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Legal Malpractice and Evidence from Experts

Michael Sean Quinn and Olga Seelig*

Legal malpractice is not just about lawyers blowing statutes of limitations anymore. Now lawyers are subject to more negligence-related or contract actions, more breach of fiduciary duty claims, and more business tort suits than ever before. In one view, this is as it should be, because the legal profession is large, drastically expanded, sporadically educated, unpermeated by either deeply felt or stringent ethical norms, and poorly regulated. Many observers believe that the lawyer business is awash in hurried negligence, at the very least. Many lawyers often do not think carefully about what they are doing.

Suits against lawyers are being predicated on ever more complex errors and other forms of misconduct. Various kinds of mistakes in transactional lawyering are becoming a more common source of legal malpractice cases. *Jerry's Enterprises, Inc. v. Larkin, Hoffman, Daly & Lingren, Ltd.*, 691 N.W.2d 484 (Miss. App. 2005). (The error in this case was the failure of some lawyers to appreciate, think about, and investigate the significance of some property

*Michael Sean Quinn is a partner at Jordan, Quinn & Carmona, P.C., in Austin, Texas. Olga Seelig is of counsel with the firm. This article originally appeared in the Fall 2003 issue of LITIGATION JOURNAL.

law principles.) Many different kinds of lawyering-errors have and are becoming focal points of legal malpractice cases. Recent examples include immigration finagling, *dePape v. Trinity Health Systems, Inc.*, 242 F. Supp. 2d 585 (N.D. Iowa 2003); Ponzi schemes, *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113 (2d Cir. 2003); unsatisfactory business advice of various sorts, *Roberts v. Chimileski*, 820 A.2d 995 (Vt. 2003), including complex advice involving the Foreign Corrupt Practices Act, *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt International B.V. v. Schreiber*, 327 F.3d 173 (2d Cir. 2003); complex tax matters, *Streber v. Hunter*, 221 F.3d 701 (5th Cir. 2000); poor intellectual property work, *Kairos Scientific, Inc. v. Fish & Richardson, P.C.*, 2003 WL 21960687 (Cal. Super. 2003); and intricate maneuverings involving various types of securities. The lawyer components of the *Enron* case, *In re Enron Corporation Securities Derivative & ERISA Litigation*, 235 F. Supp. 2d 549 (S.D. Tex. 2002), perhaps symbolize this last trend. In 2006, it was reported that Vinson & Elkins agreed to pay \$30 million to Enron's bankruptcy estate. Apparently, part of this sum is damages, while part of it is restitution. The University of California has stated that it approved a \$13.5 million settlement with the law firm of Kirkland & Ellis in the *Enron* case. (Probably, these *Enron* related law-firm foul-ups are not over yet.) No one doubts that all is not well for lawyers as defendants.

Although legal malpractice cases are getting more fashionable, since lots of them involve a good deal of money, many of them still are extremely difficult to win at trial. Why is it so hard to win lawyer foul-up cases? Simply put, the injury and damages elements of these actions are hard to prove. It is less difficult to demonstrate that a material object or human body has sustained physical injury than it is to show that a lawyer's mistake is a principal cause of substantial and complicated financial loss.

Lawyer mistakes frequently are (or appear to be) quite abstract. The general public may find them nuanced and subtle—not at all like driving 92 mph in a 70 mph zone. Sometimes lawyer errors involve judgment, and they are often a matter of degree. Frequently they involve omissions for which one of several alternatives might have been within the realm of acceptable. So establishing causal links between the lawyer's act or omission and economic damages is no easy task. Of course judgments arrived at and made by lawyers can be negligent, and errors of

degree can be sloppy. And complex causal connections can—in principle—be proved up. That is one place where expert testimony can be crucial. It may take a lawyer—indeed, a very experienced trial lawyer—to testify as an expert that if a case had been prepared and presented correctly, the plaintiff in the malpractice case would have prevailed, or vice versa. The confusingly complex must be made familiar. And the simple-looking must be recast in its proper perspective. Experienced and knowledgeable lawyers who are gifted at telling stories can do precisely this.

When you look at the evidence needed to prove up a legal malpractice case, you must consider the nature of the claim. Substance determines the evidence. In some states, legal malpractice sounds exclusively in tort rather than contract. It is essentially a negligence case only. Many plaintiff's lawyers plead both malpractice and breach of fiduciary duty, hoping to get a jury instruction on fiduciary duty that sounds like a religious invocation requiring the defendant-lawyer to play the role of holy priest. But courts may dismiss the fiduciary claim where issues of loyalty or betrayal are not a focus of the lawsuit. In some states, there is considerable difficulty between tort actions for legal malpractice and breach of fiduciary duty tort actions. Often a lawyer's individual mistake will not count as both. Often a single error is one, or it is the other. It is almost never made both at once. *Archer v. Medical Protective Co. of Fort Wayne, Indiana*, 197 S.W.3d 422 (Tex. App.—Amarillo, 2006). We have seen some lawyers argue that it is not possible to have both causes of action in the same case. This idea is clearly mistaken, although they may not be involved in exactly the same injury-producing poor conduct. The idea is false because if a lawyer does more than one thing his mistakes can be of different species. In the final analysis, legal malpractice is an offense against the attorney-client relationship, not against the agreement between the parties. Contract cases always require detailed evidence about the wording of the contract and the steps specified for performance: You do this; I do that; you do the other thing; then I do something else. But a malpractice case seldom turns on the linguistic subtleties sometimes found in contract documents between lawyer and client. Such a focus in defending a legal-mal case invites disaster. It can look like the lawyer-defendant and his defense lawyer are playing manipulative games.

Cases involving lawyer derelictions can be fascinating. But they do not, as a general rule, involve fascinating legal issues about factual evidence. Aside from the lawyers' files and the client's files, plus who said what to whom when, there is often not much factual evidence genuinely disputed. Proof of damages is an exception to this observation. The interesting evidentiary problems in legal malpractice cases fairly uniformly involve issues of expert testimony. Pleadings and/or other documents say what they say, even if they fail to say some things clearly and unambiguously. Lawyers' files either contain research or they don't. It is relatively rare that large, complex legal malpractice cases involve the destruction or the phony invention of law firm documents. This is not always true, of course. Interestingly, when evidentiary misconduct is discovered, defendant law firms are not usually 100% behind either the commission of the sin or the protecting of the individual sinner.

Almost every component in a legal malpractice case permits or requires expert testimony, because of either a legal requirement or practicalities. Unnecessary experts often are retained. If expert testimony may be permitted, many lawyers believe they should try to come up with some. They figure that the other side will do it, so they'd best do so as well.

Here is a highly segmented, and therefore inelegant, articulation of the elements of legal malpractice. First, there must be some sort of a special relationship involved. Usually this is the attorney-client relationship, although some states such as California see things somewhat differently (but only somewhat). *See Moore v. Anderson Zeigler*, 135 Cal. Rptr. 2d 888 (Cal. App. 2003) (the lawyer for testator did not owe the testator's children a duty to recognize that the testator did not have testamentary capacity to change documents). For the sake of simplicity, we shall misleadingly assume that an attorney-client relationship is a necessary condition for standing to bring a malpractice action. Second, the lawyer has a duty to exercise reasonable care in working for the client. The lawyer must exercise reasonable care in performing each type of particular activity done for the client. Third, the lawyer errs in tending to the client's affairs. The error might be affirmative or omissive. It might be in litigation. It might be in designing or executing a transaction, designing or papering the creation of a legal entity, advising the client, and so forth. Fourth, the client must sustain some sort of injury. As a general rule, this injury will

be economic, but it might be emotional. It is not likely to be physical. Fifth, the client's injury must be proximately caused by the lawyer's conduct. The injury may in fact be caused directly, or it may be caused indirectly. Sixth, the client's injury must be given a reasonable monetary valuation. Damages from direct injuries are called actual damages; damages measuring indirect injuries are called consequential damages (although they, too, are a species of actual damages). If the lawyer has acted recklessly or with an intent to injure, punitive damages may lie. Punitive or exemplary damages are rare in malpractice cases. Seventh, in legal malpractice cases growing out of litigation in at least some states, the recoverability of the underlying judgment must also be proved. If the underlying judgment could not have been collected roughly speaking when it was entered, or when it would have been finished on appeals. See *Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court*, 40 Cal. Rptr. 446 (Cal. App. 2006).

All elements that have a factual component either require or strongly invite expert testimony. Frequently the existence of an attorney-client relationship can best be proved partly through expert testimony. Articulating the standard of conduct for this or that kind of lawyering almost invariably requires expert testimony. Proof that the lawyer made a mistake often is best proved through expert testimony. Of course, some mistakes are so obvious that a lay jury does not need an expert to explain them. If testimony as to what is required and the nature of a mistake is necessary, it must come from a lawyer.

Proving that the client actually sustained an injury often requires some sort of expert testimony. This is especially true for indirect injuries. Proof of this fourth element usually does not—and logically should not—require testimony from a lawyer, although courts sometimes get this wrong. Many times, however, the right lawyer can deliver this testimony.

Proof of proximate causation—the fifth element—requires proof that the lawyer's foul-up in fact caused the client's injury, and there must be proof that the cause-in-fact also was the proximate cause. At least in lawyer malpractice cases based on previous litigation, and in at least some states, there must be expert testimony to the effect that the now complaining former client would have prevailed in the underlying trial, but for the attorney's negligence in preparing and trying the case. In other words, the expert witness must be willing and able truthfully to

say, "In my opinion, if the lawyer had done a reasonable job in the underlying case, his client would have prevailed, and so the client ought to recover from the lawyer in this case." *Alexander v. Turtur & Associates, Inc.*, 146 S.W.3d 113 (Tex. 2004). Of course, the expert must not only believe this proposition, he must be able to argue it, i.e., give plausible reasons for his view.

Sixth, testimony from a lawyer as to what in fact caused a financial injury is not required. Testimony from some expert very well may be required. Sometimes that witness might be the right lawyer. This is frequently true in business cases, where it is necessary to discard other potential causes of injury to a business. Similarly, testimony from a lawyer as to proximate causation is not required, but it is often a good idea. Although proximate causation is measured by an objective standard, were a highly experienced lawyer to testify that most transactional lawyers would in fact foresee the kind of injury the client sustained, the inference of proximate causation becomes easier for the finder of fact. Seventh, there is hardly any developed law on this topic, so we will let it go by for now.

The testifying expert witness has a manifest function and a latent function. Virtually all evidence law is designed to regulate the manifest function. The manifest function of an expert witness is to state the standard of care and to indicate identifiable, isolatable, listable opinions regarding whether and how it was breached and, if possible, what the consequences of the breach are. The manifest function of expert witnesses is to address the elements of the tort directly and to state appropriate opinions. The latent function of an expert witness may be even more important. It is narrative pedagogy. It is to tell the story of the case coherently and comprehensively from the point of view of one side. This means the expert must provide a narrative organized around a theme, where the theme is the theory of the case his side has (or should have) posited. The expert must actually believe in the theme. The embodiment should be rich, natural, and unforced. The theme or theory should subtly permeate the evidentiary story. It should *not* be identifiable, isolatable, or listable.

Of course, experts who testify late in a trial presentation often do not get a chance to tell their whole story. Sometimes the latent function of the expert witness is to provide backup in case his or her story has not come in fully or well. In telling the story,

the expert witness must be restrained. Expert witnesses have been disqualified for being overly contentious. *GST Telecommunications, Inc. v. Irwin*, 192 F.R.D. 109 (S.D.N.Y. 2000). In addition, expert lawyers must not try to argue the case. *Kidder, Peabody & Co., Inc. v. IAG International Acceptance Group*, 14 F. Supp. 2d 391 (S.D.N.Y. 1998). Such dramatics may lead to witness disqualification. In the *Kidder, Peabody* case, the expert witness disqualified was star law professor Arthur R. Miller, from Harvard and PBS television.

Now we arrive at a few really interesting questions. How should testifying experts be picked for legal malpractice cases? How should they be prepared? And how should they be cross-examined?

The controlling Federal Rules of Evidence (FRE) are 401, 402, and 702–704. A majority of states follow these rules or something pretty much like them. (Occasionally, there are special rules for presenting medical malpractice expert testimony different from other rules in a given states. *Formyduval v. Britt*, 630 S.E.2d 192 (N.C. App. 2006).) The generally received rules of evidence, as applied to professional malpractice, add up to three significant propositions. First, evidence is admissible if and only if it is relevant. Second, evidence is relevant if and only if it makes an operative fact at issue in a case more or less probable. Third, if “specialized knowledge will assist the trial of fact . . . , a witness qualified as an expert . . . may testify [about specialized knowledge] in the form of an opinion.” This language comes from Rule 702, which also applies to scientific knowledge and technical knowledge.

In olden days, expert witnesses could not express opinions about ultimate issues, e.g., that the lawyer-defendant had committed malpractice. Under FRE 704(a), this is no longer true. Trial courts have substantial discretion, however, in applying this rule, and they can apply it gingerly in legal malpractice cases. Still, the goal of a legal-mal plaintiff’s lawyer is to have his expert assert unequivocally that the lawyer-defendant was negligent, how he was negligent, and what standards were violated. A bullet list should be created, used, and projected on a screen. If defense counsel cannot prevent the testimony, she should deconstruct the bullet points in whatever ways are available and try to prove parts of her case out of the expert’s mouth to the extent possible.

The holding in the famous *Daubert* case—now a decade old—applied Rule 702 to more purely scientific experts. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Daubert* did not apply Rule 702 to physicians, design engineers, technical types, and others who use science for practical ends. The holding in *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999), however, applied the rule to engineering testimony. Dicta in *Kumho Tire* extended the rule to all kinds of specialized knowledge, including knowledge about the standards against which lawyer conduct should be judged and knowledge about the nature of lawyerly conduct. Pretty much everybody ignores the fact that *Kumho Tire* cannot possibly have enunciated a holding as to non-scientific and non-engineering specialized knowledge. That kind of knowledge was simply not at issue in *Kumho Tire*. Nevertheless, the practicing bar, commentators, and law faculties apparently have formed a silent consensus as to what *Kumho Tire*—and hence *Daubert*—stand for.

Daubert formulated a series of non-exclusive tests that experts should pass before their alleged expertise can come into the record. The tests were designed to make it probable that the opinions a proposed expert will give are relevant, in the “make more probable” sense of the Federal Rules of Evidence, not merely relevant in the ordinary sense of being *about* the issues at stake. They were also designed to make sure that the expert is a reliable opinion giver, i.e., that the expert has a reliable basis for his or her opinion. In the area of science, the overarching issue is the *scientific validity* and *reliability* of what the expert means to say. Similarly, in the area of lawyer screw-ups, the issue will be the evaluative and judgmental validity, and hence the evidentiary reliability, of the expert’s testimony.

Following are some of the tests for scientific opinions the majority of the Supreme Court suggested in *Daubert*:

- The expert used a scientific methodology based on generating hypotheses and testing them to see whether they can be falsified.
- The opinions of the expert are capable of empirical testing and hence have genuine empirical content.
- The opinions of the expert are subject to tests for falsification potential.
- The opinions of the expert have been subject to peer review.

- The expert's opinions have been published in respectable publications. Underground newspapers will not suffice.
- The expert's methodology is subject to rate-of-error testing.
- The expert's methodology and conclusions are generally accepted in his or her scientific field, other things being equal.

The justices believed that only with these kinds of controls is it safe to permit experts to opine, rely upon, and testify as to hearsay. None of these principles is a litmus test. Some are not even necessary, just helpful. Each of these tests is process oriented, intended to increase the probable reliability of the proffered opinion. The justices did not think publication was an absolutely necessary condition of admissibility. Some opinions are too narrow to be published. Other conclusions are too new. Finally, it is worth noting that the idea of *general acceptance* appears twice in the last bullet point. First, the view should usually be generally accepted in a field. Second, the field must itself be generally accepted as scientific. The force of this last test may be rebutted to allow for innovative evidence that is reliable. It is a cliché (and hence true) that human knowledge now changes quickly.

It has become a virtual mantra in the jurisprudence of expert witness evaluation since *Daubert* that trial courts are to act as gatekeepers. This terminology is repeated ad nauseam as if it were a hallowed liturgical phrase, the utterance of which invokes the gods of sound adjudication. The role is pronounced so often it is as if *Daubert* established a new jurisdiction for trial judges. Little could be further from the truth. Judges always have been gatekeepers with respect to evidence of all types, especially evidence from expert witnesses. To be sure, with respect to scientific evidence, previous rules on admissibility were too simplistic. Formerly, if a proposition of science had not achieved a general acceptance in the relevant field, it could not be admitted. If it was generally accepted, it could be. *Frye v. United States*, 293 F. 1013 (D.C. App. 1923). *Frye* was a litmus test. This misbegotten rule made keeping the gate closed for innovative scientific expertise much simpler.

The Supreme Court's use of the gatekeeping concept in *Daubert* was that trial courts should focus upon various process features related to the testimony ostensible experts wanted to

give. By what procedures could such an opinion be established? What was the connection of the opinion to processes of empirical testing? What is the relationship between the propositions opined and the procedures of their having been subject to critique by peers of the expert? What procedures have critics used? Has the expert sought to have his work published in a recognized, authoritative place? Is the work precise enough to be susceptible of statistical testing? Have the ideas relied upon by this expert permeated the culture of his discipline? Does the discipline have stable procedures to insure rationality? Is the discipline of the expert itself regarded as intellectually respectable? Is the expert a recognized member of it?

Basically, the Supreme Court says that it is not the judiciary's function either to embrace or to reject the expert's conclusions. The judiciary simply is to determine whether the processes by which the expert derived her opinions are epistemologically acceptable. Thus, the focus of the judge is on processes and procedures that elicit rationality. It is for the trier of fact to determine whether it will accept or reject the expert's conclusions. The judge decides only whether the expert is credible from the point of view of the accepted processes by means of which knowledge is acquired and defended. When the court lets the jury hear the testimony, it is not endorsing the truth of the testimony.

In *Daubert* the Court was quite clear that the tests it formulated for reliability were flexible; they were not to be rigidly applied even to scientific expertise. Not all of them should be applied straightforwardly to non-scientific expertise. Here are some additional points judges might consider in determining whether expert testimony as to lawyer failures is reliable.

- Is the lawyerly field about which the expert is testifying one in which the expert has worked? Is the field one that the expert has studied extensively or systematically? (Probably only one of these alternatives need be true to permit the admission of the expert's evidence. Credibility is a different matter, of course.)
- Is the opinion empirically based? Is it really about the behavioral world? Or is it simply a reformulation of the law? Is the opinion some kind of disguised definition? Or is it simply that the so-called expert is saying he does not like what happened? Purely subjective valuations are not

the stuff of expertise. (Sometimes, it needs to be pointed out that empirical observations are not always collected in life—or even in the social sciences—in the same way they are collected in physics, chemistry, and biology. Indeed, the same point is true about the practice of medicine. Those who wrote the influential—indeed, crucial—United States Supreme Court cases should have been more careful about this distinction. Not all reliable objectivity can actually be scientific.)

- Is the origin of the expert's opinion sound? Does it include observation of the conduct of lawyers? If so, how much? Does it include formal education or less formal but still genuine study? If so, how much, what kind, and how valid?
- Has the expert tested her thoughts in the forum of meaningful lawyer conversation and debate? Conversational testing with other insightful and perhaps learned lawyers is about as good as it's going to get. Laboratory experiments for such things do not exist.
- Has the proposed expert received recognition for what she has done in this area? Has any of her work been published in relevant periodicals or books? Does she give speeches to lawyers? Does she teach the subject in a law school or elsewhere (e.g., continuing education programs, graduate studies programs, undergraduate programs)?
- Does it appear the proposed expert generally is thought of in the legal community as someone who knows about standards governing lawyer misconduct? What was done or not done in this particular case?

These are the types of questions a trial judge must scrutinize in order to be a meaningful gatekeeper with respect to testimony about lawyer conduct. Trial courts have considerable discretion about how to interpret and employ these principles. Decisions of trial courts on these evidence questions are reviewed only for an abuse of discretion.

Only a few cases have explicitly applied *Daubert/Kumho Tire* standards to legal malpractice cases. Some cite the cases only pro forma. One case in which the authors were involved cited *Daubert* to disqualify experts (although the experts intended to

give testimony only as to matters of law anyway). *Cunningham v. Bienfang*, 2002 WL 31553976 (N.D. Tex. 2002).

Several other cases are instructive, however. In *Lifemark Hospitals, Inc. v. Jones, Walker*, 1999 WL 33579235 (E.D. La. 1999), a trial court refused to hear expert testimony from a lawyer concerning Louisiana practice for collateral mortgages. The proposed lawyer-witness had not tested his ideas, discussed them with anyone (much less conversed about them widely), nor taught his ideas or published on them. Obviously, he had not received general acceptance for his views. The proposed witness could testify only as to his personal opinion about how to conduct certain kinds of property transactions. Absent *Daubert*-like controls on the practitioner's opinion, the court declined to receive the testimony. The witness could not establish what all Louisiana lawyers do, what a majority of them do, or even what a representative sample might do.

Absent such authority, the Court is unable to conclude that a solo practitioner from Vidalia, Louisiana [a small town], who has not written, lectured, taught or otherwise received endorsements for his opinions on legal duties in this area is qualified to testify regarding a duty applicable to attorneys around the state.

The court's unfortunate formulation sounds like urban-oriented, large-firm snobbishness. And so it might be. Then again, perhaps the court's only point is that without *Daubert*-type guarantees, this particular witness may be isolated, not included within the flow of legal conversation, and outside the mainstream.

In a case already mentioned, *GST Telecommunications*, a very distinguished senior district judge, Milton Pollack, rejected expert testimony on how corporate lawyers should have dealt with the board of directors of a corporation they represented. Judge Pollack refused to admit the testimony of a proposed lawyer-expert for several reasons: The proffered expert misunderstood the case; he misconstrued authority relations in the attorney-client relationship; his testimony really was about business ethics in a fast-changing and highly volatile market, not in legal practice; there was too much disagreement among the proposed expert witnesses; and the proposed expert did not conduct himself with the kind of detachment one expects from an expert.

Although Judge Pollack cites *Daubert* and *Kumho Tire*, it is not entirely clear that he was relying on the principles articulated in those cases. The judge implied that business lawyers do not necessarily qualify as experts on the business ethics of a market area in which they work (even if extensively). He also suggested that true experts, even when opposing one another, will disagree about very little so that any disagreement will, in effect, aid the trier of fact by focusing the case on these narrow areas. If ostensible experts disagree wildly about many things, the topic to be testified upon is not currently susceptible to expert testimony. Although this observation is not inherent in *Daubert*, it is probably true about many areas of science and science-based inquiry. *GTS Telecommunications* also suggests that if a lawyer wants another lawyer to appear as an expert witness, the proposed witness must conduct himself with restraint and the external trappings society associates with objectivity, e.g., calmness, detachment, and reflection.

In *Noel v. Martin*, 2001 WL 1251662, 21 Fed. Appx. 825 (10th Cir. 2001), the circuit court affirmed a district court in Colorado that had disqualified the plaintiff's lawyer-expert. This legal malpractice case arose out of a previous business litigation in which the plaintiff complained he was wrongfully prevented from selling shares of stock and thereby deprived of the value of his stock; as a consequence, he claimed, he lost the additional earnings he would have made by reinvesting proceeds from the original sale of stock. In the underlying case, lawyers tried to prove the plaintiff's consequential damages by demonstrating how much the average price of a share of stock on the S&P 500 rose during the period of time in which the plaintiff would have reinvested his profits. The jury and the court in the underlying case found that this evidence was irrelevant. Instead, the facts about the plaintiff's actual financial history were placed before the jury. They demonstrated that he tended not to buy S&P 500-type stocks, and to buy more speculative items such as vacation homes, oil and gas ventures, and racehorses.

The proposed lawyer-expert in the malpractice case intended to articulate and rely upon a seemingly unexceptional standard of care: Reasonable trial attorneys do not present damage theories that are unsupported by facts and can be contradicted by obvious evidence. The trial court excluded the testimony of the proposed lawyer-expert for the following reasons: He "never

tried a stock valuation case and had no experience in this area"; he opined that "the lost earning appreciation model [designed to account for any consequential damages] was really prejudgment interest"; he was unfamiliar with the plaintiff's past history of investments; and he had not read the trial transcript and was not really familiar with the issues in the case.

There is room to wonder whether the court got this one right. It seems to us that a trial lawyer probably does have the expertise to say that the consequential damage model employed by previous counsel was completely irrelevant to the conclusions he was trying to establish, and hence that he should have employed a different damage model. The fact that the proposed lawyer-witness was not an expert on the internal mechanics of accounting for and predicting earnings appreciations in a stock market does not mean that he should not be able to testify about the complete irrelevance of a study of that type. Perhaps the true problem here was that the proposed lawyer-witness simply was not particularly well informed about the underlying case. That apprehension was certainly true.

One final case stands for the proposition that appearances are important. In *Ramsey v. Reagan, Burrus*, 2003 WL 124206 (Tex. App.—Austin 2003, no pet.), the court refused to hear testimony from a proposed lawyer-expert on the proper way to conduct a real estate foreclosure in Texas. The proposed witness did not have a Texas law license, and for this reason the court said he did not have the kinds of qualifications that are a necessary condition for reliable testimony. We wonder. Nevertheless, we do not wonder about appearances. If a party wishes to utilize lawyer-experts, they must not only be reliable but also look reliable. As many of our mothers taught us: Appearances are important.

Expert witnesses are supposed to testify as to their opinions about difficult complexes of fact, which are not well understood or appreciated by the general public. And they are supposed to testify as to received valuation standards, such as what constitutes negligence. They are not to express purely personal evaluations as to what they individually happen to think is excellent, incompetent, negligent, well crafted, good, bad, noble, wicked, ethical, unethical, honorable, praiseworthy, or anathema.

Generally not even expert witnesses—not even in legal malpractice cases—are permitted to testify about purely legal matters.

It must be kept in mind, however, that sometimes legal matters are raised in such a way that they become operative facts to be proved within a case. *Crookham v. Riley*, 584 N.W.2d 258, 267 (Iowa 1998). If the standard of care requires that lawyers make a reasonable effort to get the law right, and an expert witness wants to testify that a lawyer did indeed get the law right, then the expert must testify as to what the law was at the time the lawyer assessed it. If the law remains unchanged between the time the lawyer assessed the law and the time the expert witness testifies, then the expert is testifying about what the law is.

Distinguishing between testimony as to the law and testimony as to the facts is not always easy in legal malpractice cases. Indeed, it is not always possible. One of the questions that is often involved in professional malpractice cases is this one: "How did you think about this problem?" If the problem is a legal problem, then parts of the answer are going to involve assertions of—or, at least, explicit elaborations upon—legal rules and principles. Often times, one of the underlying questions in a legal malpractice case is whether the lawyer thought appropriately about relevant law. Indeed, often central questions involve whether the lawyer thought about the law carefully and correctly. Here is an example case we recently saw. The lawyers charged extravagant fees. The client eventually refused to pay all of them. The law firm sued the client, and the client responded with a malpractice case involving multiple counts. It was absolutely clear—at a sophisticated level—that the fee-seeking lawyers in the underlying case had made a crucial mistake. The case had involved serious damage to an office building. The clients, the owners of the building, retained counsel to sue the construction companies that inflicted the damage. The property insurer of the building had paid an enormous sum for the damages, so both the owners and the property insurer were involved in the case. Eventually, the property insurer and the owners entered into a subrogation agreement. The owners of the building tried to prove, at the legal malpractice case, that they did not get enough out of the underlying case. This case failed, and the lawyers prevailed on the fee claim. Significantly, the owners' malpractice claim easily could have succeeded. The lawyers representing the building owners did not realize that the state in which the case was pending adopted the "Made Whole Rule" in subrogation cases. (Under this rule insurers may not recover

before their insureds have been fully compensated for their injuries.) Consequently, the owner should not have been advised by his lawyers to enter into the distribution agreement with the insurers that he did. There should have been no such agreement except one which conformed to the "Made Whole Rule." Unfortunately, when it came time to try the legal malpractice case, the prevailing rules of subrogation should have been crucial to the cross examination of the lawyer who brought the suit for fees. Thus, while the lawyer's not knowing the "Made Whole Rule" and deploying it was clearly malpractice, the whole matter got lost on the jury, because it was not made a central theme of the property owners' malpractice case.

This mission could easily have been accomplished had an expert witness been asked to testify as to whether it was negligent for a lawyer to fail to know about that rule and fail to insist upon it. In order to do this, the witness would have to explain the law of subrogation. Hence, the expert would have to discuss legal principles as part of his testimony. (Most states subscribe to the Made Whole Rule. See *Ortiz v. Great Southern Fire and Casualty Insurance Company*, 597 S.W.2d 342 (Tex. 1980). Although a few do not. *Met Life and Home Insurance Company v. Lester*, 719 N.W.2d 385 (S.D. 2006).)

What is important to notice here is the mixture between law and fact. The expert is testifying about a factual matter. What did the defendant lawyer think about? How did she think about it? To what conclusions did she come? Now what the lawyer is thinking about is a legal matter.

Lawyers who are presenting or cross-examining experts in legal malpractice cases should sort out and separate three fundamental categories. The law opinions should be eliminated. The personal evaluations should be ruled inadmissible. Only fact and mixed law-fact questions should be at issue. After deciding *what* to present, the *how* to present is easy: Explore in baby steps—short, clear questions—first by one side and then by the other.

The cross-examiner should realize that, under FRE 702 and its state-law analogues, expert opinions are based on a trellis-like structure. The expert must have justification supporting his opinions. There must *be* reasons, and the expert must *have* them. These reasons must themselves be truths, or close to them. Often these reasons must themselves be justified. Thus, an expert's support for an opinion often resembles a diagram, like a decision

tree, in which one claim to know is based on another, and the claim to know the second claim is based on a third, and so forth. The cross-examiner must keep in mind that the proposition the other side wants to introduce through an expert is at the top of the trellis. It should not be admitted unless the trellis itself is (1) firmly grasped by the witness and (2) strong and firmly attached to something else that itself is strong and firm.

There are two practical implications of this discussion. They pertain to precision and support. Remember these requirements throughout the chronology of an expert's work in a case.

Rule 26(a)(2) of the Federal Rules of Civil Procedure requires, as do many state jurisdictions by rule or court order, written expert reports. After an expert is designated and a report is produced, the expert is deposed. Then some sort of a motion as to whether the expert should be disqualified is formulated and filed (often, even in state cases, these are called "*Daubert* motions"). The proponent of the expert files a reply. The court considers the matter, sometimes after a hearing.

Frequently, the expert report is as flexible and broad as possible—often, even intentionally somewhat vague. One responsibility of the lawyer taking the expert's deposition is to get the expert's opinions formulated in as specific and concrete a manner as the subject matter permits. Of course, an opinion about lawyerly misconduct usually cannot be formulated with mathematical rigor. Nevertheless, vague, flexible opinions should be drawn out and concretized with as much precision as possible. This requires that the lawyer taking the deposition have a detailed and nuanced knowledge of the law upon which the expert is relying.

Courts have been known to permit experts in malpractice cases to give truly vague opinions. Here is a particularly troubling example that arose in a tax case where the expert witness was called upon to state the standard of care for tax attorneys. The court relied on the expert testimony, despite the complaint that the expert "did not sufficiently identify the standard of care for tax specialists[] and trial attorneys[]."

We find that [expert]'s testimony sufficiently identified the standard of care. [Expert] clearly stated that, to satisfy the standard of care, the attorneys had to act as an ordinarily

prudent attorney would in the same or similar circumstances. He also stated that for tax specialists, the standard was higher because tax specialists "have been trained in . . . a fairly complex—very complex area . . . [and] our clients come to us believing that because we are tax specialists, we have this higher degree of knowledge they are seeking." [Expert] also testified to specific duties that [defendants] owed their clients, [plaintiffs]. Specifically, he testified that the attorneys had a duty to carefully analyze the facts of their situation and the relevant state and federal law and make sure that their clients were "fully informed and not misled" about both the facts and the law.

Streber v. Hunter, 221 F.3d 701, 722 (5th Cir. 2000). The court appears to have permitted this testimony because what the expert said was true. But what the expert said was no more than could be found in a jury charge. What the court permitted here was about as vague as it could be. Even the last sentence in the quote has little actual content. It is unclear, therefore, why or how the expert testimony served to aid the trier of fact. The real issue was what a reasonably prudent tax specialist would have done under the circumstances, and what she would not have done.

The lawyer cross-examining this witness should have obtained a far more precise formulation of the standards actually applied. The witness's views should be specifically tested. There is an additional rhetorical advantage to examining witnesses the right way. Many people—even lawyers—are uncomfortable when confronted with a requirement to define their terms. Of course such demands are not always fair. In the real world a great many terms used in the law, business, and elsewhere are rich, fuzzy-edged, and to some extent ambiguous. Adjudication, however, is not the same context as the flux of the ongoing, day-to-day, *real* world. A certain degree of conceptual and descriptive formality is a good thing. Consequently the expert should be required to formulate his opinions with as much precision as the subject matter will permit.

The expert should be required to set forth the foundations—the support—for his opinions. These foundations can be explored through three interlocking areas of questions:

- What is your evidence for what you have asserted?
- Why do you say what you just said?
- How did you obtain the evidence upon which you are relying?

In a way, these questions are analogous to asking someone for authority when they are setting forth a legal argument. In another way, the questions are nothing more than an application of the reiterated question we all learned as children to torture our parents: *Why? Why? Why? Why?* Or similarly: *How do you know this?* [Answer.] *How do you know that?* [Another answer.] *How do you know the other thing?* And so on into (parental or witness) madness or at least substantial frustration and inarticulateness; fear of the next round (at least in the witness, if not the parent); and perhaps even anger (which usually reduces the authority of the parent and often the credibility of the witness).

This strategy works particularly well when several conditions are met. It is most effective when an expert witness is prideful, arrogant, or paternal. It is also helpful if the witness is somewhat—but only mildly—inarticulate. The strategy works best when the lawyer employing it can appear innocent. The best way to appear innocent, of course, is to be innocent. (Only talented, trained thespians can appear genuinely innocent when they are not. Some lawyers like to think of themselves as consummate actors. Most who do are drastically wrong. They are usually not even very good.) In any case, innocence in this situation means that the examining lawyer really is interested to know why the witness thinks what he does.

If the witness expresses his opinions on the basis of, say, "My 30 long years of intimate experiences with precisely this problem," so much the better. The next request, then, is: "List all the things you can from your lengthy experience that tell you such-and-such is the case." Use of the word *list* here introduces an element of rigidity, atomization, and formality—not to mention exhaustiveness—that often is both threatening and disconcerting. The witness has the impulse to say, "Well, I didn't bring a list." Notice how much more aggressive is the phrase "List all" than "Tell me about."

Constant reiterations of the question "How do you know?" will sooner or later lead most witnesses to say something like, "I don't know how I know that, I just do." Or they will fall back

and say "I know that on the basis of my long experience." In the end, you want to be able to contend that a so-called expert witness does not know the premises from which he derives his opinions to be true, thus he cannot really know his opinions to be true. Firm beliefs, even elaborate ones, do not make an expert. And if a witness is not really an expert, of course, he really should not testify as to his opinions.

The kind of argument we are recommending can get out of hand and make the examiner look silly. Obviously, self-silification should be avoided. Nevertheless, it takes a long time—many reiterations of "How do you know?"—to get a lawyer to look comical. Thus, a lawyer presenting an expert witness should prepare her carefully so that she can defend as many of her premises and as many levels of her latticework of supporting reasons as she can.

Another way in which a sequence of "How do you know?" questions can be useful involves the distinction between questions of law and questions of fact. Another legal mantra is that purely legal questions are the province of the judge, and that the judge does not need help on figuring out what the law is. Maybe so. Maybe not. In particularly complex situations, many judges can use help. Nevertheless FRE 702 makes expert testimony admissible when it will *aid the trier of fact*. If the trier of fact is not also the trier of purely legal questions, testimony as to the law does not trigger Rule 702. Of course, an expert's testimony must be based on a correct interpretation of the law. When an expert gets the law wrong, and the jury realizes it, his credibility is profoundly impeached or his testimony is excludable. *Franch v. Ankney*, 670 A.2d 951 (Md. 1996) (Said the court: The testimony of expert witnesses about the handling of a workers' compensation case was excluded when they got the law wrong "because an expert opinion on the standard of care in an attorney negligence case is often based upon the expert's interpretation of the law, experts in such cases may state their opinion on the law as a foundation for their opinion on the standard of care.").

One of the things that always has made legal malpractice cases interesting is the so-called requirement of proving the "case within the case" (also called the trial within the trial). This requirement follows from a straightforward application of the general principle of tort law to legal malpractice situations. If a plaintiff is going to prove that his lawyer caused him injury, he must show that but for the lawyer's mistakes, the then client

and now plaintiff would not have suffered loss. *Viner v. Sweet*, 70 P.3d 1046 (Cal. 2003). The case-within-the-case requirement is an application of the element of causation.

This requirement is, to some extent, counterfactual. The plaintiff must prove that in the absence of his lawyer's conduct, he would have been better off. This rule applies both when the lawyer's error is in previous litigation and when it occurs in some other context, such as a transaction or the administration of an entity. The trouble, of course, is that proving complex, counterfactual propositions is not proof about the world the way it really is, but proof about the way the world might have been—about the world as it can only be imagined. That is true for all proof of causation. But in legal malpractice cases, imagining a different world but for the lawyer's misconduct often is vastly more complicated than in an auto accident case, say, where the jury is asked to imagine a world in which the plaintiff did not have a broken leg.

Because all sorts of other things might have gone wrong, and because complex situations are influenced by a variety of possible factors, proving damages in legal malpractice cases—especially those involving complex business transactions—always tends toward speculation. This is a difficulty in trying business-based legal malpractice cases because expert testimony is required and admissible expert testimony cannot be based upon out-and-out speculation. *Potter v. Polozie*, 757 N.Y.S.2d 418 (App. Div. 2003). This black-and-white-sounding rule actually is a matter of shading. Although courts do not admit it, a moderate amount of speculation is both necessary and permitted.

There are other problems about the use of expert testimony in the case-within-the-case context. One temptation is to try to introduce as much as possible through expert opinion. This is a bad idea. In general, the same evidence must be used in a malpractice case that would have been used in the underlying case. Moreover, as a general rule, expert witnesses are not permitted to testify as to how a jury would have decided the case within the case. Several reasons are given for this view by various courts. The real reason, of course, is that predicting jury outcomes is not the sort of thing on which practicing lawyers have expertise. It is not permissible to have a lawyer pontificate one day to a client that no one can predict what a jury will do, and the next day testify as to precisely what a rational jury would have done.

At least two additional points should be made about the spread of legal malpractice cases. Here is the first point. Malpractice actions are not only spreading among different kinds of lawyer activity, they are spreading among different kinds of plaintiffs. In most jurisdictions, most of the time, legal malpractice can be brought against lawyers only by the clients of those lawyers. Other actions against lawyers are, of course, possible; these include negligent misrepresentation, for example, some statutory actions, and some breaches of fiduciary duties. Nevertheless, liability insurance companies are now bringing legal malpractice actions against insurance-defense lawyers more and more often. This is true even though it is controversial whether the lawyer hired by a liability insurer to defend an insured is likely to have represented the liability insurer itself. (Obviously, the former does not entail the latter, but lawyers for insureds often give liability insurers advice, e.g., on settlement, which extends the lawyer-client relationship.) In any case, some courts are skipping over this controversy and simply permitting liability insurers to sue the lawyers they hire for the defense of their insureds.

Sometimes, this move is supported by means of some sort of an assignment from the insured to the insurer. Many states, however, reject the validity of any sort of voluntary assignment of this type. *Zuniga v. Groce, Lock & Hepton*, 878 S.W.2d 313 (Tex. App.—San Antonio 1994, writ ref'd). (The notation "writ ref'd" indicates that the entire opinion has been embraced, adopted, and promulgated by the Texas Supreme Court.) Nevertheless, under Texas law, certain other kinds of transfers of legal malpractice rights are possible. Legal malpractice claims become the property of the bankruptcy estate upon a filing and they may be pursued by the bankruptcy trustee. *Douglas v. Delp*, 987 S.W.2d 879 (Tex. 1999).

In addition, liability insurers, including excess insurance carriers, may be equitably subrogated to an insured's claim against his attorney, as well as the primary carrier, for negligence in handling the defense of the liability claim. *Centennial Insurance Co. v. Canal Insurance Co.*, 843 S.W.2d 480 (Tex. 1992).

Not all states have adopted all of these views. Massachusetts, for example, permits some assignments of legal malpractice claims. *St. Paul Fire and Marine Insurance Company v. Birch, Stewart, Kolasch & Birch, LLP*, 379 F. Supp. 2d 183 (D. Mass. 2005) (and cases cited there). Not every state permits the subrogation of

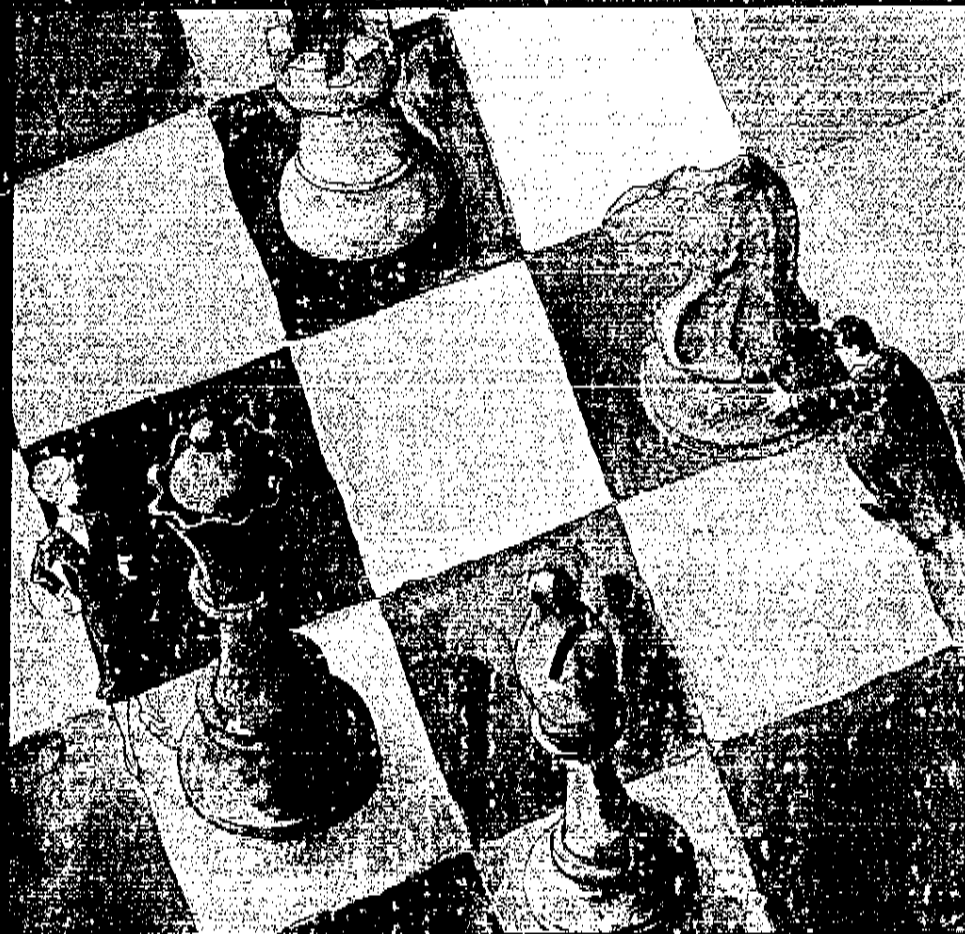
legal malpractice claims. Ohio is one such state, *Swiss Re Insurance America Corporation, Inc. v. Roetzel & Andress*, 837 N.E.2d 1215 (Ohio App. 2005).

From the point of view of the present article, the most interesting question here is how expert witnesses may be used. Obviously, there will be two distinct issues woven together. First, what are reasonable actions for lawyers to take, as opposed to their many opposites? Second, how should a liability insurer think and act when reasonably administering a covered liability case against one of its insureds which is in litigation? How should defense lawyers deal with them? How should the insurer deal with the defense lawyer? Obviously, it would be a good idea to have one person who can adequately testify on both of these groups of questions. If one such person cannot be found, there will have to be at least two people: one for the insurance questions and one for the lawyer questions. Now comes our really interesting question: How, in trying the type of case under discussion, can the testimony of the two different experts be effectively integrated? Either one witness is better than two, or one plaintiff's lawyer in the malpractice case needs to prepare them both and needs to do so in an intellectually integrated way. Remember! The discourse and actions of this lawyer and the experts are not privileged.

Now for the second point. Fairly clearly, even though the matter has not been successfully litigated, it would be malpractice negligently to designate as an expert/witness someone who was clearly incompetent and who was subject to disqualification. See *Dimond v. Kazmierczuk & McGrath*, 790 N.Y.S.2d 219 (App. Div. 2005). It might also be malpractice not to at least try hard to make sure that an expert's report conforms to applicable court rules. These rules vary from state to state and they are fairly stringent in the federal courts, if the terms of the Federal Rules of Civil Procedure 26(a)(2) and 26(b)(4) are enforced. Along with this point, litigation lawyers should remember that, if a report is weak enough, even broadly experienced lawyers, who have served as well-known judges, and who have testified in other legal malpractice cases, may not be acceptable expert witnesses in legal malpractice cases. See *The Cadle Co. v. Sweet & Brousseau, P.C.*, 2006 WL 435229 (N.D. Tex 2006) (where the witness disqualified was a well known former Texas Supreme Court Justice).

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Priscilla Anne Schyab, Editor

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