1023.5 PROFESSIONAL NEGLIGENCE: LEGAL—STATUS OF LAWYER AS A SPECIALIST IS NOT IN DISPUTE

In providing legal services to a client, it is a lawyer's duty to use the degree of care, skill, and judgment which reasonably prudent lawyers practicing in this state would exercise under like or similar circumstances. A failure to conform to this standard is negligence. The burden is on (plaintiff) to prove that (lawyer) was negligent.

You are to determine whether (lawyer) was negligent in representing (plaintiff) in light of the facts and circumstances of which (lawyer) was aware or should have discovered at the time legal services were provided to (plaintiff). A lawyer is negligent if the lawyer fails to discover or recognize the importance of relevant facts or legal principles which reasonably prudent lawyers would discover or recognize or if the lawyer's skill or judgment was not consistent with that exercised by reasonably prudent lawyers. A lawyer is not negligent because of the results of (his) (her) representation, if (his)(her) efforts were those reasonably prudent lawyers would have taken.

[Use this paragraph if the parties stipulate or the trial judge finds as a matter of law that the lawyer presented himself or herself as a specialist in the relevant area of law: Lawyers who present themselves to the public or their clients as having special experience, knowledge, or skill in a particular area of law are held to the standard of care of reasonably prudent lawyers with that special experience, knowledge, or skill. This is the standard you should apply in considering question _____ of the special verdict.]

You have heard testimony during this trial from lawyers who have testified as expert witnesses. The reason for this is because the degree of care, skill, and judgment which a reasonably prudent lawyer would exercise is not a matter within the common knowledge of lay persons. This standard is within the special knowledge of experts in the

field of law and can only be established by expert testimony. You, therefore, may not speculate or guess what that standard of care, skill, and judgment is in deciding this case, but rather must attempt to determine this from the expert testimony that you heard in this trial.

(Also Give Wis JI-Civil 265.)

SPECIAL VERDICT

1. Was (lawyer) negligent in providing legal services to (plaintiff)?

Answer: _____
Yes or No

COMMENT

This instruction and comment were approved in 1997. The comment was updated in 1998, 2002, 2003, 2016, 2020, and 2021. If the status of the lawyer as a specialist is in dispute, see Wis JI-Civil 1023.5A.

Consistent with the supreme court's direction in medical malpractice cases, the Committee has eliminated reference to "guaranteed results" and has framed the duty of lawyers in terms of "reasonable care" rather than in reference to what is "usually exercised" by lawyers. See Nowatske v. Osterloh, 198 Wis. 2d 419, 543 N.W.2d 265 (1996), and Comment to Wis JI Civil 1023.

Elements. The Wisconsin Supreme Court has said that the following rule governs legal malpractice actions:

> In an action against an attorney for negligence or violation of duty, the client has the burden of proving the existence of the relation of attorney and client, the acts constituting the alleged negligence, that the negligence was the proximate cause of the injury, and the fact and extent of the injury alleged. The last element mentioned often involves the burden of showing that, but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action. Lewandowski v. Continental Casualty Co., 88 Wis.2d 271, 277, 276 N.W.2d 284 (1979). See also Kraft v. Steinhafel, 2015 WI App 62, 364 Wis.2d 672, 869 N.W.2d 506.

To establish causation and injury in a legal malpractice action, the plaintiff is often compelled to prove the equivalent of two cases in a single proceeding or what has been referred to as a "suit within a suit." Lewandowski v. Continental Casualty Co., 88 Wis.2d 271, 277, 276 N.W.2d 284 (1979); Helmbrecht v. St. Paul Ins. Co., 122 Wis.2d 94, 103, 362 N.W.2d 118 (1985); see also Pierce v. Colwell, 209 Wis.2d 355, 563 N.W.2d 166 (Ct. App. 1997). This entails establishing that, "'but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action.'" Lewandowski, 88 Wis.2d at 277, citing 7 Am. Jur. 2d, Attorneys at Law, sec. 188 at 156 (1963).

In Helmbrecht v. St. Paul Ins. Co., supra, the court made several important holdings which cleared up some uncertainty. First, in calculating damages due to the loss of a claim, an objective standard should be used, i.e., what a reasonable judge (jury) would have awarded in the initial action. Second, the court said the Code of Professional Responsibility, although beneficial as an ethical guide, "does not exhaustively define the obligations an attorney owes his client," nor does it "undertake to define standards for civil liability of lawyers for professional conduct." 122 Wis.2d at 111.

In Denzer v. Rouse, 48 Wis.2d 528, 534 180 N.W.2d 521 (1970), the court said that "between the end points of competence and malpractice lies a broad area of difficult and complex situations in which an attorney is bound to exercise his best judgment in the light of his education and experience, but is not held to a standard of perfection or infallibility of judgment."

Cause. The court of appeals in 1997 considered the following question: When a client is represented sequentially by two lawyers, both of whom were arguably negligent with respect to the same manner, can the first lawyer's alleged negligence be a cause of the client's damages if the client would not have sustained any damage if the second lawyer could have prevented the harm but did not? The court of appeals concluded that the answer to this question was "no." Seltrecht v. Bremer, 214 Wis.2d 110, 571 N.W.2d 686 (Ct. App. 1997).

Outcome of Representation. In DeThorne v. Bakken, 196 Wis. 2d 713, 539 N.W.2d 695 (1995), the court of appeals considered a lawyer's mistaken judgment that was made in good faith. The court stated: "we will not hold attorneys responsible when their decisions are ones that a reasonably prudent attorney might make even though they are later determined by a court of law to be erroneous." Id. at 724. The Committee believes that juries should be informed that the outcome of the representation is not determinative of lawyer's negligence. The jury should, instead, determine whether the representation conformed with reasonable care, considering all of the evidence.

Nature of Representation. If there is a dispute concerning the nature or scope of the representation, add the following paragraph:

Whether (lawyer) has discharged (his) (her) duty depends on the purpose for which (lawyer) was retained or agreed to provide representation. The purpose (or scope) of the representation for which the (lawyer) was retained is for you to determine from the evidence. It is irrelevant to the determination of the lawyer's negligence whether the lawyer was paid.

Specialists. The court of appeals has adopted the higher standard of care for lawyers who represent themselves as specialists in Duffy Law Office v. Tank Transport, Inc., 194 Wis. 2d 675, 535 N.W.2d 91 (1995). The Committee recommends use of the higher standard paragraph when the trial court finds that there is credible evidence of such representation by the lawyer. See also JI-Civil 1023.5A. Since most areas of practice do not have State Bar sanctioned specialty certification, these

cases will generally present a question of fact concerning whether the lawyer held himself or herself out as a specialist to the public or to the particular client. (Patent and admiralty practice have recognition as specialists by policy and tradition in federal courts.)

Contributory Negligence. The contributory negligence of a client can be a defense in a legal malpractice action. Gustavson v. O'Brien, supra at 204.

Tort Versus Contract Claim. The Wisconsin Supreme Court has stated that legal malpractice may give rise to either a tort claim or a contract claim. The tort claim arises from a breach of the attorney's common law duty; whereas, the contract claim arises from a breach of a duty created by contractual agreement between the attorney and the client. See Milwaukee County v. Schmidt, Gardner, and Erickson, 43 Wis.2d 445, 168 N.W.2d 559 (1969); Klingbeil v. Saucerman, 165 Wis. 60, 160 N.W. 1051 (1917).

Expert Testimony. Expert testimony is not required to establish a standard of care in cases involving conduct not necessarily related to legal expertise where the matters to be proved do not involve special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind and which require special learning, study, or experience. Nor is expert testimony required where no issue is raised as to defendant's responsibility, where the negligence of defendant is apparent and undisputed, and where the record discloses obvious and explicit carelessness in defendant's failure to meet the duty of care owed to plaintiff for the court will not require expert testimony to define further that which is already abundantly clear. Olfe v. Gordon, 93 Wis.2d 173, 286 N.W.2d 573 (1980). See also Kraft v. Steinhafel, 2015 WI App 62, 364 Wis.2d 672, 869 N.W.2d 506; DeThorne v. Bakken, 196 Wis. 2d 713, 718, 539 N.W.2d 695 (1995). In Olfe v. Gordon, supra, the client's claim alleged negligence by the attorney in failing to follow specific instructions. The court concluded that proof of this negligence does not require expert testimony. Such a claim is controlled by the law of agency. Thus, the duties of care owed by the attorney to the client are established not by the legal profession's standards but by the law of agency. The court held that a jury is competent to understand and apply the standards of care to which agents are held. Olfe v. Gordon, supra at 184 (citing Wis JI-Civil 4000, Agency: Definition, and Wis JI-Civil 4020, Agent's Duties Owed to Principal).

Damages. The supreme court has said it is appropriate, in some complex cases, for the trial judge to determine reasonable attorney's fees as a matter of law. See Glamann v. St. Paul Fire & Marine Ins., 144 Wis.2d 865, 424 N.W.2d 924 (1988). For the determination and awarding of attorney fees (both trial and appellate), see Glamann, supra at 870-75.

Legal Malpractice Claim for Criminal Defense. The court of appeals has held that, in a legal malpractice claim for criminal defense, the plaintiff must prove that he or she did not commit the offenses of which he or she was convicted. Hicks v. Nunnery, 253 Wis.2d 721, 643 N.W.2d 809 (2002). This proof requirement is commonly referred to as the "actual innocence" rule, and was adopted in Hicks as a matter of public policy. More specifically, this rule is meant to prevent individuals who commit criminal offenses and are convicted of those crimes from recovering damages for legal malpractice. In such a case, the following language is suggested:

> Question no. _____ asks whether (Plaintiff) is innocent of the charge of _____. This charge consists of the following elements: (Here explain the elements of the offense from the appropriate instruction in Wisconsin Jury Instructions-Criminal.)

(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) is innocent.

[Give JI-Civil 200, Ordinary Burden of Proof]

The suggested question for the special verdict is:

Was Plaintiff innocent of the charge of _____?

The court of appeals in Hicks states that "the question of plaintiff's innocence is in addition to, not a substitute for, a jury question regarding whether the plaintiff would have been found not guilty absent the defendant's negligence. A defendant's negligence must . . . have been a substantial factor contributing to the plaintiff's conviction." Thus, the questions of existence of the attorney-client relationship, negligence, causation and damages would be first submitted for the jury's consideration.

Actual Innocence Rule. The application of the actual innocence rule has been considered in several Wisconsin decisions. As noted, the rule was first adopted in Hicks v. Nunnery, supra, which held that, in addition to proving the four elements of a standard legal malpractice claim, public policy considerations require that a criminal malpractice plaintiff must also establish that he or she "is innocent of the charges of which he [or she] was convicted." Hicks, supra at ¶46. This is true even if a plaintiff can prove that his or her conviction resulted from their attorney's failure "to bring a clearly meritorious motion to suppress evidence that establishes guilt, which the state could not prove without it[,]" Id. at ¶43.

The court of appeals later relied on the actual innocence rule adopted by Hicks in Tallmadge v. Boyle, 300 Wis.2d 510, 730 N.W.2d 173 (2007). In this decision, the court stated that the public policy considerations supporting the actual innocence rule require that the criminal malpractice plaintiff must "prove that 'but for' that defense counsel's actions, the convicted criminal would be free." Id. at ¶22. This principle was later refined in Skindzelewski v. Smith, 2020 WI 57, 392 Wis.2d 117, 944 N.W.2d 575. In that case, the claimant conceded his guilt to the underlying offense but advocated for an exception to the actual innocence rule because his attorney had negligently failed to raise a statute of limitations defense that would have precluded his conviction. Stating that such an exception would be contrary to public policy considerations and would reward criminality, the court in Skindzelewski explained that even if an attorney's negligence results in a conviction that is unauthorized by law, there is no applicable exception to the actual innocence rule if the error does not negate a guilty defendant's culpability. Id. at 128. The court concluded that "[T]he law bars such legal malpractice claims because even if an attorney's negligence harms a defendant by adversely affecting the outcome of the case, attorney error does not negate a guilty defendant's culpability." Id. at 130.

Nonliability of an Attorney to a Non-Client. A longstanding rule in Wisconsin is that an attorney is not liable to a non-client for "acts committed in the exercise of his [or her] duties as an attorney. See Auric v. Continental Cas. Co., 111 Wis.2d 507, 512, 331 N.W.2d 325 (1983). However, there are exceptions to this rule in the context of estate planning. The "Auric exception," established in Auric, holds that the beneficiary of a will may maintain an action against an attorney who negligently drafted or supervised the execution of a will even though the beneficiary is a third-party not in privity with the attorney. In general, this exception allows a named beneficiary to sue an attorney for malpractice when the beneficiary can show that he or she was harmed by attorney negligence that frustrated the intent of the attorney's client.

In 2009, the post-Auric decision of Tensfeldt v. Haberman, 2009 WI 77, 319 Wis.2d 329, 768 N.W.2d 641 seemed to narrowly limit the Auric exception to negligence by an attorney in drafting or supervising the execution of an estate-planning document which resulted in a loss to a named beneficiary. However, the supreme court's holding in MacLeish v. Boardman Clark LLP, 2019 WI 31, 386 Wis.2d 50, 924 N.W.2d 799, provided that "[t]he narrow Auric exception to the rule of nonliability of an attorney to a non-client applies to the administration of an estate in addition to the drafting of a will. That is, a non-client who is a named beneficiary in a will has standing to sue an attorney for malpractice if the beneficiary can demonstrate that the attorney's negligent administration of the estate thwarted the testator's clear intent." Id. at ¶48.

For estate planning post-MacLeish, see Pence v. Slate, 387 Wis.2d 685, 928 N.W.2d 806 (Table), 2019 WI App 26.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.