

Experts in Legal Malpractice Cases: Necessary Today, Excluded Tomorrow

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Many of us who defend law firms or serve in a firm's General Counsel office know well the rule that, in order to prevail at trial, the plaintiff in a legal malpractice case usually must offer testimony from a competent expert establishing that the defendant lawyer failed to comply with the standard of care. See, e.g., *Pongonis v. Saab*, 396 Mass. 1005 (1985). An exception exists where the malpractice is so obvious that a layperson can recognize it without the aid of an expert, or where the lawyer disobeys his or her client's lawful instructions. In those instances, expert testimony is not required.

The necessity of expert testimony in most cases does not mean, however, that experts are allowed to testify in all cases. A recent decision by the Supreme Court of New York illustrates this point. In *Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, Index No. 650318/2011, the plaintiff alleges that the defendant law firm gave it bad advice concerning an agreement for an investment bank's fee during a proxy fight in 2005. Shortly before trial, the plaintiff moved to exclude the testimony of several expert witnesses that the firm intended to call to testify that the firm acted reasonably and did not commit malpractice. In its August 1, 2018 order, the court (O.P. Sherwood, Justice) concluded that no expert testimony on the standard of care would be admitted because the case turned on a simple factual dispute about whether the firm had provided certain advice to the client. If the jury concludes that the advice (not to sign a proposed amendment to the bank's fee agreement) was provided, then there was no negligence. If the jury concludes that the advice was not provided, but that instead the law firm erred in allowing its client to sign an amendment that did not accurately reflect the terms of the parties' agreement, then the firm was negligent. The court found that deciding what advice the firm provided based upon the conflicting testimony will not "involve matters outside the ken of the typical juror," nor will it "require[] specialized knowledge." Accordingly, the court held that "no expert testimony is needed."

Red Zone underscores the importance of thinking critically about the need for and admissibility of expert testimony in every legal malpractice case. If you have a professional liability question or business concern, we invite you to reach out directly to any member of our [Professional Liability Litigation](#) group.