

5.51A LEGAL MALPRACTICE (Approved 06/1979; Revised 10/2022)

NOTE TO JUDGE

The elements of a legal malpractice action are “(1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney; (2) the breach of that duty by the defendant, and (3) proximate cause of the damages alleged by the plaintiff.” Gilbert v. Stewart, 247 N.J. 421 (2021); Jerista v. Murray, 185 N.J. 175 (2005) (quoting McGrogran v. Till, 167 N.J. 424 (2001)); Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 179 N.J. 343 (2004).

Pursuant to the Supreme Court’s guidance in Garcia, the trial court should permit a plaintiff to pursue either the suit within a suit, a reasonable accommodation of the suit within a suit, or lost settlement value. See also Lieberman v. Employers Ins. of Wausau, 84 N.J. 325 (1980); Kranz v. Tiger, 390 N.J. Super. 135 (App. Div. 2007).

As to any other charge which may be relevant to a case involving professional negligence, the Committee suggests that the use of the term “malpractice” or the phrase “guilty of malpractice” not be used and that the general term “negligence” be used in its place.

A. Duty and Negligence

In this case, the plaintiff(s), [*insert plaintiff(s) name(s)*], retained or hired defendant(s) [*insert defendant(s) name(s)*] to represent [*insert plaintiff(s) name(s)*] in the underlying case/matter [*insert information about the underlying case and retention*]. As a result of this retention or hiring, an attorney-client relationship was established between defendant(s) [*insert defendant(s) name(s)*] and plaintiff(s) [*insert plaintiff(s) name(s)*], and defendant(s) were required to represent plaintiff(s)

according to the standard of care for lawyers handling a case/matter [*insert type of case in underlying matter*].

Here, plaintiff(s) contend(s) that the defendants [*insert defendant(s) name(s)*] was (were) negligent, that is to say, breached or deviated from the standard of care, when defendant(s) represented plaintiff(s) in the underlying case/matter which involved [*insert underlying case/matter type*]. Plaintiff(s) also contend(s) that as a result of defendant(s)' negligence, plaintiff(s) suffered injury or damages.

Attorneys in New Jersey must provide services with reasonable diligence and must exercise that degree of reasonable knowledge and skill that lawyers of ordinary ability and skill possess and exercise.¹

NOTE TO JUDGE

Pursuant to Cellucci v. Bronstein, 277 N.J. Super. 506, 521-22 (App. Div. 1994) (citing Ronald E. Mallen & Victor B. Levitt, Legal Malpractice sec. 253 (2d ed. 1981)), if the case involves an attorney(s) who hold themselves out as a specialist(s) or who has/have been designated by the Supreme Court of New Jersey as a “certified attorney” in civil trial law, criminal trial law, matrimonial law, municipal court law, and workers' compensation law, the trial court should include the following charge in place of the preceding sentence.

The defendant(s) in this case claim(s) to be or hold(s) themselves out as a specialist(s) in the field of [*insert appropriate specialty description*]. Accordingly, a lawyer(s) like defendant(s), who claim(s) to be or hold themselves out as a

¹ See, e.g., Ziegelheim v. Apollo, 128 N.J. 250, 260 (1992); St. Pius X House of Retreats v. Camden Diocese, 88 N.J. 571, 588 (1982); Sommers v. McKinney, 187 N.J. Super. 1, 9 (App. Div. 1996).

specialist in in the field of [*insert appropriate specialty description*], must exercise the knowledge and skill ordinarily possessed by other specialists in this area of law [or of [*insert appropriate specialty description*]].

REMAINDER OF CHARGE

Given what I have just said, it is important for you to know the standard of care which an attorney is required to observe in the attorney's practice of law on behalf of a client under the circumstances of this case. Based upon common knowledge alone, and without legal training, jurors normally cannot know what conduct constitutes standard legal practice. Therefore, the standard of practice by which an attorney's conduct is to be judged must be furnished by expert testimony, that is to say, by the testimony of persons who by knowledge, training or experience are deemed qualified to testify and to express their opinions on legal subjects.

You as jurors should not speculate or guess about the standards of care by which the defendant attorney(s) should have conducted themselves in the practice of law on behalf of the plaintiff. Rather, you must determine the applicable legal standard from the testimony of the expert witness(es) you have heard in this case.

Where there is a conflict in the testimony of the legal experts on a subject, it is for you the jury to resolve that conflict using the same guidelines in determining credibility that I mentioned earlier. You are not required to accept arbitrarily the opinions offered. You should consider the expert's qualifications, training, and

experience, as well as the expert's understanding of the matters to which the expert testified.

Where an expert has offered an opinion upon an assumption that certain facts are true, it is for you, the jury, to decide whether the facts upon which the opinion is based are true. The value and weight of an expert's testimony in such instances is dependent upon, and no stronger than, the facts upon which it is predicated.

When determining the applicable standard of care, you must focus on accepted standards of legal practice and not on the personal subjective belief or practice of the defendant attorney.

NOTE TO JUDGE

If a plaintiff and/or plaintiff's expert asserts that a defendant's conduct violated the Rules of Professional Conduct (RPCs), the following charge should be provided. A violation of the RPCs is not negligence *per se*, but a jury may consider such a violation. See Baxt v. Liloia, 155 N.J. 190 (1998); Albright v. Burns, 206 N.J. Super. 625; Lamb v. Barbour, 188 N.J. Super. 6 (App. Div. 1982).

In this case, plaintiff(s), in support of plaintiff(s)' claim of negligence, asserts that defendant violated one or more of the New Jersey Rules of Professional Conduct, also known as the RPCs or an RPC for short. In this case, plaintiff(s) and/or plaintiff(s)' expert have asserted that defendant has violated RPC [*insert rule*], which provides: [*read RPC*].

The Rules of Professional Conduct has set up a standard of conduct for lawyers in New Jersey. If you find that defendant has violated that standard of conduct, such violation is evidence to be considered by you in determining whether negligence, as I have defined that to you, has been established. You may find that such violation constituted negligence on the part of the defendant, or you may find that it did not constitute such negligence. Your findings on this issue may be based on such violation alone, but in the event that there is other or additional evidence bearing upon the issue, you will consider such violation together with all such additional evidence in arriving at your ultimate decision as to the defendant's negligence.

REMAINDER OF THE CHARGE

The law recognizes that in the practice of law, an attorney cannot guarantee² a favorable outcome. Therefore, the practice of law according to accepted legal standards may not prevent a poor or unanticipated result. Therefore, whether the defendant attorney was negligent depends not on the outcome, but on whether defendant attorney adhered to or departed from the applicable standard of care.

Thus, the obligation or duty of care which the law imposes upon defendant is

² This charge does not deal with or address a situation where a lawyer guarantees or promises a result. In such a situation, a trial court and the parties will have to determine whether there are common law causes of action like breach of contract and/or promissory estoppel. See generally *Murphy v. Implicito*, 392 N.J. Super. 245, 265 (App. Div. 2007) (holding that claim against doctor for failing to provide appropriate medical care is malpractice, but in certain cases where special agreement is made, action may be breach of contract).

to bring to defendant's client that degree of knowledge and skill which are ordinarily possessed and exercised in similar situations by attorneys of ordinary skill and ability [or as a specialist in the field of *[insert area of law]*]. The attorney is obliged to use the attorney's knowledge and skill in an effort to perform the work the attorney undertakes according to the standard of care. This obligation or standard of care requires an attorney or attorneys, among other obligations, to formulate a reasonable legal strategy, and if an attorney formulates a reasonable legal strategy, then the attorney did not commit malpractice even if the outcome of the case/matter was unsuccessful.³

If you find that the defendant(s) has/have complied with the accepted standard of care, then defendant(s) is/are not liable to the plaintiff(s) regardless of the result. On the other hand, if you find that the defendant(s) has/have deviated from the standard of care resulting in injury or damage to plaintiff(s), then you should find defendant(s) negligent and return a verdict for plaintiff(s).

³ See, e.g., *Ziegelheim v. Apollo*, 128 N.J. 250, 261 (1992); *Prince v. Garruto*, 346 N.J. Super. 180, 190 (App. Div. 2001). Trial courts should be careful when charging this sentence because in certain cases, this sentence will not apply and should not be charged. For example, not filing a lawsuit within the statute of limitations does not involve reasonable strategy. This example is not intended to be exhaustive.

B. Common Knowledge May Furnish Standard of Care

NOTE TO JUDGE

This charge should be used if a plaintiff(s) is not supplying or offering expert testimony on the standard of care.

In this case, the plaintiff(s), [*insert plaintiff(s) name(s)*], retained or hired defendant(s) [*insert defendant(s) name(s)*] to represent [*insert plaintiff(s) name(s)*] in the underlying case/matter [*insert information about the underlying case and retention*]. As a result of this retention or hiring, an attorney-client relationship was established between defendant(s) [*insert defendant(s) name(s)*] and plaintiff(s) [*insert plaintiff(s) name(s)*], and defendant(s) were required to represent plaintiff(s) according to the standard of care for lawyers handling a case/matter [*insert type of case in underlying matter*].

Here, plaintiff(s) contend(s) that the defendant(s), [*insert defendant(s) name(s)*], was/were negligent, that is to say, breached or deviated from the standard of care, when defendant(s) represented plaintiff(s) in the underlying case/matter which involved [*insert underlying case/matter type*]. Plaintiff(s) also contend(s) that as a result of defendant(s)' negligence, plaintiff suffered injury or damages.

Attorneys in New Jersey must provide services with reasonable diligence, and must exercise that degree of reasonable knowledge and skill that lawyers of ordinary ability and skill possess and exercise.⁴

Typically, it is necessary to establish the standard of care by expert testimony, that is, by testimony of persons who are qualified by their training, study, and experience to give their opinions on subjects not generally understood by persons who lack such special training or experience. In the typical case, the standard of care for a lawyer by which to judge a defendant lawyer's conduct cannot be determined by a jury without the assistance of expert legal testimony.

However, in certain cases, such as the case at hand, the jury may determine from common knowledge and experience the standard of care by which to judge a defendant's conduct. In this case, plaintiff(s) contend(s) that defendant(s) violated the duty of care defendant(s) owed to plaintiff(s) by doing _____/by failing to do _____. Therefore, it is for you, as jurors, to determine, based upon common knowledge and experience, what skill and care the average attorney practicing in defendant's field would have exercised in the same or similar circumstances. It is for you as jurors to say from your common knowledge and experience whether defendant(s) did something which the average member of

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defendant's profession would not have done or whether defendant failed to do something or failed to take some measure which the average member of defendant's profession would have done or taken in the circumstances of this case in the representation of the plaintiff(s).

NOTE TO JUDGE

Where there has been expert legal testimony as to the standard of care, but the standard is one which can also be determined by the jury from its common knowledge and experience, the jury should determine the standard of care after considering all the evidence in the case, including the expert legal testimony, as well as its own common knowledge and experience. Accordingly, the trial court may need to include language from the previous charge if expert testimony was offered in the case.

NOTE TO JUDGE

The trial court should use the specialist charge and the RPC charge provided above as appropriate, i.e., the trial court should blend the two charges to fit the appropriate case if common knowledge is being used.

REMAINDER OF CHARGE

The law recognizes that in the practice of law, an attorney cannot guarantee⁵ a favorable outcome. Therefore, the practice of law according to accepted legal standards may not prevent a poor or unanticipated result. Therefore, whether the defendant attorney(s) was/were negligent depends not on the outcome, but on

⁵ This charge does not deal with or address a situation where a lawyer guarantees or promises a result. In such a situation, a trial court and the parties will have to determine whether there are common law causes of action like breach of contract and/or promissory estoppel. See generally *Murphy v. Implicito*, 392 N.J. Super. 245, 265 (App. Div. 2007) (holding that claim against doctor for failing to provide appropriate medical care is malpractice, but in certain cases where special agreement is made, action may be breach of contract).

whether defendant attorney(s) adhered to or departed from the applicable standard of care.

Thus, the obligation or duty of care which the law imposes upon defendant(s) is to bring to defendant's client that degree of knowledge and skill which are ordinarily possessed and exercised in similar situations by attorneys of ordinary skill and ability [or as a specialist in the field of *[insert area of law]*]. The attorney is obliged to use the attorney's knowledge and skill in an effort to perform the work the attorney undertakes according to the standard of care.

If you find that the defendant(s) has/have complied with the accepted standard of care, then defendant(s) is/are not liable to the plaintiff(s) regardless of the result. On the other hand, if you find that the defendant(s) has/have deviated from the standard of care resulting in injury or damage to plaintiff(s), then you should find defendant(s) negligent and return a verdict for plaintiff(s).