute. The Court found that the plaintiff would have undisputedly been eligible for certain federal benefits and the attorney’s advice based upon outdated law was so clear that a trier of fact may find professional negligence unassisted by expert testimony. Stanley v. Richmond (1995) 35 Cal.App.4th 1070, 1093.

Expert testimony from a bankruptcy specialist was not necessary to establish professional negligence claim against a bankruptcy attorney who failed to perform even the most perfunctory legal research and, thus, advised his general contractor client to handle financial affairs in a manner that violated Penal Code section 484b. Goebel v. Lauderdale (1989) 214 Cal.App.3d 1502.

An attorney failing to obtain service of process before the statute of limitations expired did not require Plaintiff to obtain an expert witness. Gray v. Hallett, 170 Ill. App. 3d 660 (Ill. App. Ct. 5th Dist. 1988).

Opposite view - The common sense of laymen could hardly be relied upon to provide the requisite standard of care for the drafting of the relatively complex transactions. Schmidt v. Hinshaw, Culbertson, Moelmann, Hoban & Fuller, 75 Ill. App. 3d 516 (Ill. App. Ct. 1st Dist. 1979).

Permissible Scope and Subject Matter of Legal Expert Opinion In Legal Malpractice Actions

Legal Experts Opining On Violation Of Ethics Rules

The Majority Rule/Trend

The vast majority of jurisdictions hold that a violation of the ethics rules does not create a cause of action for legal malpractice; define the standards for civil liability; or constitute malpractice per se. See e.g. Weyher v. Cohen, 2016 Conn. Super. LEXIS 542 (Conn. Super. Ct. Mar. 10, 2016) (holding that Connecticut’s appellate courts have long recognized that the Rules of Professional Conduct applicable to attorneys do not provide a basis upon which civil liability may

But that is where the clarity ends. Many of these same courts nevertheless admit expert testimony on ethical violations because the existence of a duty owed by an attorney may be supported by reference to an attorney’s obligations under the rules. Ethics rule violations may be “relevant” to the standard of care or ethics violation may supply “some evidence” that an attorney breached an applicable standard of care. Thus, a plaintiff may present evidence that an attorney has violated the rules. *See Mahoney v. McDonnell, Esq.*, 616 Fed. Appx. 500 (3d Cir. 2015) (holding that the existence of a duty owed by an attorney may be supported by reference to an attorney’s obligations under New Jersey’s Rules of Professional Conduct and a plaintiff may present evidence that an attorney has violated the rules), citing *Bax v. Lilota*, 155 N.J. 190, 714 A.2d 271 (1998); *see also Tucker v. Rogers*, 334 Ga. App. 58, 62 778 S.E.2d 795, 798 (2015) (holding the Georgia Rules of Professional Conduct were not designed to be a basis for civil liability and their violation does not per se establish legal malpractice liability, but noting that the “pertinent Bar Rules are relevant to the standard of care in a legal malpractice action”); *DeSimini v. Durkin*, 2015 DNH 107 (D.N.H. 2015) (recognizing the majority view that an expert in a legal malpractice action can opine on violation of ethical rules as relevant to the standard of care and denying motion to exclude expert testimony); *Bor-Son Building Corp. v. Fabyanske, Westra, Hart & Thomson P.A.*, 2013 Minn. Dist. LEXIS 28 (Oct. 15, 2013) (accepting opinion of Prof. Geoffrey Hazard that violation of ethics rules provides evidence that defendant attorney breached the applicable standard of care).

**Some Illustrative Exceptions, Qualifications or Refinements to the Majority Rule**

There are also some well-reasoned exceptions or clarifications. For example, the Superior Court of Connecticut in *Weyher v. Cohen*, 2016 Conn. Super. LEXIS 542 (Co. Super. Ct. Mar. 10, 2016), this year has rejected use of ethics rules to define a lawyer’s duty. The Court, quoting the Connecticut Superior Court in *Biller Associates v. Peterken*, 269 Conn. 716, 849 A.2d 847 (2004), recognized the purposes of the ethics rules:

…can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

*Id.* at 722-23.
Similarly in *Greenwald v. Eisinger, Brown, Lewis & Frankel, P.A.*, 118 So.3d 867 (Fla. Dist. Ct. App. 3d Dist. 2013), the defendant attorney moved by motion in limine to preclude introduction of expert testimony. Before ruling on the motion, plaintiff called his expert and the Trial Court sustained several objections to questions regarding the requirements of the ethics rules.

On appeal, the Appellate Court found among other things that the trial court did not abuse its discretion “in excluding the reference to the Florida Rules of Professional Conduct…” despite the fact that a violation of the Florida Rules of Professional Conduct “may be evidence of a breach of the applicable standard of conduct.” *Id.* at 870-71.

The Court held that neither the case law nor preamble to the Rules of Professional Conduct “mandates the admission of such evidence; rather, the decision to admit or exclude such evidence remains vested in the broad discretion of the trial court....” *Id.* at 871. This discretion may be exercised, generally, to balance the probative value against the danger of unfair prejudice or more specifically here, to ensure the Rules of Professional Conduct are not “subverted when they are invoked by opposing parties as procedural weapons....” *Id.* at 870.

The same concerns apparently motivated the decision in *Tilton v. Tilton*, 12 Misc. 3d 1152(A), 819 N.Y.S.2d 213 (Nassau Cty. 2006). The Court held that the New York code makes no attempt to “define standards for civil liability of lawyers for professional conduct.” Accordingly, the Court adopted the Washington Supreme Court’s decision in *Hizey v. Carpenter*, 119 Wn.2d 251 (1992) and held that the expert could testify as to what she considered unethical conduct “even using the language of the rule without citing to specific sections.” The Court explained that the testimony must not be presented in such a way that the jury could conclude it was the ethical violations that were actionable rather than the breach of their legal duty of care. “This can be achieved by allowing the expert to use language of the codes but prohibiting specific reference to the code. *See also Laroche v. Billbe*, 2015 U.S. Dist. LEXIS 13415 (W.D. Wash. Feb. 4, 2015) (noting that under *Hizey* while an expert is prohibited from making references to the R.P.C.s in jury instructions and expert testimony that expert testimony regarding an attorney’s failure to conform to ethics rules is permissible so long as the expert addresses the breach of the legal duty of care, and not simply the supposed breach of the ethics rules).

In *Pollen v. Comer*, 2007 U.S. Dist. LEXIS 46906 (D.N.J. June 28, 2007) the District Court in New Jersey granted summary judgment to defendant attorney. The Court noted even where an attorney violates a rule of professional conduct and there is some evidence of malpractice, the plaintiff must still prove the attorney’s violation rises to the level of legal malpractice and was the proximate cause of his injury. There, the Court dismissed because rather than using the defendant’s alleged violation of the R.P.C.s as evidence of defendant’s breach of the standard of care, plaintiff attempted to bring a cause of action for violation of the rules themselves which is impermissible.

Legal expert testimony based solely on alleged violations of ethics rules standing alone was also insufficient as a matter of law because conduct of lawyers as they actually practiced controlled the standard of care in a civil setting and not the model code of professional conduct. *Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400 (Tenn. 1991).
Legal Expert Opinions that Usurp Province of the Court in Instructing on the Law or Usurp the Jury’s Role as the Trier of the Facts/Deciding Ultimate Factual Issues

An important threshold question when assessing the admissibility and propriety of legal expert testimony is whether the issue opined on is an issue of fact or law. Resolution of this issue can trigger very different results in different jurisdictions and among courts in the same jurisdictions. In *Henkel v. Wagner*, 2016 U.S. Dist. LEXIS 41485, *46 fn. 8* (S.D.N.Y. Mar. 29, 2016) the Court, while declining to strike a legal expert report which assessed the merits of a *quantum meruit* and unjust enrichment counterclaim, respectively limited that opinion and noted that at trial it will require “resolving both issues of law and fact,” but that determinations that are “‘purely a matter of…law, must be made by this Court’ without the benefit of an expert opinion.”

The Court continued, at most the expert testimony as to the viability of the defendant’s counterclaims was admissible “only if it aids the jury in assessing how a fact finder would rule on her *quantum meruit* and unjust enrichment claims.” 2016 U.S. Dist. LEXIS 41485, *46*. (emphasis added). Given the fact that in a legal malpractice action the jury is a finder of fact, the Court noted there is a real question whether the Court should permit any expert testimony on whether the plaintiff would prevail on claims in the underlying action.

The Court felt allowing the legal expert in a malpractice action to opine regarding what would have occurred at a securities arbitration was an ultimate issue and such opinion would usurp the jury’s function, noting, even where an expert does not opine on an issue of law it is not admissible if it invades the province of a jury to decide a case. The Court held that it was the jury’s role to step into the shoes of the arbitrator’s, consider the facts of the underlying claims and ultimately determine the merits and that cases have held it to be error to allow a legal expert to tell the jury how the arbitrator would have granted relief and usurped the jury’s function. *Cosmetics Plus Corp. Ltd. v. Traub*, 105 A.D.3d 134, 960 N.Y.S.2d 388 (1st Dep’t 2013). (Noting that the vagaries of how long it takes to procure a structured dismissal of plaintiff’s bankruptcy case is proper a subject of legal expert testimony and “not purely a matter of bankruptcy law which the court could determine without expert opinion.”)

Courts in other jurisdictions have rejected such expert testimony where it impermissibly encroaches on the jury’s role. *See Hickey v. Scott*, 796 F. Supp.2d 1 (D.D.C. 2011) (noting in attorney malpractice cases where causation requires proof of what would have happened in the underlying case within a case, the courts simply instruct the jury on the legal aspects of the case and leaves to the jury to decide, based on the law, what a reasonable fact-finder would have concluded if the attorney had not been negligent); *Leibel v. Johnson*, 291 Ga. 180, 728 S.E.2d 554 (2012) (holding evaluating the merits of the case within a case is solely a task for the jury in a malpractice action and not properly the subject of expert testimony); *Piscitelli v. Friedenberg*, 87 Cal. App. 4th 953, 105 Cal. Rptr.2d 88 (Cal. App. 4th Dist. 2001) (holding that to allow the expert to reach the ultimate question of fact of whether the plaintiff’s underlying arbitration would have been successful invaded the jury’s function).
In *Gersten v. Lemke*, 2010 N.Y. Misc. LEXIS 5851 (Sup. Ct. New York County Nov. 10, 2010) the Court held that an “expert” opinion from a lawyer in a malpractice action, which opined that plaintiff met his burden of proving legal malpractice as a matter of law, was inappropriate since “it is well-established that a trial court should not rely on the testimony of a legal expert on a question of domestic law...” and whether a lawyer’s performance constitutes legal malpractice is the function of the court and an opinion by an expert as to a legal conclusion is impermissible and usurps the court’s function of determining whether the plaintiff has met the legal standard of his malpractice claim.

However, in *Middle Market Financial Corp. v. D’Orazio*, 2002 U.S. Dist. LEXIS 17817 (S.D.N.Y. Sept. 18, 2002), the Court permitted the expert to testify to the substantive law in a legal malpractice action as to the underlying proceeding. The Court held that “in a legal malpractice action, the law applicable in the underlying action and the state of that law at the time of the alleged malpractice is almost always a consideration relevant to determining whether the malpractice plaintiff would have prevailed in the underlying action but for the alleged malpractice and whether the alleged malpractice did, in fact, constitute a departure from acceptable professional standards.” *Id.* at *21-22. “Where, for example, the law is unsettled because of an ambiguity in a statute or a split of authority among intermediate appellate courts, a determination by counsel which subsequently proves to be erroneous may not constitute malpractice. On the other hand, an attorney’s failure to comply with the statute of limitations applicable to a garden variety personal injury action will be substantially more difficult to defend.” *Id.* at *22. The Court held that “[i]n either case, however, the clarity of the law applicable to the underlying action will be relevant to the fact finder’s determination of whether counsel departed from acceptable professional standards.” *Id.*

The Court concluded that “in a legal malpractice action an expert should be permitted to testify to the substantive law applicable to the underlying proceeding, at least to the extent necessary to explain the expert’s conclusion that the defendant did or did not exercise the appropriate standard of care.” *Id.* at *26. The Court reasoned as follows:

Whether an attorney exercised the appropriate standard of care in a particular case will almost always involve an inquiry into the substantive law governing the underlying claim. Whether an attorney acted improperly by failing to offer certain evidence or by failing to assert a particular claim can be determined only by understanding whether the evidence was admissible and whether the claim was at least colorable. If an expert is precluded from testifying as to the law applicable to the underlying action, he will not be able to explain the rationale for his opinion and the jury will be left with only the expert’s naked conclusion with no basis for evaluating its validity or persuasiveness.

*Id.*  See also *Terry v. Woller*, 2010 U.S. Dist. LEXIS 128953 (C.D. Ill. Dec. 7, 2010) (holding that although experts may not opine on questions of law as a general rule, since the plaintiff in a legal malpractice action must show that but for the alleged malpractice, the plaintiff would have succeeded in the underlying action, the merits of the underlying case and the law that applied in
The Qualifications and Background Needed For Admissible Legal Expert Testimony in Legal Malpractice Actions

- An expert who has not practiced in the jurisdiction in a particular area of law lacking any personal familiarity with the standard of care in the specific legal community

In legal malpractice cases, expert testimony is required to establish the standard of care unless the attorney's lack of care is so obvious that it is a matter of common knowledge. The standard used by many courts to qualify expert witnesses is that an attorney will be qualified to testify as an expert in a legal malpractice case if they are general legal practitioners who by training and experience are familiar with the degree of care and skill reasonably to be expected of lawyers acting under the circumstances of the case. However, the admission or exclusion of expert testimony is committed to the informed discretion of the trial judge and will be sustained absent manifest error. The following cases demonstrate various approaches courts have taken to determining whether expert witnesses are qualified, and they suggest that practitioners should take care in selecting expert witnesses and in framing the issues for expert testimony.

- what about academics not actually in the practice of law

Expert Testimony of Professor Admitted:

In *Crawford v. Katz*, 32 A.3d 418 (D.C. Ct. App. 2011), a former client brought a legal malpractice action against a law firm that had represented him in wrongful termination litigation against his former employer. The plaintiff offered the expert testimony of Professor Hazard regarding the standard of care. The defendant challenged this expert testimony and asserted that the professor, who had admitted he was not an expert on employment law, was not qualified to testify regarding the standard of care. The trial court excluded the expert testimony. The appellate court reversed explaining:
It is true that Professor Hazard agreed with counsel for [Defendant’s] that he was “not holding [himself] out as an expert in employment litigation.” However, Professor Hazard described himself as “an expert in how to conduct litigation generally.” Earlier in the deposition, Professor Hazard informed counsel for Mr. Balaran that his expertise is “[p]rofessional ethics in civil litigation” and that he had previously testified about ethical issues in a class action employment lawsuit. In that regard, there are professional norms—statutes, regulations, and ethics—that apply to all civil litigation and, presumably, additional norms applicable to employment law cases of various sorts. Hence, we believe that Professor Hazard's testimony is properly evaluated in the context of professional norms applicable to civil litigation alleging a wrongful termination of employment. Our case law provides guidance as to how to evaluate Professor Hazard's testimony. In Battle, supra, we said that “‘an attorney will be qualified to testify as an expert in a legal malpractice action if the witness is a general legal practitioner who by training and experience is familiar with the degree of care and skill reasonably to be expected of lawyers acting under the circumstances of the case in which the expert is testifying.’” 646 A.2d at 323. We clarified in Battle, a Medicaid fraud case, that the expert need not be a Medicaid fraud specialist or have handled a Medicaid fraud case, so long as the proposed expert “by training and experience is familiar with the degree of care and skill reasonably to be expected of lawyers acting under the circumstances of the case in which the expert is testifying.” Id.

Id. at 430-31.

**Professor’s Testimony Admitted over Objections:**

In *Webb v. Sanborn*, 526 F. Supp. 2d 135 (D. Mass 2007), the court rejected a challenge to the expert's testimony based on the fact that the proposed expert had never testified as an expert witness before and that the areas of his scholarship related to professional responsibility
and civil procedure rather than legal malpractice. The court stated that “[i]mplicitly included within [the expert's] scholarship of legal ethics is legal malpractice.” *Id.*

**Tennessee Attorney not Competent to Testify to the Standard of Care Applicable to an Alabama Attorney even where the case involved application of Section 1031 of the Internal Revenue Code:**

In *San Francisco Residence Club v. Baswell-Guthrie*, 2012 WL 4339316 (N.D. Ala 2012), the defendant law firm argued that plaintiff’s expert, who was a licensed Tennessee attorney, lacked familiarity with the customs and practices of attorneys practicing real estate law in the Huntsville, Alabama area and thus should be precluded from testifying as to the standard of care. The court, in rejecting the expert’s testimony, noted that he was not familiar with the Alabama Legal Service Liability Act (ALSLA) and that the expert's deposition testimony focused largely on the requirements of Section 1031 of the Internal Revenue Code and showed no familiarity or attempt to learn Alabama law. The court noted that the plaintiff contended the expert was qualified to testify because the duties of attorneys in closing a transaction to comply with Section 1031 “do not vary by state; rather, the same standard of care applies across the nation.” Thus, plaintiff argued, “the standard of care imposed ... by the courts in Alabama ... is precisely the same as the standard of care in any other state.” The court found that argument “unavailing, as it confuses an *attorney's standard of care* as established by the ALSLA with the *legal requirements* of Section 1031. While the standard of care may, or may not, require flawless execution of and strict compliance with Section 1031's legal requirements in order to avoid malpractice liability under the ALSLA, the two are not synonymous.” *Id.*

**Active Practice of Law or Legal Teaching at U.S. Law School Required By Statute:**

In *Wilson v. McNeely*, 307 Ga. App. 876, 705 S.E.2d 874 (2011), the court found that a proffered expert that was licensed to practice law in Georgia was not qualified because he was not actively practicing law at the time of the alleged malpractice. At the time, the Georgia Evidence Code provided that expert testimony that is offered in a professional malpractice action on the issue of the acceptable standard of conduct of the professional “shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert [w]as licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time.” OCGA § 24–9–67.1(c)(1). The court
interpreted that statute as requiring that “in order to comply with the licensing requirement of OCGA § 24–9–67.1(c)(1), an expert in a professional malpractice action must be licensed and practicing (or teaching) in one of the states of the United States at the time the alleged negligent act occurred.” (emphasis supplied) Craigo v. Azizi, 301 Ga.App. 181, 186–187(3), 687 S.E.2d 198 (2009) (This statute was repealed effective January 1, 2013, by Laws 2011, Act Section 2.)

Former Judge's Expert Testimony Rejected as not Meeting the Daubert Standard:

In The Cadle Company v. Sweet & Brousseau, P.C., 2006 WL 435229 (N.D. Texas Feb. 23, 2006), the plaintiff asserted that its proposed expert was qualified to testify in the legal malpractice case because of the knowledge and experience he had learned and applied as a practicing attorney, a former civil trial judge, a former justice of the Texas Court of Appeals, a former justice of the Texas Supreme Court and as a past expert witness work involving legal malpractice. The trial judge indicated that he was inclined to grant the motion to exclude unless the plaintiff could provide supplemental information demonstrating that the expert possesses specialized knowledge or experience about the legal malpractice issues involved in the case that could assist the trier of fact in understanding the evidence or determining a fact issue. The proposed expert provided supplemental information indicating that most of his expert witness work involved legal malpractice cases. The court found the supplemental information insufficient to satisfy Daubert, saying that the court still “was in the dark about the particular malpractice issues [the expert] addressed in such cases . . . .” Id. The court found that plaintiff had failed to demonstrate that the testimony was based upon sufficient facts or data, and was therefore, the product of reliable principles and methods to satisfy Rule 702 of the Federal Rules of Evidence. Id.

Out of State Attorney's Testimony Not Per Se Inadmissible:

In Sloan v. Urban Title Services, Inc., 770 F. Supp. 2d 227 (D.D.C. 2011), the court in denying a motion for summary judgement held that fact issues existed as to whether the plaintiff's expert attorney, who was not licensed in Virginia, had the necessary experience with real estate settlement practice in Virginia. The plaintiff’s expert was an attorney licensed in the District of Columbia, Maryland, and New York, who had conducted more than 1,000 real estate settlements in the region over the course of his nearly 30-year career, and he had experience that had apparently extended to settlement closings in Virginia. He also had authored various
publications and served as a panelist in programs involving real estate practice. At his deposition, the proposed expert attorney testified that his opinions as to the obligations imposed upon the settlement agent applied to Virginia practice. The court stated that while, without a doubt, the attorney's testimony was less forceful and less compelling when it related to Virginia practice than when it related to the practice within the District of Columbia or Maryland, it could not say at this stage and with this record that the testimony was entirely unsupported or unreliable. Whatever its ultimate merits, this factor alone did not render the proposed expert so clearly unqualified that his testimony must be altogether disregarded. See also, Walker v. Bangs, 601 P.2d 1279 (Wash. 1979) (noting that a lawyer’s lack of admission to the local bar should go to weight not admissibility of the lawyer’s expert testimony).

Out of State Attorney’s Testimony Admissible regarding Multi-jurisdictional Practice:

In Taylor v. Bell, 185 Wash. App. 270 (Ct. App. Wash. 2014), the court found that the trial court erred in excluding the expert testimony of a lawyer that was not licensed in the jurisdiction. The appellate court stated that in excluding the expert’s testimony, the trial court misperceived the appropriate inquiry. Id. at 959. The court explained in a footnote:

The record suggests that McDermott's testimony was rejected on the basis that he was not licensed to practice law in Washington. “There is just no admissible evidence under Washington law because Mr. McDermott doesn't have the requisite expertise for us to admit his declaration as admissible evidence. He is qualified to opine under Idaho law, perhaps New York law, but there's no admissible evidence under Washington law for the admissibility of his opinion. It's a different question about whether it's admissible under Idaho law.”

Id. at n. 17 (emphasis added).

The appellate court concluded that:
[t]he trial court should have sought to ascertain whether McDermott was qualified to opine on matters of multi-jurisdictional corporate practice, including third party opinion practice. That was the gist of his testimony and the purpose for which it was offered. Had the trial court considered McDermott's credentials, which were undisputed, they would have revealed, as detailed below, that he is eminently qualified to testify as an expert in this matter.

- He has extensive experience in multi-jurisdictional practice;
- He has been a member of the TriBar Opinion Committee for over 20 years;
- He has experience in the preparation or receipt of over 100 third party opinion letters;
- He has over 33 years of experience as a professor of law on corporate finance;
- He is the author of a law school textbook on corporate finance;
- He is the author of a chapter in a treatise on opinion letters; and
- He has over 35 years of experience in all aspects of corporate law.

**Every member of the Bar is Not Qualified to Testify to the Standard of Care:**

In *Young v. Rutkin*, 79 Conn. App 355, 362 (Conn. App. 2003), the court found that not every member of the state’s bar would be qualified to testify to the standard of care in a legal malpractice case. The court explained:

We recognize that attorneys in Connecticut do not have formal specialties involving additional licensing requirements beyond that necessary for the practice of law generally. Nevertheless, we recognize that the relevant experience necessary to qualify one as
an expert witness in a particular legal malpractice action is not shared equally by every member of the bar. Our Supreme Court has expressly stated that to qualify as an expert in a particular matter, an attorney “must be found to possess special knowledge beyond that exhibited by every attorney simply as a result of membership in the legal profession. Rather, [an attorney] must possess special knowledge that, as properly applied, would be helpful in the determination of the question of whether the defendant's actions were in accordance with the standard of care applicable to attorneys under comparable circumstances” (Emphasis added.) *Id.*, at 417, 576 A.2d 489. “[A]n expert must show more than a ‘casual familiarity’ with the standards of the specialty in question.” (Emphasis added.) *Id.*, at 416, 576 A.2d 489.

- When do you attack a “bad” expert – or do you?
  - Do you try to strike or preclude a bad expert early or do you wait until trial when it may be too late for the other side to replace the expert

Factors to Consider

- Are you in a jurisdiction that will permit a pre-trial deposition that will allow you to more fully assess the expert’s capabilities
- What is the relative strength of your case – can an attack on the expert at a deposition or mediation soften the other side’s perspective of its case
- when a motion for summary judgment is based upon legal expert opinion, do you really have a choice but to attack the expert and the stated opinion

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