USE OF AN EXPERT WITNESS TO DISPROVE A LEGAL-MALPRACTICE CLAIM

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CHAPTER 10
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I. INTRODUCTION

The purpose of this paper is to provide an overview regarding the use of expert testimony in a legal-malpractice case. In order to conduct a successful examination of an expert witness, a clear understanding of the elements of the cause of action at issue is critical, as is an understanding of the likely jury charge to be submitted. The elements of the cause of action and the facts to be found by the jury serve as guideposts for direct or cross-examination of an expert.

The first section of this paper will discuss the basis of legal-malpractice liability, focusing specifically on negligence. The use of expert testimony in a legal-malpractice case will also be addressed in this section. The next section will discuss the jury charge in a legal-malpractice case. The final section will discuss the direct and cross-examination of an expert witness in a legal-malpractice case with an application to a specific set of hypothetical facts.

II. HYPOTHETICAL

In order to better illustrate the topics that will be covered in this paper, the following hypothetical will be used and referenced throughout: the case is a legal-malpractice case that arises out of the representation of Ms. Allen by Mr. Best. In April 2000, Ms. Allen injured her right knee in a fall during an on-the-job accident. Dr. Dunn treated her for that injury. Ultimately, he operated on her right knee. Ms. Allen contends that a pre-surgery MRI showed a torn medial meniscus. However, Dr. Dunn’s operative report indicates that when he explored the medial meniscus during surgery, he noticed that it was healing. The operative report also noted that Dr. Dunn observed a problem with the lateral meniscus, which he repaired during that same surgery. Ms. Allen reported that following her surgery, she failed to enjoy any relief from her pain and disability and therefore began treatment with Dr. East, who had a second MRI done. This second MRI showed a medial meniscus tear. In October 2000, Dr. East operated on and repaired Ms. Allen’s medial meniscus. Before that surgery, he told her that Dr. Dunn should have repaired her medial meniscus in the surgery that Dr. Dunn had performed.

Ms. Allen says that she consulted with Mr. Best in September 2001, asking him to represent her in a medical-malpractice case against Dr. Dunn. She said that Mr. Best agreed and had her sign a Power of Attorney with a “letterhead” saying “Best & Cole,” under which was printed “An Association of Trial Lawyers.” Ms. Allen had sporadic contact with Mr. Best until January 2003, when she learned that he had died and had never filed suit against Dr. Dunn.

During Mr. Best’s representation of Ms. Allen, he and four other attorneys shared office space with another attorney, Mr. Cole, who had rented the space. Another attorney in the office worked directly for Mr. Cole. Sometimes, attorneys sharing the office space accepted referrals from Mr. Cole. In those instances, Mr. Cole and the attorney to whom he referred a case would share any recovery of fees, but not expenses, which were always borne by Mr. Cole. Each attorney primarily handled his own docket of cases in which Mr. Cole had no legal or monetary involvement. Mr. Cole never met with Ms. Allen and had no monetary interest in her medical-malpractice case.

After learning that Mr. Best had failed to sue Dr. Dunn, Ms. Allen hired an attorney to sue Mr. Best’s estate. That attorney learned that Mr. Best had not been covered by an errors and omissions policy but that Mr. Cole had coverage. Ms. Allen sued both Mr. Best’s estate and Mr. Cole for negligently failing to sue Dr. Dunn before the running of the statute of limitations. The pleadings alleged that Mr. Best and Mr. Cole were partners or, alternatively, that Mr. Best was Mr. Cole’s ostensible agent.

III. BASIS OF LEGAL-MALPRACTICE LIABILITY

In order to properly prepare for and conduct the examination or cross-examination of an expert to disprove legal malpractice, one must keep in mind the basis for a legal-malpractice suit in Texas. Understanding the necessary elements for a prima facie case can serve not only as a guide for establishing a legal-malpractice claim, but also as an outline for the examination of an expert witness.

Potential theories of recovery against attorneys include negligence, breach of fiduciary duty, DTPA, and breach of contract. Which theory applies depends on the nature of the facts giving rise to the claim. See Latham v. Castillo, 972 S.W.2d 66 (Tex. 1998); Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921 (Tex. App.—Fort Worth 2002, pet. denied). This paper focuses on claims sounding in negligence, the typical legal-malpractice case. Specifically, as indicated by the hypothetical, the paper discusses negligence in handling

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1 Any similarity of names used in this hypothetical with real persons or similarity to facts of a real case is purely coincidental as this hypothetical is for illustrative purposes only.
litigation rather than negligence in handling a transactional matter.

A. Negligence in Handling Litigation — the Suit Within a Suit

As with other negligence suits, a claim of negligence against a professional includes the following elements: 1) a duty of care owed to the client by the professional, 2) a breach of that duty, 3) proximate cause, and 4) damages. See GMAC v. Crenshaw, Dupree & Milam, L.L.P., 986 S.W.2d 632, 636 (Tex. App.—El Paso 1998, pet. denied). Stated differently, the failure to use ordinary care, the result of which proximately causes injury, constitutes actionable “negligence.” Thus, in a professional-malpractice case, negligence is defined as failure to use the ordinary care required of the same kind of professional under the same or similar circumstances which results in injury to the client.

In addition to establishing a duty and breach, the plaintiff must prove that the attorney’s negligence caused him damage. This element of proof gives rise to the “suit within a suit” concept. A plaintiff in a legal-malpractice case must prove that “but for” the defendant attorney’s negligence, he probably would have won the underlying case. See Schaeffer v. O’Brien, 39 S.W.3d 719, 721 (Tex. App.—Eastland 2001, pet. denied). This “but for” requirement forces plaintiff to litigate two trials at once: one “suit” on the underlying claim and another on the current malpractice claim. Therefore, the ex-client, plaintiff in the primary suit, must adduce evidence from the underlying case that 1) the defendant in the underlying case owed the plaintiff a duty, 2) the defendant breached that duty, 3) the plaintiff was damaged by the defendant’s conduct, and 4) the plaintiff would have recovered his damages had the attorney representing him in the underlying case not been negligent. A legal-malpractice defendant may argue the position of the defendant from the underlying case as a possible defense to the current malpractice claim (e.g., Mr. Best would offer proof that Dr. Dunn did not commit medical malpractice). See Gibson v. Johnson, 414 S.W.2d 235 (Tex. Civ. App.—Tyler 1967, writ ref’d n.r.e.), cert. denied, 390 U.S. 946 (1968). And even if that defense fails and the legal-malpractice plaintiff proves liability and causation, plaintiff must also prove that he could have collected a judgment against the underlying defendant. Cosgrove v. Grimes, 774 S.W.2d 662, 665–66 (Tex. 1989); Gibson, 414 S.W.2d at 238–39 (the burden of proof is on the client to prove that his suit would have been successful but for the negligence of his attorney, and to show what amount would have been collectible had he recovered judgment).

To clarify the above points, it may be helpful to apply these requirements to our hypothetical fact pattern. Let us first focus only upon Ms. Allen’s claims against the estate of her former attorney, Mr. Best. Ms. Allen has filed a legal-malpractice claim against the estate of Mr. Best (primary case) since Mr. Best never filed a medical-malpractice suit against Dr. Dunn (underlying case). The “suit within a suit” concept applied to these facts would mean that Ms. Allen will have to prove not only that Mr. Best was negligent in the performance of his legal duties but also that Dr. Dunn was negligent in the performance of his medical duties, that Dr. Dunn’s negligence proximately caused Ms. Allen injury, that Ms. Allen suffered damages, and that Ms. Allen could have collected a judgment from Dr. Dunn or his insurer. If Mr. Best negates even one of the required elements in either case, he wins. In some sense, an attorney gets two bites at the apple while a plaintiff must succeed at two levels to recover in the primary suit.

B. Expert-Witness Testimony

The standard of care for a professional usually must be established by an expert in the relevant field. In other words, the law recognizes that the jury needs “assistance” in determining what the standard of care for a certain profession is before it can determine whether that standard has been breached. In most malpractice cases, an expert is called upon to establish the standard of care for an ordinarily prudent professional in the situation at issue. See, e.g., I.O.I. Systems, Inc. v. City of Cleveland, 615 S.W.2d 786, 790 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.). An expert witness must be qualified to provide an opinion in the relevant field under examination. Whether an expert is qualified to testify is a preliminary question decided by the trial court. TEX. R. EVID. 104(a).

An expert witness is qualified by “knowledge, skill, experience, training, or education” and must have special knowledge about the particular situation in which he intends to provide testimony. TEX. R. EVID. 702; Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 588 (1993). However, this rule does not prevent a defendant from qualifying as an expert on the subject of his own liability. See Tijerina v. Wennermark, 700 S.W.2d 342, 347 (Tex. App.—San Antonio 1985, no writ); disapproved on other grounds, Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989). In E.I. du Pont de Nemours and Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995), the Texas Supreme Court held that in addition to showing that an expert witness is qualified, Rule 702 also requires that the expert’s testimony be relevant to the issues in the case and based upon a reliable foundation. As a result of the Daubert and Robinson decisions, trial courts became
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In most legal-malpractice cases, an expert witness is necessary to establish a prima facie case against the defendant attorney. That attorney expert must withstand Daubert/Robinson challenges, meaning he should be experienced in handling the type of matter undertaken by the defendant attorney in the underlying case. For example, if the legal-malpractice defendant is a personal-injury attorney, it will be more persuasive to use another personal-injury attorney rather than a securities litigator to define the relevant standard of care. A securities litigator might qualify as an expert, depending on his experience and on the specific malpractice issue, but is less likely to understand the nuances and hold up as well under cross-examination. Further, an additional expert witness may be necessary to establish the breach of duty of the defendant from the underlying case and the damages suffered by the plaintiff from that conduct. For instance, if the underlying case involved surgical error, a medical expert would be necessary to establish the negligence of the surgeon from the underlying case and the injuries flowing therefrom. However, when the malpractice is “common knowledge,” no expert is required. See Roark v. Allen, 633 S.W.2d 804, 809 (Tex. 1982), citing Hood v. Phillips, 554 S.W.2d 160, 165 (Tex. 1977). Examples of matters that are within the common knowledge of laymen include: 1) operating on the wrong part of the body, or 2) leaving surgical instruments or sponges in the body. See Martin v. Petta, 694 S.W.2d 233, 239 (Tex. App.—Fort Worth 1985, writ ref’d n.r.e.).

Applying these principles to our fact pattern, we will need one attorney expert witness, preferably one who is experienced in dealing with medical-malpractice cases, to testify that Mr. Best was not negligent and did not injure Ms. Allen. The same expert may also testify that there was no liability on Mr. Cole’s part simply for sharing office space with Mr. Best. We will also need a physician expert witness to testify that Dr. Dunn did not breach the relevant standard of care and that Dr. Dunn’s conduct did not cause any injury. This approach gives Mr. Best various ways to escape liability. Mr. Cole can escape liability if the jury absolves Mr. Best for any reason and also if Mr. Cole can establish that no agency relationship existed with Mr. Best.

IV. JURY CHARGES

The jury charge itself can serve as an outline for examination on direct or cross-examination. The charge can help determine which witnesses to call, what questions to ask, and all necessary elements of proof. A specific instruction in the damages question tells the jury in a legal-malpractice case to award only those damages recoverable and collectible in the underlying suit. Tex. PJC 61.4, 61.1. From a defense standpoint, an instruction or separate question focusing the jury on this critical causation issue is warranted and should be requested. In Cosgrove, the trial court submitted a separate question asking whether the attorney’s negligence adversely affected the plaintiff. See Cosgrove, 774 S.W.2d at 665.

A. Example Jury Charge

QUESTION 1:

Did the negligence, if any, of Mr. Best proximately cause the occurrence in question?

“NEGLIGENCE” when used with respect to the conduct of the defendant, means failure to use ordinary care; that is, failing to do that which an attorney of ordinary prudence would have done under the same or similar circumstances or doing that which an attorney of ordinary prudence would not have done under the same or similar circumstances.

“ORDINARY CARE” when used with respect to the conduct of the defendant, means that degree of care that
could be used by an attorney of ordinary prudence under the same or similar circumstances.

“PROXIMATE CAUSE” when used with respect to the conduct of the defendant, means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that an attorney using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom.

In order for the negligence, if any you find, of Mr. Best to have been a proximate cause of damage to Ms. Allen, you must find that had Ms. Allen sued Dr. Dunn, he would have been found negligent in his care of her and that the negligence of Dr. Dunn would have been found a proximate cause of damages to Ms. Allen.

Answer “Yes” or “No”:
Answer: _______________

If you have answered “Yes” to Question No. 1, then answer Question No. 2. Otherwise do not answer Question No. 2.

QUESTION 2:
What sum of money, if paid now in cash, would fairly and reasonably compensate Ms. Allen for her loss, if any, resulting from the occurrence in question?
Do not reduce the amount, if any, in your answer because of the negligence, if any, of Ms. Allen. Do not include interest in any amount of damage you find.
You shall award the sum, if any, that Ms. Allen would have recovered and collected if her original suit against Dr. Dunn had been properly prosecuted.

Answer in dollars and cents for damages, if any:
Answer: _______________

QUESTION 3:
Was there an ostensible agency relationship between Mr. Best and Mr. Cole with respect to Mr. Best’s representation of Ms. Allen?

An ostensible agency relationship existed if (1) Ms. Allen had a reasonable belief that Mr. Best was the agent or employee of Mr. Cole, (2) such belief was generated by Mr. Cole’s affirmatively holding out Mr. Best as his agent or employee, or by Mr. Cole’s knowingly permitting Mr. Best to hold himself out as his agent or employee, and (3) Ms. Allen justifiably relied on the representation of authority.

Answer “Yes” or “No”:
Answer: _______________

See Tex. PJC 52.4 (2002).

V. DISPROVING LEGAL MALPRACTICE ON DIRECT EXAMINATION
A. General Discussion
In determining which legal expert to employ in a legal-malpractice case, it may be helpful to choose an attorney who is experienced in handling claims involving legal malpractice as well as the type of “underlying case.” This is because such an attorney will be better able to educate the jury on the “suit within a suit” concept and the relevant standard of care. On direct, the best practice is to have the legal expert begin by explaining all the elements of a legal-malpractice cause of action. The expert should then provide an opinion regarding the defendant attorney’s conduct as to each element. Finally, the legal expert should address the adverse expert’s criticisms regarding the defendant attorney’s conduct.

The same legal expert can also be used to explain the elements from the underlying case that the plaintiff must prove to establish liability. If an additional expert is needed to “defend” the underlying case, thought should be given to the type of expert that could best explain the relevant standard of care for the field in question.

B. Application
Application of the above principles to our case will develop as follows: 1) we will have our legal expert testify to the necessary elements needed to prove legal malpractice, 2) our legal expert will then testify about the relevant standard of care and how Mr. Best’s conduct comported with that standard of care, 3) our legal expert will negate the criticisms that were made by plaintiff’s expert, 4) we may have our legal expert discuss the elements needed to prove medical malpractice, and 5) we may have our legal expert establish the elements for ostensible agency and explain why no ostensible agency was created in this situation. In addition to this testimony, we will call an orthopedic surgeon to testify about the relevant standard of care in the field of orthopedic surgery and about how Dr. Dunn complied with that standard of care.

With regard to the underlying medical-malpractice case, our focus will be on proving that Dr. Dunn followed the relevant standard of care for his field. The elements for a medical-malpractice cause of action are like any other negligence claim: 1) existence of a duty (physician-patient relationship), 2) breach of that duty, 3) proximate causation, and 4) damages. Points we will want to focus on during our direct examination of the orthopedic surgeon involve negating the breach, proximate cause, and damage elements of the medical-malpractice claim. First, we will want to establish that Dr. Dunn was operating
within the standard of care when he performed surgery on Ms. Allen’s knee. To bolster this argument, we will refer to Dr. Dunn’s operative report, which notes that Ms. Allen’s medial meniscus was healing. We will want our expert to testify that Dr. Dunn was acting within the standard of care when he decided not to operate on the medial meniscus due to the fact that it was healing. Our expert should also point out that with ordinary and even extraordinary care, results are not always as hoped for. Physicians are not liable for undesirable results, only for negligence. See Bowles v. Bourdon, 213 S.W.2d 713, 715 (Tex. Civ. App.—Galveston 1948, no writ).

We will also want to elicit testimony that undermines the causation element in the underlying case. For example, our expert may be able to testify that in his opinion, the medial meniscus was healing at the time of the first surgery and that something plaintiff did later caused the need for the second surgery. Or, the expert may testify that plaintiff would have had an identical course after the first surgery, if the medial meniscus had been repaired then, as she had after the second surgery; this testimony would limit the causal effect of any negligence to the cost and time of the second surgery.

With regard to the primary legal-malpractice claim, our legal expert may opine that the reason Mr. Best never filed suit against Dr. Dunn was because Mr. Best read Dr. Dunn’s operative report noting the healing of Ms. Allen’s medial meniscus. We will want the expert to testify that Mr. Best was acting within the standard of care when he made a good-faith decision that prosecuting a suit against Dr. Dunn would have been unsuccessful. We will want our expert to emphasize the fact that Mr. Best acted as a reasonably prudent attorney would have acted in the same situation. This testimony will support a “No” answer to the liability question since an attorney who makes a decision that a reasonably prudent attorney could have made under the same or similar circumstance is not liable for negligence even if the result is undesirable. See Cosgrove, 774 S.W.2d at 665.

The absence of ostensible agency will be the final area we may try to develop through expert testimony. Our expert will have carefully reviewed Ms. Allen’s deposition, and may have heard or read her trial testimony, so that he can testify that Ms. Allen did not have a reasonable belief that Mr. Best was Mr. Cole’s agent, that no affirmative act by Mr. Cole generated that belief, and that Ms. Allen did not justifiably rely on any representation of authority by Mr. Best. We may also want to have our expert testify that the designation “association of trial lawyers” does not make one attorney working in the same office space with other attorneys liable on the other attorneys’ cases. On proper objection, though, the trial court might not allow our expert’s testimony on ostensible agency because the testimony arguably encompasses legal matters for the court or factual matters on which expert testimony is unnecessary.

VI. DISPROVING LEGAL MALPRACTICE ON CROSS-EXAMINATION

A. General Discussion

One of the primary purposes of cross-examination is to overcome, qualify, or explain testimony given on direct examination by eliciting additional information from the witness. William V. Dorsaneo, III et al., Texas Civil Trial Guide § 70.02 (1st ed. 1989 & Supp. 2002). During the cross-examination of an adverse expert witness, the only viable course of action may be to attempt to disprove at least one or two of the facts used by the expert as a basis for his opinion. An unfavorable witness, such as an adverse expert, should be cross-examined about the possibilities favoring the cross-examiner’s side, even if the expert may have testified otherwise on direct. Id. at § 70.11. If the examining attorney can get the expert to admit that something is possible, then the cross-examination may cast some doubt on the expert’s direct testimony. If the examining attorney can then find at least one point that favors the “possible” theory more than the “probable” theory and get the adverse expert to admit that fact, then the examining attorney has made points with the jury.

B. Application

Regarding the medical-malpractice claim, our focus should be on Dr. Dunn’s operative report and the fact that he believed Ms. Allen’s medial meniscus was healing. Our goal is to have the expert agree that Dr. Dunn was acting within the standard of care when he chose not to operate on Ms. Allen’s medial meniscus. To accomplish this goal, it might be helpful to start by discussing a relevant example with the adverse expert. In our case, that example could be exploratory surgeries. We will attempt to have the adverse expert admit that it is common, or at least within the standard of care, for a surgeon to do exploratory surgery on a patient and, upon realizing that nothing is amiss, to close without making any unnecessary repairs. We may also want to address the fact that unnecessary repairs can cause other complications such as scar tissue that may lead to future problems. Our strategy here will be to have the expert admit that Dr. Dunn was acting within the standard of
care when he decided not to operate on Ms. Allen’s medial meniscus after he reasonably believed it was healing.

Another area that we might consider exploring with the expert is the possibility that Ms. Allen’s medial meniscus was in fact healing at the time Dr. Dunn operated but that she re-injured her knee following that surgery. We want the jury to hear the possibility that the reason a medial meniscus tear showed up on the second MRI was due to something Ms. Allen did after her first surgery and not due to something Dr. Dunn failed to do. Even if the expert argues that this is not what occurred, he may agree that it is possible that Ms. Allen re-injured her knee subsequent to her first surgery, or he may look extremely biased if the objective facts suggest the possibility of a re-injury. Cross-examination may also address the damages issue. Even if the expert believes Dr. Dunn was negligent, we may elicit admissions that limit the damages.

Our next hurdle to overcome is the plaintiff’s attorney-expert. Our goal here is two-fold. First, we will want the expert to agree that simply because a client receives an unfavorable result does not, by itself, mean that the attorney was negligent in the handling of the case. We may even want to ask the expert about his own unfavorable experiences as examples. This will at least establish for the jury that bad results do not necessarily equate to malpractice liability. Second, we will want to have the expert eventually agree that Mr. Best was acting within the standard of care when he decided not to file suit against Dr. Dunn. The expert will probably not admit this, but we may help our defense by getting the expert to discuss situations in which attorneys have rejected bad cases, or accepted cases they initially thought had merit, only to later withdraw. These points should be made on cross to at least present the possibility to the jury that Mr. Best accepted what he thought was a good case based on what the client told him when, in fact, the objective record suggested little or no chance of recovery. It will be beneficial to our defense if we can get the expert to agree that it is not uncommon for an attorney to accept a case, conduct some preliminary discovery, and then learn that the case has little merit.

Although the cross-examination of a well-prepared adverse expert may not be the highlight of the defense, cross-examination offers opportunities if properly orchestrated to cast doubt on the expert’s direct testimony and to open the door for alternative explanations of the conduct at issue.

**VII. CONCLUSION**

In a legal-malpractice case, it is important to see the forest as well as the trees. The direct and cross-examination of experts should focus on the weakest links in the plaintiff’s case. Those weak links will vary from suit to suit, but proper preparation should illuminate where the best attack lies. Because a plaintiff trying the suit within a suit must offer proof on so many elements, the defense usually has good opportunities through examining both sides’ experts to create doubt about and to undermine plaintiff’s case.