

**1023.5B PROFESSIONAL NEGLIGENCE: LEGAL – DISPUTE AS TO STATUS OF LAWYER HAVING CLAIMED EXPERTISE<sup>1</sup>**

When providing legal services to a client, a lawyer must exercise the degree of care, skill, and judgment that reasonably prudent lawyers in this state would use under comparable circumstances. A lawyer is negligent if he or she fails to exercise the skill, knowledge, and care that reasonably prudent lawyers would exercise under comparable circumstances, whether by failing to investigate or research; or by overlooking or misapplying relevant facts or legal principles; or by committing acts or omissions that fall below the applicable standard. However, lawyers who present themselves to the public or their clients as having claimed expertise—that is specialized experience, knowledge, or skill in a particular area of law—are held to a different standard of care, that being the standard of care that reasonably prudent lawyers with that expertise would exercise. This is the heightened standard of care. The plaintiff has the burden of proving that the lawyer was negligent.

It is for you to decide, based on the evidence, whether (lawyer) presented (himself) (herself) as having expertise in the relevant area of law. If your answer to question \_\_\_ is “yes,” indicating that (lawyer) held (himself) (herself) out as having expertise, you must apply the heightened standard of care when answering question \_\_\_\_. If your answer to question \_\_\_ is “no,” you should apply the general standard of care that reasonably prudent lawyers in this state would exercise under comparable circumstances.

You must decide whether (lawyer) was negligent in representing (plaintiff) based on the facts and circumstances that (lawyer) knew or should have discovered when providing legal services to (plaintiff). Under either standard of care, a lawyer is not negligent simply because the outcome of the representation was not favorable, as long as the lawyer's actions were consistent with the applicable standard of care.

You have heard testimony in this trial from lawyers who appeared as expert witnesses. Their testimony was necessary because the degree of care, skill, and judgment that a reasonably prudent lawyer under the applicable standard of care would exercise is not a matter within the common knowledge of non-attorneys. Instead, this standard is within the specialized knowledge of legal experts and can be established only through expert testimony. Therefore, you must not speculate or guess about this standard when deciding the case; you must determine it based on the expert testimony presented during this trial.

[Also Give Wis JI-Civil 265.]

**SPECIAL VERDICT - STATUS OF HAVING CLAIMED EXPERTISE IN DISPUTE**

1. Did (lawyer) present (himself) (herself) to the public or (plaintiff) as having special experience, knowledge, or skill in (insert claimed area of expertise, e.g., personal injury law)?

Answer: \_\_\_\_\_  
Yes or No

**If your answer to question 1 is yes, you should apply the heightened standard of care in considering question 2. If your answer to question 1 is no, you should apply the general standard of care in considering question 2.**

2. Was (lawyer) negligent in (his) (her) representation of (plaintiff)?

Answer: \_\_\_\_\_  
Yes or No

## NOTES

1. The Committee chose to adopt the phrase “claimed expertise” in place of “specialist” to avoid confusion with the formally regulated term “specialist” under Supreme Court Rule 20:7.4, which generally prohibits lawyers from using that designation except in the fields of admiralty and patent law. This substitution also aligns with the holding in Duffey Law Office, S.C. v. Tank Transport, Inc., 194 Wis. 2d 674, 535 N.W.2d 91 (Ct. App. 1995), which imposes a heightened standard of care on attorneys who represent that they possess superior skill or knowledge, regardless of whether the restricted title “specialist” is used.

## COMMENT

This instruction and comment were approved in 1997. This revision was approved by the Committee in September 2025. It renumbered the instruction previously designated as Wis JI-Civil 1023.5A. The term “specialist” was replaced with “claimed expertise,” in the body of the instruction, and the comment was updated.

See Duffey Law Office, S.C. v. Tank Transport, Inc., 194 Wis. 2d 675, 535 N.W.2d 91 (Ct. App. 1995), and DeThorne v. Bakken, 196 Wis. 2d 713, 539 N.W.2d 695 (1995).

This instruction is designed for use when the status of the lawyer having claimed expertise is in dispute.

If there is no claim that the lawyer is subject to the heightened standard of care, use Wis JI-Civil 1023.5C.

If there is no dispute concerning the status of the lawyer, but the lawyer is being held to the heightened standard of care, use Wis JI-Civil 1023.5A.

If there is a dispute concerning the nature or scope of the representation, add this paragraph:

Whether a lawyer has discharged (his)(her) duty depends on the purpose for which the lawyer was retained or agreed to provide representation. The purpose of the representation for which

the lawyer was retained is for you to determine from the evidence.

When a retainer agreement expressly excludes a particular subject, that exclusion negates any duty to advise the client on the excluded matter. Freude v. Berzowski, 2024 WI App 53, ¶15, 413 Wis. 2d 644, 12 N.W.3d 893. Courts will enforce reasonable limited-scope representation agreements when there is no challenge to their validity or to the client’s informed consent, as required by SCR 20:1.2(c). Id. ¶¶11–13. Absent a contrary statute, regulation, or controlling judicial decision, public policy does not impose duties beyond those defined in a valid limited-scope agreement. Id. ¶¶22–24.

**Specialists.** The court of appeals has adopted the heightened standard of care for lawyers who represent themselves as having claimed expertise in Duffey Law Office, S.C. v. Tank Transport, Inc., 194 Wis. 2d 674, 535 N.W.2d 91 (Ct. App. 1995). The Committee recommends use of the heightened standard of care instruction when the trial court finds that there is credible evidence of such representation by the lawyer. See also Wis 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 having claimed expertise to the public or to the particular client. (Patent and admiralty practice have recognition as specialists by policy and tradition in federal courts.) The Committee chose not to use the term “specialist” to avoid conflating it with the meaning assigned to the term under Supreme Court Rule 20:7.4, which governs its use for ethical purposes.