Legal-malpractice experts: Choosing, using or losing

Your expert will explain the law to the jury, setting the stage for your "case within a case"

By John P. Blumberg

Legal malpractice is a variety of negligence. However, unlike general negligence cases, most legal-malpractice cases require an expert witness. When you have finished this article, you will know how to select a legal-malpractice expert, use that expert to your best advantage in preparing your case, and how the expert's testimony should be presented during trial.

Legal-malpractice expert witnesses are generally of two types: litigation and specialist. The litigation expert becomes the jury's teacher of legal procedure and strategy. The specialist expert is the jury's teacher of the specific area of law that is involved in the underlying matter.

The basics of legal malpractice

A lawyer has an obligation to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise under similar circumstances. (*Kirsch v. Duryea* (1978) 21 Cal.3d 303, 308.) Attorneys fall below the standard of care if "their advice and actions were so legally deficient when given that it demonstrates a failure to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performing the tasks they undertake." (*Unigard Insurance Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1237.) To fall below that standard of care is negligence, commonly referred to as malpractice.

There must also be actual loss or harm. Even if there is clear and unmistakable negligence by an attorney, there will be no malpractice liability absent actual harm. The plaintiff must prove that a breach of the duty of care resulted in injury and actual loss. Nominal damages, speculative harm or the threat of possible future harm are insufficient to establish a cause of action for malpractice. (*Alhino v. Starr* (1980) 112 Cal.App.3d 158, 176.)

Evaluating the underlying case

Before a legal malpractice case is undertaken, there must be a thorough evaluation of both the attorney negligence and the underlying case. Some lawyers representing plaintiffs have mistakenly assumed that if the previous lawyer blew the statute of limitations, then the liability is a foregone conclusion. Far from it. In malpractice arising out of litigation, the subsequent legal malpractice action is, in reality, "a case within a case." (*Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1531.) The first case is whether the defendant-attorney was negligent. The second case is the "causation" element, namely, whether the underlying matter would have resulted in a favorable prosecution or defense for the client who is the potential legal malpractice plaintiff.

A legal-malpractice case is only as strong as the underlying case would have been if it had been properly prosecuted or defended. If the underlying case could not have been won, then the lawyer's malpractice in failing to file it on time caused no damages. Stated in an old-fashioned way: "You can't make a silk purse from a sow's ear." A losing case is not converted to a winning case just because the lawyer negligently handled it.

The expert as case consultant

In many instances, the role of the legal-malpractice expert in evaluating the underlying case is crucial. Consider a case arising out of a claim that an attorney recommended an inadequate settlement to his client. Before the expert can testify about whether the advice to settle was negligent, he must be familiar with the facts of the underlying case.

What was the strength of the liability? What were the provable damages? Were there procedural factors or unsettled areas of case law which could affect the outcome of a trial? The expert must be able to testify about all these factors of the underlying case that would have gone into a competent opinion by the defendant-attorney in recommending the settlement. In such a case, it is best to engage the expert early in the litigation so that the trial attorney can develop the facts to support the expert's opinion.

Why is an expert needed at trial?

In a general negligence case, liability is based on whether the defendant failed to use reasonable care to prevent harm. (*Weaver v. Chavez* (2005) 133 Cal.App.4th 1350, 1355.) However, when an attorney is being sued for errors or omissions, his or her conduct must be measured by the level of skill and care that a reasonably careful attorney would use in similar circumstances. In most cases, this is not a matter of common knowledge, and the standard of care must be provided by expert testimony. (*Unigard Insurance Group v. O'Flaherty & Belgum,* 38 Cal.App.4th at p. 1239.)

Accordingly, in *Lipscomb v. Krause* (1978) 87 Cal.App.3d 970, 976, a nonsuit was properly granted when the plaintiff failed to introduce expert testimony that the defendant-attorney was negligent.

And, from a defense perspective, it is an abuse of discretion for the court to exclude an expert witness who would testify regarding the propriety of the defendant-attorney's tactical decisions. (*Blanks v. Shaw* (2009) 171 Cal.App.4th 336, 377.)

When is an expert not needed at trial?

In medical-malpractice cases, it has been held that no expert is needed when the misfeasance is sufficiently obvious as to fall within the common knowledge of laypersons. Examples include leaving a foreign object in a patient's body following surgery or the amputation of a wrong limb. (*Ewing v. Northridge Hosp. Medical Center* (2004) 120 Cal.App.4th 1289, 1302-03.) In legal malpractice cases, "if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary." (*Goebel v. Lauderdale* (1989) 214 Cal.App.3d 1502, 1508.) In *Goebel*, the court held that no expert was required where the defendant-attorney's advice resulted in the client's violation of a criminal statute.

In *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 716, the attorney had favored the interests of his client's insurance company over the interests of his client. In holding that expert testimony is not required to establish legal malpractice in all cases, the court said, "This is not a case in which the question of breach turned on legal technicalities requiring the fine exercise of professional judgment. The issue was simply whether Ruston did or did not abandon Betts' best interests in deference to the conflicting interest of Allstate. The proof on that issue was clear in its inculpatory impact. It speaks for itself without the aid of expert opinion."

"Where the attorney's performance is so clearly contrary to established standards that a trier of fact may find professional negligence without expert testimony, it is not required. (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1146.) That said, however, the better practice is *always* to use an expert witness in a legal malpractice case. First, the trial judge may disagree that an expert is not necessary, second, "established standards" may need explanation, and third, the expert can provide context and explain the law's complexity.

What can't the expert testify about?

As discussed above, the causation element of the case-within-a-case requires that the trier of fact hear the case that would have been presented but for the defendant-attorney's negligence. The trier of fact then decides the underlying case. The legal-malpractice expert cannot express an opinion of how the underlying case would likely have been decided. Even though Evidence Code section 805 permits an expert to express an opinion "that embraces the ultimate issue to be decided by the trier of fact," a legal-malpractice expert is not allowed "to tell the jury what a reasonable trier of fact would have done." (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 972-973.)

Different kinds of legal-malpractice experts

Although there are as many ways for a lawyer to mishandle a matter as there are different types of lawyers and legal matters, legal-malpractice expert witnesses are generally of two types: litigation and specialist. The litigation expert becomes the jury's teacher of legal procedure and strategy. The specialist expert is the jury's teacher of the specific area of law that is involved in the underlying matter (e.g., tax, bankruptcy, probate, etc.).

For example, if the alleged error was a failure to take certain depositions in the underlying case, a litigation expert would be able to explain what depositions are and why they are important. However, if the legal error arose from a transactional matter involving the sale of a business without adequate documentation of security for indebtedness, a lawyer specializing in such an area will be needed to explain what security instruments are and why they are important.

Why use an expert when the CACI explains the law?

In a legal malpractice case, the CACI instructions provide guidance regarding the standard of care (600), causation of damages (601), that success is not required (602), acceptable alternative legal decisions and strategies (603), and the obligation to refer to a specialist (604). However, neither these instructions nor special instructions can make the complexity of the law understandable to the jury. Just as the testimony of an expert physician in a personal injury case can illustrate and illuminate medical questions of physical structure and function, an expert witness attorney should be used as a teacher of legal fundamentals.

The expert's task goes far beyond the conclusion that the defendant-lawyer did or did not fall below the standard of care; he or she must lay the foundation for the jurors to be able to understand the language of the law and the reasons why actions must be taken or avoided. It is not enough for the expert to know the standards and the law; the expert must be able to make it understandable on a basic level.

Suppose, for example, that the alleged malpractice dealt with a failure to name a "deep pocket" as a defendant in an injury case. The plaintiff's expert must be able to explain the public policy behind the principle of joint-and-several liability in a manner that brings out its fundamental fairness to the victim. Or, what if the alleged malpractice involved the failure to serve appropriate discovery? The expert can explain the types of discovery and how each is used to obtain valuable information that is necessary to prove or defend a case.

Should the expert consultant also be the expert witness?

In medical-malpractice cases, the early retention of an expert is key to understanding the complexities and designing the discovery. In legal-malpractice cases, however, there may be drawbacks to retaining an expert who acts both as a consultant and a witness. One such problem is that the expert-consultant is privy to strategic information which may be discoverable when the expert's deposition is taken, and he or she is asked to disclose everything that has been discussed with the retaining attorney.

Also problematic is that the expert witness, who has acted as a consultant assisting in the development of strategy, may be seen by the jury as just another lawyer for the plaintiff or defendant. This would destroy the image of the independent witness whose testimony is offered to give impartial expertise to the jury. Therefore, it may be advisable to retain two experts: a non-testifying consultant to assist in the preparation of the case and the design of cross-examination of the opposing expert, and a witness to testify regarding the standard of care and causation.

What information does your expert need?

What information should the legal-malpractice expert witness be given in preparation for his or her testimony? As with other experts, nothing should be contained in a writing that the trial lawyer would not want opposing counsel or the jury to see. It is usually not economical to deluge the expert witness with every document and deposition in the case preparatory to a preliminary question of "what do you think"? It is better to prepare a statement of facts that you want the expert to assume as true and a timeline of events with pertinent documents attached as exhibits.

After the expert reviews the preliminary information, he or she will usually be able to express a tentative opinion about liability. A careful expert will usually condition the opinion on further review of the underlying case.

If the expert is requested to render his or her opinions in writing, the retaining attorney should first have a conference with the expert to make sure that the expert has all the information that is necessary. In the conference, the purpose for the report can be discussed, and any incorrect information or misunderstood goals can be corrected and clarified. Many experienced trial lawyers believe that unless there is a specific reason for a written report, it is better practice not to request one, since it usually gives the other side an unnecessary advantage in preparing for deposition and cross-examination.

Trial testimony – hypotheticals or facts?

An expert witness can base opinion testimony on knowledge of the underlying facts from a review of pertinent documents or on an assumption that certain facts are true. A hypothetical question is one in which the expert is asked to assume that certain facts are true. It need not encompass all of the evidence in the case. "The statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question." (*People v. Vang* (2011) 52 Cal.4th 1038, 1046.) What is better – facts or hypotheticals?

If the goal is to sum up the evidence either at the beginning or end of the presentation of proof, then a hypothetical question allows the trial lawyer to make the equivalent of an opening statement or closing argument as the preface for the expert's opinion. But if the goal is an explanation of the evidence, then the expert's testimony can assist the jury to understand the complexity of the law or the significance of the underlying acts and omissions.

A template for effective expert examination

Expert testimony is effective only if it captures the jury's attention. Most people will reject opinions that are not prefaced with an explanation of relevant experience and methodology. Stated another way, jurors are wondering "who is this guy and how did he arrive at that conclusion?" Contrary to popular belief, there is no requirement that opinion testimony be preceded by a request that the expert recite his education, training and experience. Your first question can be, "I will be asking you to explain the standards that lawyers must follow. Are you qualified on this subject?" Then, follow up:

- Is this something that you regularly do in your practice?
- Are you involved in teaching this subject?
- Have you ever written anything on the subject?
- Before reaching a conclusion, did you use any method of evaluation?
- Would you please explain how you went about the analysis?
- Why was it important for you to review these things?

Be careful of friends as experts

A legal-malpractice expert witness can be a renowned subject-matter authority or a general practitioner. Choices that should be avoided include friends of the trial lawyer or the defendant. Once that relationship is disclosed, credibility can be seriously diminished. Selection is a matter of strategy, but it is important that the expert have experience as a witness. Some excellent lawyers are terrible witnesses.

What is ultimately required is a professional who can exude the credibility and experience that a jury will want to rely on. In the "battle of the experts," the jury will weigh the relative credentials of the opposing experts, so the content of the expert's professional resume is always important.


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