

Legal *Mal*practice:  
Getting the Most out of Your  
Expert Witness

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**Legal*Mal*practice.com**

expertise *beyond* expectation!

**American Board of Professional Liability Attorneys  
New Orleans, LA**

April 26, 2013

**Legal*Mal*practice.com**



# The Expert: Your Most Important Witness

- an expert can do things other witnesses can't
  - s/he can base an opinion--and get before the jury--  
things that would otherwise be inadmissible

# Three Kinds of Expert:

- The Affidavit of Merit Expert
- The Testifying Expert
- The Consulting Expert

# Before You Get any Expert

**GET**

**THE UNDERLYING FILE**

Frenkel v. Frenkel, 252 N.J. Super 214 (1991)

***ALSO:***

**BILLING RECORDS**

**PERSONNEL FILE**

**YEARLY REVIEWS**



# The Affidavit of Merit Expert

# I. Affidavit of Merit Expert

- Creature of Tort Reform the AoM Statute
- Function is limited to the Statutory Grant
- AoM is part of the pleadings--not discovery
  - No Deposition of AoM Expert--no “discovery side shows”
  - Expert Qualifications are resolved at the Ferreira Conference

# NJ: Content of the AoM

- Bare minimum? Only what the statute requires.
- Mini-Report?: May encourage early settlement
  - May serve as the basis to cross-examine the expert
- Do not rely on “common knowledge” to dispense with an AoM. AoM Costs Less than your Insurance Deductible payment
- SAMPLE NJ AFFIDAVIT OF MERIT

# PA: Certificate of Merit

- Essentially the same as New Jersey except:
  - PROXIMATE CAUSE
  - Documents Reviewed Should Cover
    - Deviation
    - Proximate Cause and Damage



# NJ Affidavit/ PACertificate of Merit Tips

- For Plaintiffs:
  - Make the area of expertise as **broad** as possible:
    - » Real Estate
    - » Personal Injury
- For Defendants:
  - To challenge the AoM Expert, make the area of expertise as **narrow** as possible
    - » Land use planning; Zoning
    - » Medical Malpractice; Mass tort

# N.Y. CPLR §3101 (d)

- N.Y. has no Affidavit/Certificate of Merit
- Unlike NJ Affidavit/PA Certificate of Merit
- It is part of the Discovery Process
  - But generally no expert depositions permitted
  - More like an expert report
  - Not signed by (but frequently composed by) the expert
  - Signed by the attorney offering the expert



# The Testifying Expert

# ABA FORMAL OPINION

97-047

- The Testifying Expert:
- *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 such as would render his services as a testifying expert subject to the Model Rules of Professional Conduct.*

# BUT:

- *...to avoid any misunderstanding, the testifying expert should **make his limited role clear at the outset.***
- *... if the lawyer has gained confidential information of the party in the course of service as a testifying expert, the lawyer may as a matter of other law have a **duty to protect the party's confidential information from use or disclosure** adverse to the party.*

# TIPS:

- The lawyer—not the client, should hire the expert
- Minimize the contact between the client and the expert
- All communications from client to expert should be through the lawyer.

# An Expert on What?

- **Traditional view:**
  - To define the applicable standard of care
  - how the defendant deviated or complied.
- **New view:**
  - On each of the elements of the legal malpractice cause of action

# Attorney-Client Relationship

- Question of Law or Question of Fact?
- Is there an attorney-client relationship?
- What is the Scope of the Relationship?
- Has the Scope of the lawyer's Relationship been properly limited?
  - RPC 1.2
  - the Laufer Letter
- Is there an attorney-third party relationship?
  - Gandhi v. Banco Popular



# The Standard of Care

- Model Civil Jury Charge 5.51A, p.2
- **The law, therefore, imposes upon an attorney the duty or obligation to have and to use that degree of knowledge and skill which attorneys of ordinary ability and skill possess and exercise in the representation of a client, such as the plaintiff in this case. This is the standard by which to judge the defendant (a general practitioner or a specialist) in his/her representation of plaintiff in this case.**

# Duty

- **Define the Duty:**

- Whether there is a Duty at all: Question of Law?
- What is the duty within that relationship?
  - » no single source book listing a lawyer's duties.
  - » expert must know how to identify and find the source of the duty.
  - » Make sure the duty existed at the time of the breach.
    - RPC 1.7 conflict of interest waivers
    - Pre-2004- no written waiver required
    - Post-2004- “each affected client gives informed consent, **confirmed in writing.**

# Tripping Up the Expert

- **Define the Breach of Duty.**
  - How did the lawyer breach that duty?
  - How did the lawyer comply with the duty?

## The Chronologically Challenged Expert

- **His Standard is Not the Standard**

- **His Report:**

- “Notwithstanding the existence of a concurrent conflict of interest, **RPC 1.7** allows an attorney enter into the representation if:

- (1) each affected client gives informed consent, **confirmed in writing**, after full disclosure and consultation...”

- **But, The Standard at the time of the alleged deviation:**

- RPC 1.7 (a): “each client consents after a full disclosure of the circumstances”

# “Complex Commercial Transaction”

Elements of a “Complex Commercial Transaction”	Baldasarre	Plaintiff
“Sellers contracted with buyer”	YES	NO
“inherited land”	YES	NO
“contingent sale”	YES	NO
“preliminary subdivision approval”	YES	NO
“built in extension period”	YES	NO
“deadline”	YES	NO
“buyer assigned contract to 3 <sup>rd</sup> party”	YES	NO
“options are numerous”	YES	NO

# Proximate Cause

- **How did that breach cause damage?**
  - **Defense: Identify other possible causes**
- **Underlying Litigation**
  - **Case within the case**
- **Underlying transaction**
  - **Froom v Perel**
- **Underlying litigation settlement**

# Use Multiple Experts

- **CAVEAT: Court Room Experience Preferred!**
- **Attorney-Client Relationship? Scope of the Engagement**  
Practicing Lawyer, Law Professor
- **Standards of Care/Duty/Breach?** Practicing Lawyer, Legal Ethics Professor or Retired Ethics officer
- **Proximate Cause? Use a specialist who has underlying and litigation experience:** Patent lawyer, land use or zoning lawyer, trademarks; tax lawyer; estate planning; business industry expert; liquor license; securities lawyers and experts that would have been used in underlying case
- **Damages:** Forensic accountants, economists, appraisers



# The Consulting Expert



# Who is the Consulting Expert?

- FRCP 26(b)(4)(B)
- 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
- Disclosure not required

# Gunn v. Minton 568 US\_\_

- Legal Malpractice Claims Arising out of patent law belong in State Court!
- But patent experts have little familiarity with state law such as RPCs or other state based standards of care
- Use legal malpractice expert for standards
- Use patent law expert for proximate cause

# More Tips

– **Get your expert early in the case**

- **Plaintiff**- Before you file your complaint-attach the AoM to the Complaint
- The AoM should stick to the statutory requirement and give no more than what the AoM statute requires
- **Defendant**-Get your expert before the Ferreira conference. Don't wait till you get the plaintiff's expert report.

# Recap: 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.

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- **The “BEN” COMMANDMENTS**  
**Of Selecting**
  - **Your Expert Witness**

# I.

## 1. Effective Writer.

- a. Experienced in how to write a winning report;
- b. Report must be consistent with theory of liability or defense.

# II.

## – **Effective Verbal Communication Skills**

- – choose an expert who is comfortable in the courtroom and who knows how to effectively communicate with the Jury.
- Talks in plain language;
- Talks with not down to the jury  
Talks in plain language;.

Uses plain and simple language and is able to explain complex cases in an understandable way

# III.

- **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)).



# IV.

- **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.

# IV.

## **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.

# VI.

Reasonable charges

– NO CONTINGENCY FEES!

# VII.

- **Make sure your expert has a clean ethics record and no reported decisions where the Court has criticized the expert.**
- *Celucci v. Bronstein*, 277 N.J. Super. 506 (1994);
- *Froom v. Perel*, 377 N.J. Super. 298 (2005).
  - a. Require your proposed expert to do a “conflicts check”.

# VIII.

**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.

# IX.

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.

# X.

- 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.

# FINAL WORD

STAY INFORMED:

LEGAL *MAL*PRACTICE LAW REVIEW.COM

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Questions?

# THANK YOU





