ON BEING AN 
EXPERT WITNESS 
IN 
LEGAL MALPRACTICE CASES 

Bennett J. Wasserman, Esq. 
benwasserman@legalmalpractice.com 
LegalMalpractice.com 

N.J. Institute for Continuing Legal Education 
March 2013
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 so the defendant can prevent that from ever happening and sometimes win a summary judgment--on the strength of his or her expert’s report.

In the nearly 40 years that I have been a practicing lawyer (Yikes! Time flies when you’re having fun!), I have had the privilege of serving as an Affidavit or Certificate of Merit Expert and the Consulting and/or Testifying Expert in more than 1,000 cases involving legal malpractice and legal ethics. I have appeared on behalf of defendants and their professional liability carriers and on behalf of plaintiffs. 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, ethics violations, advertising rule breaches and billing abuses. 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 a “cutting edge”… “‘blawreview’—part blog, part law review…[that] includes lawyers on all sides of the malpractice wars…”. You can visit it at www.legalmalpracticelawreview.com

Since I entered this field of law more and more lawyers and law firms, who would never have thought of taking on legal malpractice 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 unjustifiably 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 that I have gleaned from my experience and to set out what I believe is required of all lawyers and their legal malpractice experts on both sides of the litigated battle.

And so, we introduce you to three kinds of expert witnesses in the legal malpractice case.

---

1 My gratitude to one young colleague, Melissa Kanbayashi, Esq., now an associate with Marks, O’Neill, O’, BrienDoherty & Kelly, P.C. who assisted me in this effort and who deserves my special thanks for her fine work.
I. The Expert and the Attorney Client Relationship

1. There is no attorney client relationship between the expert and the client.

2. ABA Formal Opinion 94-047:

“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. However, to avoid any misunderstanding, the testifying expert should make his limited role clear at the outset. Moreover, 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 to the adverse party.” (See Appendix A for the full text of this Opinion)

The Affidavit of Merit Expert

Legislative History:


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 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 related to the proximate cause or damages elements of a legal 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 therof, 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.


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 pursuant to P. L.1997, c. 259 (C.45:2B-42 et seq.);

b. an architect pursuant to R.S.45:3-1 et seq.;

c. an attorney admitted to practice law in New Jersey;

d. a dentist pursuant to R.S.45:6-1 et seq.;

e. an engineer pursuant to P.L.1938, c. 342 (C.45:8-27 et seq.);
f. a physician in the practice of medicine or surgery pursuant to R.S.45:9-1 et seq.;

g. a podiatrist pursuant to R.S.45:5-1 et seq.;

h. a chiropractor pursuant to P.L.1989, c. 153 (C.45:9-41.17 et seq.);

i. a registered professional nurse pursuant to P.L.1947, c. 262 (C.45:11-23 et seq.);

j. a health care facility as defined in section 2 of P.L.1971, c. 136 (C.26:2H-2);

k. a physical therapist pursuant to P.L.1983, c. 296 (C.45:9-37.11 et seq.);

l. a land surveyor pursuant to P.L.1938, c. 342 (C.45:8-27 et seq.);
m. a registered pharmacist pursuant to P.L.2003, c. 280 (C.45:14-40 et seq.);

n. a veterinarian pursuant to R.S.45:16-1 et seq.;

o. an insurance producer pursuant to P.L.2001, c. 210 (C.17:22A-26 et seq.); and

p. a certified midwife, certified professional midwife, or certified nurse midwife pursuant to R.S.45:10-1 et seq.

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. Barlow*, 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.
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 “sideshows” to discovery that Affidavit of Merit compliance had become.

See Appendix B 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.

See Appendix C for a sample of a Certificate of Merit used in Pennsylvania legal malpractice cases.

See Appendix D for a sample of an Expert Disclosure statement under NY CPLR 3101 D.
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.


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

h. The Conduct of the Lawyer in prior cases

i. Form Books in a law library (See, Fiorentino v. Rapoport, 693 A. 2nd 208 (1997)

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


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).

The expert is permitted to testify as to what the reasonable value of the underlying case would have been had the lawyer not been negligent. Kelly v. Berlin, 300 N.J. Super 256 (App. Div. 1997).

The jury sitting in the malpractice case can decide what a reasonable jury would have awarded in the underlying action. Fuschetti v. Bierman, 128 N.J. Super 290 (1974).

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. Fineo, 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. See, Kelly v. Berlin, supra

b. Consider using experts such as economists, accountants, appraisers, and the like.


(“...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**

   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**

   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

---

2 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 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.”

3 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.”
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).

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.


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

3. Complete failure to investigate a client’s claim

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

6. Obvious casual link

7. Where attorney used unclear and ambiguous language in contracts
   \[\textit{(Belfer v. Leckstein, Dkt#A-4372-96T3; Superior Court of NJ, App. Div., decided 10/17/97 – unpublished thus far.)}\]

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 acceptable 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.2nd 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

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.  

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

---

4 Federal court case part 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 we 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 informing the opinions; any exhibits to be used as, a summary of or support for the opinions; the qualifications authored by 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.
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.

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).


“Discovery of communications between an attorney and any expert retained or specially employed by that attorney occurring before service of an expert’s report is limited to facts and data considered by the expert in rendering the report. Except as otherwise expressly provided by R.4:17-4(e), all other communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process shall be deemed trial preparation materials discoverable only as provided in paragraph (c) of this rule. (“only upon a showing of substantial need” and “unable without undue hardship to obtain the substantial equivalent by other means.”)

e. FRCP 26 (b) (4) (A)-(C)

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party’s Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party’s attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
(i) relate to compensation for the expert’s study or testimony;

(ii) identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

III. The Non Testifying (Consulting) Expert:

New Jersey Court Rule 4:10-2(d)(3)\(^5\) 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.

\(^5\) 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 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.” 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 Eliasen v. Hamilton, 111 F.R.D. 396 (N.D. Ill. 1986). See also In Re Long Branch, 388 N.J. Super. at 262.
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 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" 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.

---

6 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.
“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 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.
4. Consider Board Certification and its significance under the Affidavit of Merit Statute

For the **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.

SHOULD YOU HAVE ANY QUESTIONS OR SUGGESTIONS, PLEASE DON’T HESITATE TO SEND US AN EMAIL: benwasserman@legalmalpractice.com
BENNETT J. WASSERMAN  
COUNSELOR AT LAW

CONSULTING OFFICES:  
legalmalpractice.com  
3 University Plaza  
Hackensack, New Jersey 07601  
Tel: (201) 488-1222  
Cell: (201)803-6464  
benwasserman@legalmalpractice.com

LAW OFFICES:  
375 Cedar Lane  
Teaneck, New Jersey 07666  
Tel. (201) 907-5000  
Cell: (201) 803-6464  
Direct Fax: (973) 556-1776  
Bennett.Wasserman@dsslaw.com

ACADEMIC OFFICES:  
Hofstra University  
Maurice A. Deane School of Law  
121 Hofstra University  
Hempstead, New York 11549-1210  
Cell: (201) 803-6464  
Bennett.J.Wasserman@hofstra.edu

WEB BIOS:  
Consulting offices:  
Law Offices:  
http://www.dsslaw.com/bennett-wasserman/  
Academic Offices:  
http://law.hofstra.edu/Directory/Faculty/AdjunctFaculty/adjfac_wasserman.html  
www.dsslaw.com/bennett-wasserman/

EXPERIENCE:  
Active participation in more than 1,000 legal malpractice cases as counsel for litigants or as consulting or testifying expert witness in transactional and litigation based matters; teaching of advanced law students a full semester course entitled “Lawyer Malpractice” at Hofstra University Law School, since 1990. Founder and Editor-in-Chief, Legal Malpractice Law Review.

BAR ADMISSIONS:  

CERTIFICATIONS:  
Supreme Court of New Jersey: Certified Civil Trial Attorney (1985);  
American Board of Professional Liability Attorneys, Diplomate in Legal Malpractice (2012).

As of January 2013
RATINGS/HONORS:

AV™ - Martindale-Hubbell;

Bar Register of Preeminent Lawyers (Lexis/Nexis Martindale Hubbell);

Best Lawyers in America® 2010, 2011, 2012, 2013 (Legal Ethics and Professional Responsibility Law and Legal Malpractice Law);

The Best Lawyers in the United States (1985);


www.Avvo.com (10 out of 10, legal malpractice)

OCCUPATION:

legalmalpractice.com

V.P. and General Counsel, Consultant to lawyers, law firms, and liability insurance companies on legal malpractice (plaintiff and defendant); qualified as expert witness by courts in the field of legal malpractice, legal ethics and law firm billing.

Davis Saperstein & Salomon, PC (Teaneck, NJ and NYC), Of Counsel and Chair, Legal Malpractice Law Section (January 2011 to date)

Special Professor of Law (in Lawyer Malpractice). Hofstra University, Maurice A. Dean School of Law, Hempstead, New York


PRIOR EMPLOYMENT:


Moderator, National Legal Malpractice Forum; Co-Moderator, N.J. Professional Liability Law Forum, Counsel Connect (on-line computer discussion groups for lawyers on professional liability.)


As of January 2013
Merck & Co. (Merck Sharp & Dohme Div.); Professional Representative (pharmaceutical marketing) (1969-1971)

**Areas of Practice.** Civil Litigation; Advocacy and Counseling in the law governing lawyers (legal malpractice, legal ethics; attorney advertising, attorney billing practices,) commercial transactions and commercial litigation; real estate litigation; real estate transactions, family law, construction and land use and development, mortgage foreclosures; securities litigation; professional due diligence; health care law, medical liability; professional malpractice; commercial torts; general negligence; toxic torts; construction site accidents and construction defect litigation; railroad and product liability in the federal and state courts of New Jersey, New York and Pennsylvania; employment law, Occupational Safety & Health (OSHA); collective bargaining, intellectual property, wills, trusts and estates, environmental law; bank and securities fraud.

**Responsibilities** include case strategy development and implementation, investigation, discovery, motion practice, appeals, overall management of major litigation and appellate cases. Alternate Dispute Resolution.

Serving as lead counsel to public and close corporations, municipal entities and individuals in major legal malpractice actions arising from botched commercial litigation and transactions; securities, intellectual property; family law, health care law and financing; real estate law and financing; land use and development; wills, trusts and estates, employment law, patent and trademark law; family law; tort litigation; ineffective assistance of counsel in criminal defense; breach of fiduciary duty, et al.

Serving as consulting and/or testifying expert on behalf of litigants, law firms, lawyers and professional liability insurers.

Serving as counsel for plaintiffs in cases of catastrophic injuries involving multiple parties; negotiating and concluding structured and lump sum settlement awards for the seriously injured; representing clients in all phases of non-litigation matters including real estate, labor, wills, estates, commercial transactions. Alternate Dispute Resolution, general law practice; defense counsel for excess liability exposure in professional liability cases (medical and legal), professional liability claims evaluation, review, administration and resolution.

Serving as defense counsel designated by select professional liability carriers in major legal malpractice cases.

Served as defense counsel in product liability, personal injury cases on behalf of Tokio Marine Insurance Company, the largest Japanese liability carrier insuring companies such as Panasonic, Honda, Matsushita Electronics Corporation and other liability insurance carriers.
- Expert witness in the law governing lawyers, including legal malpractice, legal ethics, lawyer advertising and law firm billing practices, including consulting, case strategy, expert witness affidavits of merit, reports, testimony in depositions, trial and arbitration venues.

NOTEWORTHY MATTERS & FREQUENTLY CITED DECISIONS:


Huber v. Watson, 568 N.W.2d 787 (Sup. Ct. of Iowa, 1997) (litigation malpractice, failure to name appropriate parties in underlying asbestos suit) (Expert witness).

Vahila et. al v. Charles D. Hall, III, et. al. 77 Ohio St.3d 421, 647 NE2d 1164 (1997) (Sup. Ct. of Ohio). (proving the case within a case in underlying criminal defense case with expert witness) (Expert witness).


Higgins v. Thurber, 413 N.J. Super. 1, 992 A.2d 50 (App. Div. 2010) (entire controversy does not bar subsequent legal malpractice action in an estate case) (Consulting Expert to Plaintiff);


**PUBLICATIONS:**

"*The Ubiquitous Detailman...*" 1 Hofstra Law Review 183-213 (1973) -- reprinted in Paul D. Rheingold, DRUG LITIGATION, 3rd Edition (1981), and in PRECLINICAL AND CLINICAL TESTING BY THE PHARMACEUTICAL INDUSTRY, 1975, Joint Hearings before the Subcommittee on Health and Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 94th Congress, pages 1258-1280; cited in Dixon, TREATISE ON DRUG PRODUCT LIABILITY, s.6.10, et seq.

SYMPOSIUM ON PRODUCT LIABILITY AND SAFETY, Volume II, Hofstra Law Review (1974), (Articles Editor and Coordinator.)

LAWYERS LIABILITY REVIEW (Timeline Publishing Co., Inc.) (Member of Advisory Board.)

Author, Proposed Amendment to N.J.S.A. 2A:13-4, endorsed by the New Jersey State Bar Association and introduced into the NJ Senate and Assembly (S-1925 & A-3063, March, 1997).


As of January 2013


Wasserman, *What if Goldman Sachs Were a New Jersey Law Firm?*

As of January 2013

Wasserman, et ano. Settle and Sue is Here to Stay, New Jersey Law Journal, Supreme Court Year in Review, September 6, 2010).


EDUCATION:
Hofstra University School of Law, Hempstead, N.Y.
-- J.D. cum laude, 1974.
-- Hofstra Law Review, Articles Editor.
-- Dean's Citation for Excellence in Trial Advocacy.
-- Class Rank: 13th of 165.

Hunter College, New York City.

BAR ASSOCIATIONS:
Association of Professional Responsibility Lawyers (APRL); Defense Research Institute; American Association of Justice (AAJ); New Jersey Association for Justice (NJAJ); American Bar Association; Center for Professional Responsibility; New Jersey State Bar Association (Member, Malpractice Insurance Committee, 1992-to date; Member, Entire Controversy Committee 1996-97; NJSBA Delegate to the American Bar Association National Legal Malpractice Conference of the Standing Committee on Lawyers' Professional Liability 1994-98); New York State Bar Association; Bergen County Bar Association; New York County Lawyer's Association (Lawyer's Professional Liability Committee); Professional Liability Underwriting Society.

MISCELLANEOUS:
-- Designed "LAWYER MALPRACTICE" course curriculum for law school level now being taught at Hofstra University School of Law, Hempstead, New York and other law schools.

-- Testified before the United States Senate, Subcommittee on Health (Edward M. Kennedy, Chairman), regarding the need for improvement in the law pertaining to the marketing of pharmaceutical products (1974).
--Interviewed by trade journals concerning developments in product liability law (e.g., Chemical Business, February 8, 1982.)

--Served on Bar Association Committees studying topics in law and medicine and multi-state practice of law.

--Lectured before Bar Association and community groups on trial advocacy and legal ethics.

--Guest lecturer on legal malpractice at:


- Rutgers University School of Law (Newark, New Jersey, 1996)

- New York Law School (New York, N.Y., April, 2006).

--Lecturer & Panelist “Avoiding Malpractice”, Continuing Legal Education Program, Bucks County (PA.) Bar Association (November 1995.)


--Faculty, “Ethical and Legal Malpractice Considerations in the Electronic Information Revolution, ATLA-NJ Education Foundation (January 1997).


--Lecture, “The Impact of the Entire Controversy Doctrine on Legal Malpractice” Bergen County Bar Association (9/12/96)


--Lecture, “Pitfalls of Legal Malpractice” Bergen County Bar Association (11/29/2001)


--Lecture, “When Ethical Violations Become Malpractice” ATLA-NJ Meadowlands Seminar, October 21, 2007;

--Lecture, “Ethics Here, Ethics There, Ethics, Ethics Everywhere (NJ State Bar Association Public Utility Law Committee/NJ Institute of Continuing Legal Education, April 9, 2010);

--Panel Member, “Teaching Tomorrow’s Lawyers to Avoid Legal Malpractice: A Roundtable Discussion (American Bar Association, National Legal Malpractice Conference, Washington, DC April 15, 2010).


--Lecturer, “Legal Malpractice: The Good, the Bad, the Future” (New Jersey Association for Justice, Meadowlands Seminar 2011, November 11, 2011).

--Lecturer, “Legal Ethics Violations and Legal Malpractice” (New Jersey Association for Justice, Meadowlands 2011, November 11, 2011).


--Appeared on radio talk shows with Barry Farber and television documentaries with Geraldo Rivera concerning cases of public interest relating to tort law.

--Received newspaper coverage on numerous matters being actively litigated in the courts.

--On-going participation in continuing legal and alternate dispute resolution education courses.

--Founded the Multi-State Bar Association, an organization seeking to foster the growth of the multi-state practice of law.


--Personal interest in environmental law, municipal finance, municipal bonds, securities and bank fraud and related legal and investment issues.
--Real Estate Broker, State of New York (Lic. # 691079).

REFERENCES: --Upon request.
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. However, to avoid any misunderstanding, the testifying expert should make his limited role clear at the outset. Moreover, 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.

Model Rules 1.7(b) and 1.10(a) apply to the lawyer’s representation of a client adverse to a party for whom he is serving as a testifying expert. If the duty of confidentiality to the party on whose behalf the lawyer serves as a testifying expert would “materially limit” the responsibilities of the lawyer to one of his clients, the lawyer and any firm with which the lawyer is associated may be prohibited from concurrently representing that client. Ordinarily it would not be reasonable for the lawyer to believe in those circumstances that the representation of the client will not be adversely affected, and thus client consent would not permit the representation. Moreover, even though these requirements of the Model Rules are satisfied, other law, including the law of client-lawyer privilege and the law of agency, may prohibit the lawyer and his law firm from representing the

This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.
client, unless the party on whose behalf the lawyer serves as a testifying expert waives its right to object.

After the testifying expert relationship has concluded, the testifying expert and his law firm may be precluded from representing a client in a matter in which use of the party’s confidential information would be necessary. Model Rules 1.9(a) and 1.9(c) do not apply because the party for whom the lawyer was asked to testify is not a former client. Nevertheless, the responsibilities of the lawyer under other law to maintain the confidentiality of the party’s information may materially limit the representation in the subsequent matter, and it may not be reasonable for the lawyer to believe that the representation would not be adversely affected; if so, Model Rules 1.7(b) and 1.10(a) would bar the subsequent representation.

Opinion

The Committee has been asked whether, under the Model Rules of Professional Conduct, a lawyer who is retained to testify as an expert witness on behalf of a party who is another law firm’s client may undertake a representation directly adverse to that party. Further, if the lawyer expert may not undertake the representation adverse to a party on whose behalf he is currently serving as a testifying expert, may the lawyer undertake the adverse representation after his testimony on behalf of the party has been concluded? Finally, if the lawyer in either situation is disqualified, may another lawyer with whom the lawyer is associated in a firm nevertheless undertake the representation?

The answers to these and related questions discussed in this Opinion depend in part upon whether the lawyer expert either has a client-lawyer relationship with the party or is engaged in providing the party with a “law-related service” within the purview of Model Rule 5.7. In either case, the lawyer expert would in that capacity be subject to the Model Rules, including Rule 1.7 (“Conflict of Interest: General Rule”) and Rule 1.9 (“Conflict of Interest: Former Client”), and the conflict of interest of the lawyer expert would be imputed under Rule 1.10 to all lawyers associated with him in a firm. Based on the analysis and assumptions in Part I of this Opinion, the Committee concludes that under the Model Rules a lawyer serving solely as a testifying expert witness on behalf of another law firm’s client, as distinct from a consultant providing expert legal advice to the firm and its client, does not thereby occupy a client-lawyer relationship with the party for whom he may be called to testify, and is not thereby providing law-related services. The lawyer nevertheless should take reasonable precautions to avoid confusion in the minds of the retain-
ing law firm and its client as to the different duties applicable to service as a testifying expert.

Moreover, the lawyer expert witness has duties under other law, such as a duty to protect the confidences of the party for whom the lawyer may testify, that may limit the lawyer and his law firm in the representation of a client in a matter adverse to the party for whom he serves or previously has served as a testifying expert. These limitations on the lawyer testifying expert are analyzed in Part II of this Opinion.

I. A Lawyer Serving Solely as a Testifying Expert as Distinct from an Expert Consultant Does Not Thereby Occupy a Lawyer-Client Relationship or Provide a “Law-related Service.”

A lawyer who is expert on a legal subject may be engaged to serve one of two distinct roles: as an expert witness who is expected to testify at a trial or a hearing as a “testifying expert,” or as a nontestifying “expert consultant.” In this Part I, the Committee (a) analyzes the role of the lawyer testifying expert as distinguished from the role of the lawyer expert consultant in respect of whether the testifying expert forms a client-lawyer relationship; (b) cautions as to the lawyer’s duty to clarify his responsibilities in either role, especially in circumstances where the roles become blurred; and (c) examines whether the role of testifying expert falls within the purview of Model Rule 5.7.

(a) A lawyer employed as a testifying expert does not form thereby a client-lawyer relationship.

The Model Rules note that “[w]hether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.” Model Rules of Professional Conduct, Scope [15] (1995). Thus, the question whether a testifying expert and the party for whom he is expected to testify have formed a relationship sufficient to invoke the ethical obligations of the Model Rules is generally a question of fact determined by principles beyond those set forth in the Model Rules.

The Committee previously has stated that, as a general matter, a client-lawyer relationship can “come into being as a result of reasonable expectations [of the client] and a failure of the lawyer to dispel these expectations.” ABA Formal Opinion 95-390 at 8; see also ABA/BNA Lawyers’ Manual on Professional Conduct 31:103-105 (1989).

1. The Committee neither makes factual findings nor decides purely legal questions. The Committee nevertheless may assume factual and legal conclusions in order to render an opinion as to ethical responsibilities under the Model Rules, and here does so.
Clients reasonably expect that lawyers whom they consult to perform legal services for them are bound by certain basic professional obligations, including duties of confidentiality and loyalty, and avoidance of conflict of interest.

The Committee believes, however, as long as the lawyer’s role is limited to service as a testifying expert and this is explained at the outset, the client of the law firm which has engaged the testifying expert’s services cannot reasonably expect that the relationship thus created is one of client-lawyer. A lawyer who is employed to testify about requirements of law or standards of legal practice, for example, acts like any non-lawyer expert witness. The testifying expert provides evidence that lies within his special knowledge by reason of training and experience and has a duty to provide the court, on behalf of the other law firm and its client, truthful and accurate information. To be sure, the testifying expert may review selected discovery materials, suggest factual support for his expected testimony and exchange with the law firm legal authority applicable to his testimony. The testifying expert also may help the law firm to define potential areas for further inquiry, and he is expected to present his testimony in the most favorable way to support the law firm’s side of the case. He nevertheless is presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates. A duty to advance a client’s objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert. Moreover, if an expert may testify at trial and his name has been provided to opposing counsel pursuant to applicable procedural rules, he may be deposed by the opposing party. Communications between the expert and the retaining law firm or its client employed by the expert in preparing his testimony ordinarily are discoverable.2

2. See, e.g., Fed. R. Civ. Proc. 26(a)(2) and 26(b), which permit broad discovery of testifying experts, but sharply limit discovery of consulting experts retained to advise in the litigation. Some courts require production of all oral and written communications by counsel with a testifying witness even though ordinarily protected as opinion work product. E.g., Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D. Cal. 1991). Other courts continue to employ a case-by-case analysis and, absent compelling circumstances, deny discovery of lawyers’ opinions and mental impressions communicated to testifying experts notwithstanding the 1993 changes to FRCP §26. E.g., Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289 (W.D. Mich. 1995), following Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593 (3d Cir. 1993). See also 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL PRACTICE & PROCEDURE: Civil 2d (1994) §2031 at 439, noting that Bogosian probably was overruled by the 1993 amendments. See also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §141(Proposed Final Draft No. 1 March 29, 1996) (adopting the Bogosian
State bar ethics committees have rendered opinions on related issues that support the conclusion that a lawyer serving as a testifying expert does not thereby occupy a client-lawyer relationship with the party for whom he is engaged to testify. The Virginia State Bar, Standing Committee on Legal Ethics, Opinion 1884 (1989) was asked whether a lawyer had a conflict of interest if the lawyer executed affidavits as an expert for both the plaintiffs and the defendants in the same litigation, but on different issues. Noting that the issue, whether the expert had a client-lawyer relationship, involved a “factual determination and is beyond the purview of the committee,” the committee added:

Should the attorney’s capacity have been purely that of an expert witness, the Code of Professional Responsibility should be inapplicable in that situation as it does not in any way preclude an individual from serving as an expert witness for both parties to an action. In contrast, protection of client confidences, in-depth strategic and tactical involvement in shaping the issues, assistance in developing facts that are favorable, and zealous partisan advocacy are characteristic of an expert consultant, who ordinarily is not expected to testify. That role at least implicitly promises the client all the traditional protections under the Model Rules, including those governing counseling and advocacy, confidentiality of information and loyalty to the client. In short, a legal consultant acts like a lawyer representing the client, rather than as a witness. Unlike the testifying expert, the expert consultant need not be identified.
and her legal advice and communications with the client and trial counsel are not expected to be disclosed, absent client consent after consultation. In sum, the lawyer as expert consultant occupies the role of co-counsel in the matter as to the area upon which she is consulted and as such is subject to all of the Model Rules of Professional Conduct.

(b) The lawyer should assure his role as testifying expert is made clear and obtain client consent should his role change to consulting expert.

In order to avoid any misunderstanding that no client-lawyer relationship is created, the testifying expert should make his role clear at the outset of the engagement. A written engagement letter accepted by both the engaging law firm and its client is much to be preferred. The engagement letter should define the relationship, including its scope and limitations, and should outline the responsibilities of the testifying expert, especially regarding the disclosure of client confidences. It is the responsibility of the firm that has engaged the testifying expert to assure that its client is fully informed as to the nature of the testifying expert’s role. See Model Rule 1.4.

The distinction between the role of the testifying expert and the role of the expert consultant can, of course, become blurred in actual practice. The testifying expert may sometimes become involved in discussion of tactical or strategic issues of the case, or become privy to confidential information pertaining to the case. When this blending of roles occurs, the lawyer whose principal role is to testify as an expert nevertheless may become an expert consultant and as such, bound by all of the Model Rules as co-counsel to the law firm’s client. The lawyer expert then must exercise special care to assure that the law firm and the client are fully informed and expressly consent to the lawyer continuing to serve as a testifying expert, reminding them that his testifying may require the disclosure of confidences and may adversely affect the lawyer’s expert testimony by undermining its objectivity. The lawyer also is bound by the Model Rules relating to conflicts of interest and imputed disqualification with respect to service as expert consultant. See infra nn. 10, 11 and 13.

---

4. See Model Rule 1.2(c) stating: “A lawyer may limit the objectives of the representation if the client consents after consultation.” Obtaining client consent after “consultation,” see Model Rules of Professional Conduct, Terminology (1995), is in this instance the joint responsibility of the law firm and the expert. See also Model Rules 1.4 and 1.5(e). Disclosure of all materials furnished to the expert by trial counsel, including opinion work product, may be ordered by courts following Intermedics, supra n. 2, when the testifying expert also serves as expert consultant. See, e.g., Furniture World, Inc. v. D.A.V. Thrifty Stores, Inc., 168 F.R.D. 61 (D. N.M. 1996).
(c) The testifying expert does not provide a "law-related service."

A question remains under the Model Rules whether a lawyer who serves solely as a testifying expert provides "law-related services" as contemplated by Model Rule 5.7. If so, the lawyer testifying expert would be subject to all the Model Rules unless the provision of the services satisfies the requirements of subparagraphs (a)(1) or (a)(2) of Rule 5.7, even though he has no client-lawyer relationship with the party on whose behalf he is to testify.

In answering the question, the Committee finds significant but not dispositive that Model Rule 5.7 is intended to address potential conflicts that arise when lawyers engage in businesses ancillary to their law practices, and that nowhere in the extensive literature surrounding adoption of Model Rule 5.7 is it suggested that a problem exists when lawyers serve as testifying experts. Of greater significance is that the way in which test-
tifying experts provide their services eliminates as a practical matter the need for the protection that Model Rule 5.7 was designed to afford recipients of law-related services in order to avoid any misperception by the recipient of the services that the protections normally part of the client-lawyer relationship apply. See Rule 5.7 Comment [1]. As noted in Part I.(b), the testifying expert should appropriately define his role at the outset of the engagement so that the law firm’s client will not be confused that the Rules of Professional Conduct apply in the relationship with the testifying expert.

While some members of the Committee believe that the plain language of Rule 5.7 encompasses testifying expert services rendered in “circumstances . . . not distinct from the lawyer’s provision of legal service to client,” Model Rule 5.7(a)(1), the clear majority believes that the words do not apply. In the view of the majority, lawyers serving as testifying experts do not offer their services “in conjunction with” the legal services they offer to their clients, Model Rule 5.7(b). Rarely does a testifying expert provide services directly to a client. The client invariably is represented by its own trial counsel, who manages the role to be played by the testifying expert in discovery, preparation and trial. Accordingly, the majority concludes that testifying expert services and trial counsel services always remain distinct with regard to a particular matter. Rule 5.7, adopted in only one jurisdiction, should not be construed to reach beyond the intent of its drafters.

For these reasons, the Committee concludes that testifying expert services are not “law-related services” under Model Rule 5.7. Thus, the testifying expert’s role as a witness excludes not only a client-lawyer relationship with the party on whose behalf he is to be called, but also a law-related service provider relationship that would require all of the Model Rules

and its predecessor also make it clear that the perceived problems related solely to lawyers being involved in businesses ancillary to their law practices and not at all to lawyers testifying as experts. See, e.g., ABA Section of Litigation, Recommendation and Report on Law Firms’ Ancillary Business Activities (1990) (recommending that the ABA adopt a rule prohibiting ancillary businesses, summarized at 6 ABA/BNA LAWSYERS’ MANUAL ON PROFESSIONAL CONDUCT 82); ABA Special Coordinating Committee on Professionalism, Special Report to the House of Delegates on Ancillary Business Activities of Lawyers and Law Firms (1990) (recommending that the ABA adopt a rule allowing, but regulating, ancillary businesses, summarized at 6 ABA/BNA LAWSYERS’ MANUAL ON PROFESSIONAL CONDUCT 429); Dennis J. Block, Irwin H. Warren, & George F. Meierhofer, Jr., Model Rule of Professional Conduct 5.7: Its Origin and Interpretation, 5 GEO. J. LEGAL ETHICS 739 (1992) (defending the ABA’s first version of Model Rule 5.7, adopted in 1991 and rescinded in 1992, that made ancillary businesses unethical). Other authorities are gathered in ABA/BNA LAWSYERS’ MANUAL ON PROFESSIONAL CONDUCT at 91:410-91:413 (1994). Predecessor Model Rule 5.7 was adopted by the ABA House of Delegates in 1991 and rescinded in 1992.
II. The Lawyer Testifying Expert Has Responsibilities to Others That Under the Model Rules May Limit Representation of Clients by the Lawyer or His Firm.

In this Part II, the Committee answers the questions posed at the beginning of this Opinion by analyzing the limitations that the Model Rules impose upon the lawyer and his firm as a result of his serving as a testifying expert when the lawyer is called upon (a) to represent a client concurrently in a matter adverse to the party for whom the lawyer currently is serving as a testifying expert, or (b) to represent a client after the conclusion of the testifying expert service.8

(a) Rule 1.7(b) may bar concurrent representation of a client adverse to the party for whom the lawyer is serving as a testifying expert.

The Committee assumes for purposes of this Opinion that the testifying expert owes a duty of confidentiality as well as other duties to the party on whose behalf he is engaged to testify.9 Accordingly, if the testifying

---

7. The lawyer who serves as a testifying expert is, however, subject to the Model Rules that govern lawyers generally, particularly Rule 8.4 (“Misconduct”). See, e.g., Attorney Grievance Commission of Maryland v. Breschi, 340 Md. 590, 667 A.2d 659 (1995) (willful failure to file income tax return on time justifies disbarment). Thus, for example, were the expert witness to testify falsely, discipline under Model Rule 8.4 would be warranted. See also ABA Formal Opinion 336 (1974).

8. A lawyer who is called upon to serve as a testifying expert in litigation in which information relating to the representation of a former client may be relevant is barred by Rule 1.9(c), infra n. 14, from using or revealing information relating to the earlier client representation in the earlier matter that is not generally known, except as permitted under Rules 1.6 or 3.3. See also Rule 1.8(b). If the former client is the opposing party, the testifying expert is subject, not only to a disciplinary charge, but also to disqualification as an expert witness in the case. See, e.g., W.R. Grace & Co., et al. v. Gracecare, Inc., et al., 152 F.R.D. 61 (D. Md. 1993) (lawyer patent expert for defendant disqualified because of earlier consultation with plaintiff’s counsel in the same case, intending to retain the lawyer to advise on patent law as well as a possible rebuttal expert). Compare cases cited infra n. 9 involving efforts to disqualify non-lawyer experts.

9. The Committee believes that most courts would find that the lawyer testifying expert is a subagent of the party on whose behalf he is engaged to testify. See supra n. 2. Courts, in cases seeking to disqualify expert witnesses from testifying for an opponent, have either held or assumed that a nonlawyer testifying expert (or a nonlawyer expert consultant) occupies a confidential relationship to the party on whose behalf the expert originally was engaged that is limited to the matters on which he was engaged as an expert. See, e.g., Conforti & Eisele, Inc. v. Div. of Building Constr., 405 A.2d 487 (N.J. Super. Ct. Law Div. 1979) (nonlawyer expert disqualified as witness for plaintiff when defendant had used the expert to advise it earlier in the same litigation, reasoning that the expert may have been the agent of defendant’s counsel and his testi-
expert’s concurrent representation of a client in a matter adverse to the party for whom the expert is to testify might be materially limited by his responsibilities as a subagent to maintain the party’s confidences or by other duties he owes the party, Model Rule 1.7(b)\textsuperscript{10} applies to that concurrent representation. At least in circumstances where the party’s material confidential information clearly would be useful in the representation of the client, the Committee is of the opinion that the testifying lawyer could not reasonably believe that the representation of a client would not be adversely affected and, therefore, client consent is no cure. Similarly, where the testifying expert might be called upon to testify for the party and could be subject to cross-examination by a lawyer from the expert’s own law firm, on behalf of a client of the firm, the representation of a client would be barred both by Model Rule 1.7(b) and by Model Rule 3.7(b).\textsuperscript{11} Under Model Rule 1.10(a),\textsuperscript{12} the testifying lawyer’s disqualification therefore might violate the lawyer-client privilege, that defendant’s counsel was upholding its obligations to preserve client confidences under DR 4-101 of the predecessor Code of Professional Responsibility, and that plaintiff’s use of the expert “would be fundamentally unfair”); Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271 (S.D. Ohio 1988) (plaintiff’s nonlawyer expert not disqualified from testifying that the cause of injuries was defective design of defendant’s baseball helmet on which the expert previously had advised defendant, rejecting the presumption of disclosed confidences under the lawyer rules and finding that defendant failed to prove any discussion about plaintiff’s injury occurred between the expert and the defendant); Great Lakes Dredge & Dock Co. v. Harnischfeger Corp., 734 F. Supp. 334 (N.D. Ill. 1990) (nonlawyer expert for defendant not disqualified where he worked closely with plaintiff’s expert at the same research center, rejecting as in the Paul case use of an analogy to the predecessor Code of Professional Responsibility and refusing to apply vicarious disqualification as if the two experts were lawyers in the same law firm).

10. Model Rule 1.7(b) states:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

11. Rule 3.7(b) states:

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

See also State Bar of Mich., Comm. on Professional and Judicial Ethics Opinion RI-21 (1989) (firm barred from representing defendant when newly arrived “of counsel” to the firm previously had provided an expert opinion on plaintiff’s behalf and would be called as a witness in the litigation).

12. Model Rule 1.10(a) states:
tion would be imputed to his law firm.

If the lawyer reasonably concludes that despite the possibility of a material limitation, the representation of a client will not be adversely affected by his duties as a testifying expert, the consent of the client after consultation is nonetheless required. This may be true, for example, if the matter in which the lawyer will testify and the matter in which a client seeks representation are entirely unrelated, and no material confidential information that the testifying lawyer has learned from the party has relevance to the second matter.

(b) **Rule 1.7(b) also may bar subsequent representation if materially limited as a result of the earlier relationship.**

If the party for whom a lawyer in the firm had acted as a testifying expert later sued a client of the expert’s law firm on an unrelated matter, neither the testifying expert nor his law firm ordinarily would be barred from representing the defendant client. Model Rule 1.9(a)\textsuperscript{13} would not apply, not only because the matters are unrelated, but also because a client-lawyer relationship did not exist when the lawyer acted as a testifying expert for the party in the earlier litigation, and Model Rule 5.7 did not apply to the testifying expert services. Even if the matter for the client is the same as or substantially related to the earlier litigation in which the lawyer had served as a testifying expert, neither Rule 1.9(a) nor Rule 1.9(c)\textsuperscript{14} would apply because the testifying expert service did not involve a client-lawyer relationship or a law-related service.

Although neither Rule 1.9(a) nor Rule 1.9(c) applies, the expert and lawyers associated in his firm nevertheless may have duties of confidentiality under other law that might materially limit the representation of the current client, even in a matter which is unrelated to the earlier engage-

---

\textsuperscript{13} Model Rule 1.9(a) states:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which the person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.

\textsuperscript{14} Model Rule 1.9(c) states:

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.
ment. For example, if the representation of the current client were to require the use of confidential financial information learned in his testifying role, the lawyer and his firm would be barred from undertaking the current client representation by Rule 1.7(b) and Rule 1.10(a) unless they reasonably believe the representation will not be adversely affected by the lawyer’s duty of confidentiality owed the party for whom the lawyer earlier had served as a testifying expert and the current client consents after consultation.

Summary

A lawyer who serves as a testifying expert on behalf of a party represented by another law firm does not thereby occupy a client-lawyer relationship or perform a law-related service within the purview of Model Rule 5.7. He nevertheless should make the nature and scope of the relationship clear at the outset. If the lawyer’s role is or later becomes that of an expert consultant for the party as described in this Opinion, a client-lawyer relationship with the party is established, and the lawyer is subject to all of the Model Rules in connection with that engagement.

Even though service solely as a testifying expert is not as such governed by the Model Rules, concurrent representation of a client adverse to the party for whom the lawyer serves as a testifying expert ordinarily is barred by Model Rule 1.7(b) as a result of constraints imposed by other law. Subsequent representation may, for the same reason, also be barred where the party’s confidential information is relevant to the subsequent representation or where other factors make it unreasonable to conclude that the representation will not be adversely affected.

15. The testifying expert’s duties of confidentiality continue after the relationship with the party terminates. See supra nn. 2 and 12.
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. BER-L-

JOHN DOE

Plaintiffs,

vs.

BERNIE D. ATTORNEY, ESQ. and JOAN DOE, ESQ. jointly, severally or in the alternative

Defendants.

CIVIL ACTION

AFFIDAVIT OF MERIT

of

BENNETT J. WASSERMAN, ESQ.

Pursuant to N.J.S.A. 2A:53A-27

STATE OF NEW JERSEY )
S.S.
COUNTY OF BERGEN )

BENNETT J. WASSERMAN being of full age, duly sworn hereby states under oath:

(a) I am an attorney at law and am duly admitted to practice in the States of New Jersey, New York and Pennsylvania.

(b) I have reviewed each of the documents listed in “Exhibit A”.

(c) I have been a Certified Civil Trial Attorney by the Board on Trial Attorney Certification of the Supreme Court of New Jersey since April 1985. I devote a substantial portion of my professional practice to the general practice of law and to the substantive area of law involved in this action, namely, commercial and real estate transactions, as well as to the areas of legal ethics and professional
malpractice. I have been so engaged for at least five years prior to the date of this affidavit. A copy of my current curriculum vitae is attached hereto as “Exhibit B”.

(d) Based upon my review of the aforesaid documents, I hereby state, pursuant to N.J.S.A. 2A:53A-27, that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the practice or work of the attorneys at law about which plaintiff complains, i.e., BERNIE D. ATTORNEY, ESQ. and JOAN DOE, ESQ. fell outside acceptable professional standards of practice.

(e) I have no financial interest in the outcome of this case.

________________________________________
Bennett J. Wasserman

DATED: February 2012

Sworn and subscribed to before me this day of FEBRUARY, 2012

Notary Public
EXHIBIT “A”

DOCUMENTS REVIEWED

Underlying transactional matters

2. Lease Agreement documents re: 388 Rt. 46, South Hackensack, NJ
3. Div. of Alcoholic Beverage Control; Liquor License related documents re License No. 0259-33-003-005 (Sakura 46 Inc. to Inoue Corp);
4. LLP Agreement Mas Partners LLP
5. Payment Verification Records;
6. Agreement to Sell/Purchase Alcoholic Beverage License;
7. Contract for Sale of Business, Inoue Corp to Mas LLP
8. Bulk Sales documents related to Mas LLP
9. Jurecky to Speziale correspondence Dec. 4, 2008 with transactional documents re Inoue to Mas;
11. Seller’s Settlement Disclosure
12. Loan Closing Documents;
13. HUD-1 Dec. 5, 2008;
16. Underlying Transactional File of XXX Esq. including Mas Partners LLP and Dio Mas LLP with cover letter dated March 15, 2011 with itemized list of contents;
17. Speziale letter to Rathe dated April 28, 2011;
18. Correspondence form Twp. of So. Hackensack to Dios Mas Partnership LLP dated July 29, 2010, from Zoning Enforcement Officer.
19. Frank Migliorino Esq. Correspondence to Zoning Enforcement Officer Aug. 11, 2010;
20. Transcript of Hearing before Zoning Bd. Of Adjustment August 23, 2010 (Migliorino);
21. Lease Agreement between Mt. Laurel LLC and GM360 LLC, 370 Rt. 46 So. Hackensack, NJ.
22. Limited Liability Partnership Agreement of Dio Mas LLP, April 21, 2010 and related transactional, purchase option agreement and governmental registration filings;
23. Restaurant Management Agreement, April 27, 2010 (GF 46 LLC to Dio Mas LLP);
24. Contract for Sale of Business, GF 46 LLC to Dio Mas, LLP., April 28, 2010
25. Agreement to Sell/Purchase Alcoholic Beverage License GF 46 LLC to Dio Mas, LLP, dated May 6, 2010;
26. Div. of Alcoholic Beverage Control correspondence re License No. 0259-33-011-005; June 29, 2010 and forms re 0259-33-011-004;
27. Assignment and Assumption of Lease, GM 360 LLC to Dio Mas, LLP;
29. AAA email dated Dec. 4, 2010 re Dio Mas LLP purchase option agreement;
30. “Exercise of Option” as to Mas & Option Agreement and related documents;

**Legal Malpractice Action**

1. Proposed Complaint
BENNETT J. WASSERMAN
COUNSELOR AT LAW

LAW OFFICES: 375 Cedar Lane
              Teaneck, New Jersey 07666
              Tel. (201) 907-5000
              Cell: (201) 803-6464
              Direct Fax: (973) 556-1776
              Bennett.Wasserman@dsslaw.com

CONSULTING OFFICES: legalmalpractice.com
              3 University Plaza
              Hackensack, New Jersey 07601
              Tel. (201) 488-1222
              benwasserman@legalmalpractice.com

ACADEMIC OFFICES: Hofstra University
              Maurice A. Deane School of Law
              121 Hofstra University
              Hempstead, New York 11549-1210
              Bennett.Wasserman@hofstra.edu

WEB-BIO: http://law.hofstra.edu/Directory/Faculty/AdjunctFaculty/adjfac_wasserman.html
              www.dsslaw.com/bennett-wasserman/

EXPERIENCE: Active participation in more than 1,000 legal malpractice cases as counsel for litigants or as consulting or testifying expert witness in transactional and litigation based matters; teaching of advanced law students a full semester course entitled “Lawyer Malpractice” at Hofstra University Law School, since 1990.

BAR ADMISSIONS: New York (1975), New Jersey (1976) and Pennsylvania (1983) State and Federal Courts; Supreme Court of the United States (1977), Certified Civil Trial Attorney (Supreme Court of New Jersey since 1985);

RATINGS/HONORS: AV™ - Martindale-Hubbell;

              Bar Register of Preeminent Lawyers (Lexis/Nexis Martindale Hubbell);

              Best Lawyers in America® 2010, 2011, 2012 (Legal Ethics and Professional Responsibility Law and Legal Malpractice Law);

              The Best Lawyers in the United States (1985);


              “Lawyer of the Year, 2008”– New Jersey Law Journal (Dec. 24, 2008) with co-
In re Opinion 39 of the Committee on Attorney Advertising.

www.Avvo.com (10 out of 10, legal malpractice)

OCCUPATION:

Davis Saperstein & Salomon, PC (Teaneck, NJ and NYC), Chair, Legal Malpractice Law Section (January 2011 to date)

generalpractice.com

General Counsel, Consultant to lawyers, law firms, and liability insurance companies on legal malpractice (plaintiff and defendant); qualified as expert witness by courts in the field of legal malpractice, legal ethics and law firm billing.

Hofstra University, Maurice A. Dean School of Law, Hempstead, New York, Special Professor of Law (in Lawyer Malpractice).

Editor-in-Chief, “Legal Malpractice Law Review: Research, Resources and Expertise in the Law Governing Lawyers”

http://www.legalmalpracticelawreview.com

PRIOR EMPLOYMENT:


Moderator, National Legal Malpractice Forum; Co-Moderator, N.J. Professional Liability Law Forum, Counsel Connect (on-line computer discussion groups for lawyers on professional liability.)


Merck & Co. (Merck Sharp & Dohme Div.); Professional Representative (pharmaceutical marketing) (1969-1971.)

Areas of Practice.  Civil Litigation; Advocacy and Counseling in the law governing lawyers (legal malpractice, legal ethics; attorney advertising, attorney billing practices,) commercial transactions and litigation; real estate litigation; real estate transactions, construction and land use and development, mortgage foreclosures; securities litigation; due diligence; health care law, medical liability; professional malpractice; commercial torts; general negligence; toxic torts; construction site accidents and construction defect litigation; railroad and product liability in the federal and state courts of New Jersey, New York and Pennsylvania; employment law, Occupational Safety & Health (OSHA); collective bargaining under the Railway Labor Act, , intellectual property, wills, trusts and estates, environmental law; bank and securities fraud.

Responsibilities include case strategy development and implementation, investigation, discovery, motion practice, appeals, overall management of major litigation and appellate cases. Alternate Dispute Resolution.
Serving as lead counsel to public and close corporations, municipal entities and individuals in major legal malpractice actions arising from botched commercial litigation and transactions; securities, intellectual property; health care law and financing; real estate law and financing; land use and development; wills, trusts and estates, employment law, patent and trademark law; family law; tort litigation; ineffective assistance of counsel in criminal defense; breach of fiduciary duty, et al.

Serving as consulting and/or testifying expert on behalf of litigants, law firms, lawyers and professional liability insurers.

Serving as counsel in cases of catastrophic injuries involving multiple parties; negotiating and concluding structured and lump sum settlement awards for the seriously injured; representing clients in all phases of non-litigation matters including real estate, labor, wills, estates, commercial transactions. Alternative Dispute Resolution, general law practice; defense counsel for excess liability exposure in professional liability cases (medical and legal), professional liability claims evaluation, review, administration and resolution.

Serving as defense counsel designated by select professional liability carriers in major legal malpractice cases.

Served as defense counsel in product liability, personal injury cases on behalf of Tokio Marine Insurance Company, the largest Japanese liability carrier insuring companies such as Panasonic, Honda, Matsushita Electronics Corporation and other liability insurance carriers.

-Expert witness in the law governing lawyers, including legal malpractice, legal ethics, lawyer advertising and law firm billing practices, including consulting, case strategy, expert witness affidavits of merit, reports, testimony in depositions, trial and arbitration venues.

**NOTEWORTHY MATTERS & FREQUENTLY CITED DECISIONS:**


**Huber v. Watson,** 568 N.W.2d 787 (Sup. Ct. of Iowa, 1997) (litigation malpractice, failure to name appropriate parties in underlying asbestos suit) (Expert witness).

**Vahila et. al v. Charles D. Hall, III, et. al.** 77 Ohio St.3d 421, 647 NE2d 1164 (1997) (Sup. Ct. of Ohio). (proving the case within a case in underlying
criminal defense case with expert witness) \textit{(Expert witness)}. 

\textbf{Profit Sharing Trust v. Lampf, Lipkind, et al.} 267 N.J. Super. 174, 180, 630 A.2d 1191 (Law Div., 1993). (Fiduciary duty of law firm to refrain from prohibited transactions with client under RPC 1.8) \textit{(Expert witness)}. 


\textbf{PUBLICATIONS:} 

"The Ubiquitous Detailman..." 1 Hofstra Law Review 183-213 (1973) -- reprinted in Paul D. Rheingold, DRUG LITIGATION, 3rd Edition (1981), and in PRECLINICAL AND CLINICAL TESTING BY THE PHARMACEUTICAL INDUSTRY, 1975, Joint Hearings before the Subcommittee on Health and Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 94th Congress, pages 1258-1280; cited in Dixon, TREATISE ON DRUG PRODUCT LIABILITY, s.6.10, et seq. 

SYMPOSIUM ON PRODUCT LIABILITY AND SAFETY, Volume II, Hofstra Law Review (1974), (Articles Editor and Coordinator.) 

LAWYERS LIABILITY REVIEW (Timeline Publishing Co., Inc.) (Member of Advisory Board.) 

Author, Proposed Amendment to N.J.S.A. 2A:13-4, endorsed by the New Jersey State Bar Association and introduced into the NJ Senate and Assembly (S-1925 & A-3063, March, 1997). 

Wasserman, \textit{The Circle Chevrolet Fallout Continues: Problems the Supreme Court Did Not Solve}. 149 N.J.L.J. 320 (July 28, 1997). 


Wasserman, et ano. *Settle and Sue is Here to Stay*, New Jersey Law Journal, Supreme Court Year in Review, September 6, 2010).


**WORK IN PROGRESS:**

LAWYER MALPRACTICE: Curriculum, Cases & Materials

http://www.legalmalpracticelawreview.com/articles/law-school-


**EDUCATION:**

Hofstra University School of Law, Hempstead, N.Y.
-- Hofstra Law Review, Articles Editor.
-- Dean's Citation for Excellence in Trial Advocacy.
-- Class Rank: 13th of 165.

Hunter College, New York City.

**BAR ASSOCIATIONS:**

Association of Professional Responsibility Lawyers (APRL); American Association of Justice (AAJ); New Jersey Association for Justice (NJAJ); American Bar Association; Center for Professional Responsibility; New Jersey State Bar Association (Member, Malpractice Insurance Committee, 1992-to date); Member, Entire Controversy Committee 1996-97; NJSBA Delegate to the American Bar Association National Legal Malpractice Conference of the Standing Committee on Lawyers’ Professional Liability 1994 -98); New York State Bar Association; Bergen County Bar Association; New York County Lawyer’s Association (Lawyer’s Professional Liability Committee); Professional Liability Underwriting Society.

**MISCELLANEOUS:**

--Designed "LAWYER MALPRACTICE" course curriculum for law school level now being taught at Hofstra University School of Law, Hempstead, New York and other law schools.

--Testified before the United States Senate, Subcommittee on Health (Edward M. Kennedy, Chairman), regarding the need for improvement in the law pertaining to the marketing of pharmaceutical products (1974).

--Interviewed by trade journals concerning developments in product liability law
(e.g., Chemical Business, February 8, 1982.)

--Served on Bar Association Committees studying topics in law and medicine and multi-state practice of law.

--L lectured before Bar Association and community groups on trial advocacy and legal ethics.

--Guest lecturer on legal malpractice at:


- Rutgers University School of Law (Newark, New Jersey, 1996)

- New York Law School (New York, N.Y., April, 2006).

--Lecturer & Panelist “Avoiding Malpractice”, Continuing Legal Education Program, Bucks County (PA.) Bar Association (November 1995.)


--Faculty, “Ethical and Legal Malpractice Considerations in the Electronic Information Revolution, ATLA-NJ Education Foundation (January 1997).


--Lecture, “The Impact of the Entire Controversy Doctrine on Legal Malpractice” Bergen County Bar Association (9/12/96)


--Lecture, “Pitfalls of Legal Malpractice” Bergen County Bar Association (11/29/2001)


--Lecture, “When Ethical Violations Become Malpractice” ATLA-NJ
Meadowlands Seminar, October 21, 2007;

--Lecture, “Ethics Here, Ethics There, Ethics, Ethics Everywhere (NJ State Bar Association Public Utility Law Committee/NJ Institute of Continuing Legal Education, April 9, 2010);

--Panel Member, “Teaching Tomorrow’s Lawyers to Avoid Legal Malpractice: A Roundtable Discussion (American Bar Association, National Legal Malpractice Conference, Washington, DC April 15, 2010).


--Lecturer, “Legal Malpractice: The Good, the Bad, the Future” (New Jersey Association for Justice, Meadowlands Seminar 2011, November 11, 2011).

--Lecturer, “Legal Ethics Violations and Legal Malpractice” (New Jersey Association for Justice, Meadowlands 2011, November 11, 2011).


--Appeared on radio talk shows with Barry Farber and television documentaries with Geraldo Rivera concerning cases of public interest relating to tort law.

--Received newspaper coverage on numerous matters being actively litigated in the courts.

--On-going participation in continuing legal and alternate dispute resolution education courses.

--Founded the Multi-State Bar Association, an organization seeking to foster the growth of the multi-state practice of law.


--Personal interest in environmental law, municipal finance, municipal bonds, securities and bank fraud and related legal and investment issues.

--Real Estate Broker, State of New York (Lic. # 691079).

REFERENCES:

--Upon request.

Updated: February 2012
EXHIBIT C
IN THE COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY, PENNSYLVANIA  
CIVIL ACTION-LAW  
TERM:  
No.  

MARTY FEIERSTEIN,  
p/k/a MARTY FEIER,  
a/k/a Slinky Records  

Plaintiff(s)  

vs.  

OSCAR S. SCHERMER & ASSOCIATES, P.C.,  
OSCAR S. SCHERMER, ESQUIRE,  
STEVEN SCHATZ, ESQUIRE,  
JONATHAN H. KAPLAN, ESQUIRE,  
JONATHAN H. KAPLAN, P.C.  
STEVEN R. GRAYSON, ESQ.,  
L. KENNETH CHOTINER, ESQ.,  
BERNARD M. RESNICK, ESQ. and  
BERNARD M. RESNICK, ESQ., P.C.  

Defendant(s).  

CERTIFICATE OF MERIT  
Pursuant to Rule 1042.3  

BENNETT J. WASSERMAN, ESQ. hereby certifies:  

1. I am an attorney at law, duly admitted to practice in Pennsylvania, New Jersey, and New York. I hold PA Attorney’s License # 38275. I have been a Certified Civil Trial Attorney by the Board on Trial Attorney Certification of the Supreme Court of New Jersey since April 1985. I have been actively engaged in the practice of law since 1975. I devote a substantial portion of my professional practice to the general practice of law and to the substantive area of
law involved in this action and in the underlying action, as well as to the areas of legal ethics and professional malpractice. A copy of my current *curriculum vitae*, which attests that I am an appropriate licensed professional as required by Rule 1042.3(a)(1), is attached hereto as Exhibit A.

2. I have reviewed each of the documents listed in Exhibit B hereto.

3. Based upon my review of the aforesaid documents and upon my professional education, training, knowledge and experience, I hereby state, pursuant to Rule 1042.3(a), that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the practice or work of the attorney(s) at law that of which the Plaintiff makes Complaint in this action, i.e., OSCAR S. SCHERMER & ASSOCIATES, P.C., OSCAR S. SCHERMER, ESQUIRE, STEVEN SCHATZ, ESQUIRE, JONATHAN H. KAPLAN, ESQUIRE, JONATHAN H. KAPLAN, P.C., STEVEN R. GRAYSON, ESQ., L. KENNETH CHOTINER, ESQ., BERNARD M. RESNICK, ESQ. and BERNARD M. RESNICK, ESQ., P.C. fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm complained of.

4. I have no financial interest in the outcome of this case.

________________________________________
Bennett J. Wasserman, Esquire
PA ID#38275

DATED: DECEMBER 27, 2010
BENNETT J. WASSERMAN
COUNSELOR AT LAW

OFFICES:
Two Penn Plaza East
Newark, New Jersey 07105
Direct Tel. # (973) 491-3965
Cell Phone: (201) 803-6464
Direct Fax # (973) 556-1776
E-mail: benwasserman@legalmalpractice.com
benwasserman@strykertams.com
bennett.j.wasserman@hofstra.edu
WEB-BIO: http://law.hofstra.edu/Directory/Faculty/AdjunctFaculty/adjfac_wasserman.html

EXPERIENCE:
Active participation in more than 1,000 legal malpractice and legal ethics cases as counsel for litigants or as consulting or testifying expert witness.

BAR ADMISSIONS:
New York (1975), New Jersey (1975) and Pennsylvania (1983) State and Federal Courts; Supreme Court of the United States (1977), Certified Civil Trial Attorney (Supreme Court of New Jersey since 1985);

RATINGS/HONORS:
AV™ - Martindale-Hubbell;
Bar Register of Preeminent Lawyers (Lexis/Nexis Martindale Hubbell);
The Best Lawyers in the United States (1985);
Best Lawyers in America® 2010 (Legal Ethics and Professional Responsibility Law and Legal Malpractice Law);

OCCUPATION:
Special Professor of Law (in Lawyer Malpractice) Hofstra University School of Law, Hempstead, New York.
Consultant to lawyers, law firms, and liability insurance companies on legal malpractice (plaintiff and defendant); qualified as expert witness by courts in the field of legal malpractice, legal ethics and law firm billing.
Editor, Legal Malpractice Law Review: Research, Resources and Expertise in the Law Governing Lawyers http://www.legalmalpracticelawreview.com

PRIOR EMPLOYMENT:
Moderator, National Legal Malpractice Forum; Co-Moderator, N.J. Professional Liability Law Forum, Counsel Connect (on-line computer discussion groups for lawyers on professional liability.)


Merck & Co. (Merck Sharp & Dohme Div.); Professional Representative (pharmaceutical marketing) (1969-1971.)

**Areas of Practice.** Civil Litigation; Advocacy and Counseling in the law governing lawyers (legal malpractice, legal ethics; attorney advertising, attorney billing practices,) personal injury and commercial litigation; health care law, medical liability; professional malpractice; commercial torts; general negligence; toxic torts; construction site accidents; railroad and product liability in the federal and state courts of New Jersey, New York and Pennsylvania; labor law, Occupational Safety & Health (OSHA); collective bargaining under the Railway Labor Act, commercial transactions, wills, trusts and estates, real estate litigation; real estate transactions, construction and development, mortgage foreclosures; environmental law; bank and securities fraud.

**Responsibilities** include case development, investigation, discovery, motion practice, appeals, overall management of major litigation and appellate cases. Alternate Dispute Resolution.

Serving as lead counsel to public and close corporations in major legal malpractice actions in commercial litigation and transactional matters.

Serving as counsel in cases of catastrophic injuries involving multiple parties; negotiating and concluding structured and lump sum settlement awards for the seriously injured; representing clients in all phases of non-litigation matters including real estate, labor, wills, estates, Alternate Dispute Resolution, general law practice; defense counsel for excess liability exposure in professional liability cases (medical and legal), professional liability claims evaluation, review, administration and resolution.

Serving as defense counsel designated by select professional liability carriers in major legal malpractice cases.

Serving as defense counsel in product liability, personal injury cases on behalf of Tokio Marine Insurance Company, the largest Japanese liability carrier insuring companies such as Panasonic, Honda, Matsushita Electronics Corporation and other liability insurance carriers.

-Expert witness in the law governing lawyers, including legal malpractice, legal ethics, law firm billing practices.
NOTEWORTHY MATTERS &
FREQUENTLY CITED DECISIONS:


Huber v. Watson, 568 N.W.2d 787 (Sup. Ct. of Iowa, 1997) (litigation malpractice, failure to name appropriate parties in underlying asbestos suit) (Expert witness).

Vahila et. al. v. Charles D. Hall, III, et. al. 77 Ohio St.3d 421, 647 NE2d 1164 (1997) (Sup. Ct. of Ohio). (proving the case within a case in underlying criminal defense case with expert witness) (Expert witness).


PUBLICATIONS:

"The Ubiquitous Detailman..." 1 Hofstra Law Review 183-213 (1973) -- reprinted in Paul D. Rheingold, DRUG LITIGATION, 3rd Edition (1981), and in PRECLINICAL AND CLINICAL TESTING BY THE PHARMACEUTICAL INDUSTRY, 1975, Joint Hearings before the Subcommittee on Health and Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 94th Congress, pages 1258-1280; cited in Dixon, TREATISE ON DRUG PRODUCT LIABILITY, s.6.10, et seq.

SYMPOSIUM ON PRODUCT LIABILITY AND SAFETY, Volume II, Hofstra Law Review (1974), (Articles Editor and Coordinator.)
LAWYERS LIABILITY REVIEW (Timeline Publishing Co., Inc.) (Member of Advisory Board.)

Author, Proposed Amendment to N.J.S.A. 2A:13-4, endorsed by the New Jersey State Bar Association and introduced into the NJ Senate and Assembly (S-1925 & A-3063, March, 1997).

Wasserman, The Circle Chevrolet Fallout Continues: Problems the Supreme Court Did Not Solve. 149 N.J.L.J. 320 (July 28, 1997).


Wasserman, et ano. *Settle and Sue is Here to Stay*, New Jersey Law Journal, Supreme Court Year in Review, September 6, 2010).

**WORK IN PROGRESS:**

LAWYER MALPRACTICE: Cases & Materials. (The West Educational Network)


**EDUCATION:**

Hofstra University School of Law, Hempstead, N.Y.
-- Hofstra Law Review, Articles Editor.
-- Dean's Citation for Excellence in Trial Advocacy.
-- Class Rank: 13th of 165.

Hunter College, New York City.

**BAR ASSOCIATIONS:**

Association of Professional Responsibility Lawyers (APRL); Association of Trial Lawyers of America; ATLA (NJ), n/k/a American Association of Justice; Trial Attorneys of New Jersey; New York State Trial Lawyers Association; American Bar Association; New Jersey State Bar Association (Member,
Malpractice Insurance Committee, 1992-to date; Member, Entire Controversy Committee 1996-97; NJSBA Delegate to the American Bar Association National Legal Malpractice Conference of the Standing Committee on Lawyers’ Professional Liability 1994-98); New York State Bar Association; Pennsylvania Bar Association (Professional Liability Committee, 1998-); Bergen County Bar Association (Co-Chairman Alternate Dispute Resolution Committee, Continuing Legal Education Committee); Association of the Bar of the City of New York; New York County Lawyer’s Association (Lawyer’s Professional Liability Committee); Professional Liability Underwriting Society; ABA Center for Professional Responsibility.

MISCELLANEOUS:

--Designed "LAWYER MALPRACTICE" course curriculum for law school level now being taught at Hofstra University School of Law, Hempstead, New York and other law schools.

--Testified before the United States Senate, Subcommittee on Health (Edward M. Kennedy, Chairman), regarding the need for improvement in the law pertaining to the marketing of pharmaceutical products (1974).

--Interviewed by trade journals concerning developments in product liability law(e.g., Chemical Business, February 8, 1982.)

--Served on Bar Association Committees studying topics in law and medicine and multi-state practice of law.

--L ectured before Bar Association and community groups on trial advocacy and legal ethics.

--Guest lecturer on legal malpractice at:


- Rutgers University School of Law (Newark, New Jersey, 1996)

-New York Law School (New York, N.Y., April, 2006).

--Lecturer & Panelist “Avoiding Malpractice”, Continuing Legal Education Program, Bucks County (PA.) Bar Association (November 1995.)


--Faculty, “Ethical and Legal Malpractice Considerations in the Electronic Information Revolution, ATLA-NJ Education Foundation (January 1997).


--Lecture, “The Impact of the Entire Controversy Doctrine on Legal Malpractice” Bergen County Bar Association (9/12/96)

--Lecture, “Pitfalls of Legal Malpractice” Bergen County Bar Association (11/29/2001)


--Lecture, “When Ethical Violations Become Malpractice” ATLA-NJ Meadowlands Seminar, October 21, 2007;

--Lecture, “Ethics Here, Ethics There, Ethics, Ethics Everywhere (NJ State Bar Association Public Utility Law Committee/NJ Institute of Continuing Legal Education, April 9, 2010);

--Panel Member, “Teaching Tomorrow’s Lawyers to Avoid Legal Malpractice: A Roundtable Discussion (American Bar Association, National Legal Malpractice Conference, Washington, DC April 15, 2010).


--Appeared on radio talk shows with Barry Farber and television documentaries with Geraldo Rivera concerning cases of public interest relating to tort law.

--Received newspaper coverage on numerous matters being actively litigated in the courts.

--On-going participation in continuing legal and alternate dispute resolution education courses.

--Founded the Multi-State Bar Association, an organization seeking to foster the growth of the multi-state practice of law.


--Personal interest in environmental law, municipal finance, municipal bonds, securities and bank fraud and related legal and investment issues.

--Real Estate Broker, State of New York (Lic. # 691079).

REFERENCES:
Upon request.

PERSONAL:
Born - January 2, 1948
DOCUMENTS REVIEWED


1. Civil Action Complaint;
2. Fee Agreement from Schermer to Feierstein dated May 6, 2005 signed by client on July 23, 2005; Two checks for $5,000 to Oscar Schermer & Associates, with supporting factual information from client to lawyer;
3. Additional factual information from client:
4. Link Wray Tour Dates 2005;
5. Wray Song File;
6. Royalty Payment check from Sony Music; 12/31/03; 8/12/2004;
7. Factual support for damages claim furnished by client to Steven Grayson, Esq. of Schermer & Associates; Schermer transmittal letter to Expert (Resnick).
8. Fax from Feier to Schermer July 7, 2005;
9. Curriculum Vitae of Marty Feier;
10. Transmittals of information to Expert;
11. Investigation/surveillance report May 17, 2005;
13. Handwritten notes entitled “Evidence”; 
14. Email exchange re: estate appointment, 8/15/2007;
15. EBay posting re Wray guitar;
17. Schermer Retirement Letter, June 15, 2007;
18. Philadelphia Inquirer article;
20. Letter from Lauren Kane to Jonathan Kaplan dated March 2, 2009;
   a. Various motions, correspondence with Court
   b. Bench Trial transcript before Judge Jacqueline Allen, November 10, 2008;
   c. Plaintiff’s Post Trial Motion, March 26, 2009;
   d. Judge Allen’s Findings of Fact and Conclusions of Law, February 9, 2009;
EXHIBIT D
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JAY JONES,
Plaintiff,

-against-

JOHN KENNEDY, ESQ., MUNCHKIN KENNEDY, & KENNEDY, P.C., DANIEL J. STEINBERG, ESQ., and STEINBERG, WEISSMAN & FORSTBERG, LLP,

Defendants.

JOHN KENNEDY, ESQ. and MUNCHKIN KENNEDY & KENNEDY, P.C.,

Third-Party Plaintiff,

-against-

IRWIN CAREY, as Administrator of the Estate of SANDRA RUTH CAREY, Deceased,

Third-Party Defendant.

DANIEL J. STEINBERG, ESQ. and STEINBERG, WEISSMAN & FORSTBERG, LLP,

Second-Third-Party Plaintiffs,

-against-

IRWIN CAREY, as Administrator of the Estate of SANDRA RUTH CAREY, Deceased,

Second-Third-Party Defendant.
PLEASE TAKE NOTICE, that the defendants, DANIEL J. STEINBERG, ESQ. and STEINBERG WEISSMAN & FORSTBERG, LLP, by and through their attorneys, SLIMMEN, GERBER, FRIEDMAN & JOSEPHSON, P.C., submit the following as their Expert Disclosure Statement pursuant to CPLR §3101(d), and show as follows:

At the trial of this matter the defendants hereby place plaintiffs on notice of their intention to call Bennett J. Wasserman, Esq., as an expert witness. Mr. Wasserman is an attorney duly licensed to practice law in the States of New York, New Jersey and Pennsylvania, and is currently of counsel to the Law Firm of Stryker, Tams & Dill, LLP, with offices located at 2 Penn Plaza, New York, New York, and Newark, New Jersey. Mr. Wasserman also serves as a Special Professor of Law at Hofstra University School of Law in Hempstead, New York where he teaches a full semester advanced elective course entitled “Lawyer Malpractice.” Mr. Wasserman’s law practice has been concentrated in the areas of civil litigation as well as transactional matters. For the past 25 years or so, he has focused on the law governing lawyers, claims involving attorney malpractice and legal ethics. Mr. Wasserman has also lectured and written extensively in the area of attorney malpractice. His background, training, and practical experience in the field of attorney malpractice is set forth in his curriculum vitae, a copy of which is attached as Exhibit “A”.

Mr. Wasserman will base his testimony upon his review of materials from the underlying litigation as well as the materials in this instant legal malpractice litigation. Mr. Wasserman will also base his testimony upon his background, training and experience in the field of attorney malpractice.

Mr. Wasserman’s opinion is that Mr. Steinberg, and the Steinberg Weissman & Forstberg firm, at all times acted in accordance with all accepted standards of practice.
relative to their very limited engagement in the underlying litigation. Mr. Wasserman will testify that Mr. Steinberg was contacted by the co-defendant KENNEDY, and there was a request that Mr. Steinberg and his firm conduct research and prepare a brief which would be submitted as part of the papers in opposition to a pending motion to dismiss JONES’s Petition to Dissolve Texron Sales, Inc., which Motion to Dismiss was brought by Liffman, Mr. JONES’s adversary in the underlying proceedings. Mr. Wasserman will testify that Mr. Steinberg and his firm fully complied with Mr. KENNEDY’s request and performed this undertaking by completing the assignment he was engaged to perform and by timely submitting it to Mr. KENNEDY. Mr. Wasserman will testify that Mr. Steinberg and his firm completed the assignment in accordance with accepted standards of conduct, namely, by fulfilling the specific request made of him by the co-defendant KENNEDY. Mr. Wasserman will testify that the limited engagement of Mr. Steinberg and his law firm by Mr. KENNEDY and his law firm was in the nature of a sub-contract that outsourced a specific legal task which Mr. KENNEDY and his law firm sought on its own behalf and to assist it in its representation of its client in the underlying proceeding that Mr. KENNEDY had brought on behalf of its client, Mr. JONES.

Mr. Wasserman will offer testimony that no attorney-client relationship existed between Mr. JONES and Mr. Steinberg and his firm. Mr. Wasserman will testify that, at all times, Mr. KENNEDY and his firm were attorneys of record, and that there was no direct contact, at anytime, between Mr. JONES and Mr. Steinberg or other persons affiliated with Mr. Steinberg’s firm. Further, Mr. Wasserman will testify that any and all decisions whether to pursue or not to pursue the courses of action taken by Mr. JONES and
Mr. KENNEDY, his counsel, in the underlying action, were beyond the scope of Mr. Steinberg’s engagement, and were independent professional judgments made and to be made solely by Mr. KENNEDY and his law firm in consultation with its client, Mr. JONES. Further, on this issue, Mr. Wasserman will testify that Mr. Steinberg and his firm provided thorough and competent legal services in accordance with and within the scope of their limited engagement which enabled Mr. KENNEDY to assess and determine how he and his law firm could best represent its client, Mr. JONES.

Mr. Wasserman will offer testimony that the September 4, 2002 correspondence sent by Mr. Steinberg to Mr. JONES, c/o Mr. KENNEDY, in an effort to comply with 22 NYCRR 1215.1, did not create an attorney client relationship between the parties. Mr. Wasserman will testify that this correspondence was sent to Mr. JONES by Mr. Steinberg out of his concern for compliance with this court rule, which did not apply to him or this situation. The correspondence simply outlined the terms of Mr. Steinberg’s engagement to perform certain limited services on behalf of Mr. KENNEDY and his firm, in connection with its representation of Mr. JONES’s efforts to dissolve Texron Sales, Inc.

Because there was never any attorney-client relationship between Mr. JONES and Mr. Steinberg and his firm, Mr. Wasserman is expected to offer testimony that Mr. Steinberg and his firm did not owe any duty to Mr. JONES. In addition, Mr. Wasserman will testify that nothing that Mr. Steinberg and his firm did in the course of their limited involvement in this action was the proximate cause of any damages allegedly sustained by Mr. JONES. On this issue, Mr. Wasserman will offer testimony that based upon his
review of the motion practice in the underlying dissolution action including, but not limited to Order of Judge Abdus-Salaam, dated December 10, 2002, the papers that were submitted in opposition to the Motion to Dismiss the Petition were successful in that the Petition was not dismissed. Further, Mr. Wasserman will testify that once Sandra Ruth Carey substituted Mr. KENNEDY as counsel for plaintiff, on or about March 27, 2003, all decisions with regard to how to proceed in the litigation were made by Ms. Carey, and that Ms. Carey had ample opportunity, in the event that there were departures from accepted standards of practice which preceded her involvement (which is vigorously denied), she had the opportunity to cure those problems. As a result, were there any departures from accepted standards of practice by Mr. Steinberg and his firm (again, vigorously denied), the involvement of Ms. Carey as successor counsel, interrupted the chain of causation. As a result, Mr. Wasserman is expected to offer testimony that plaintiff will be unable to demonstrate that anything that Mr. Steinberg and his law firm did or failed to do constituted a proximate cause of the damages alleged to have been sustained by Mr. JONES.

The defendants hereby reserve the right to amend this response up to and including the time of trial.

Dated: New York, New York
July 12, 2010

SLIMMEN, GERBER, FRIEDMAN & JOSEPHSON, P.C.
Attorneys for Defendants
Daniel J. Steinberg, Esq. and Steinberg, Weissman & Forstberg, LLP.

By: ______________________
Barry Slimm
TO: LAW OFFICES OF REGINA L. HARDY
Attorney for Plaintiff
20 Vesey Street, Suite 310
New York, New York 10007
(212) 925-5040

FORSTENBERG KRONENBERG & BRENNAN, LLP
Attorneys for Defendants and Third-Party Plaintiffs John KENNEDY, Esq. and
MUNCHKIN KENNEDY & KENNEDY, P.c.
570 Taxter Road, 5th Floor
Elmsford, New York 10523
(914) 920-4000

ON LAW FIRM, PLLC
Attorneys for Third-Party Defendant/
Second Third-Party Defendant
Irwin Carey, As Administrator of the
Estate of Sandra Ruth Carey
1123 Broadway
New York, New York 10010
(212) 252-1212