

Appendix Chapter 24

Appendix 1. Part A: Sample fact pattern and jury instructions for malpractice of attorney in handling divorce case.

FACTS

Attorney Adams represented Ruben in a divorce with Maria. The result of the divorce was a division of assets between the two parties. The assets consisted of real property and cash. Maria received the real estate that was community property, as well as a large lump sum cash payment. Ruben later discovered that the property Maria received in the divorce may have been significantly undervalued in the divorce decree, which may have resulted in a larger cash payment to Maria than she would have otherwise received.

Ruben did not know when he hired Attorney Adams that: 1) Adams in the past had represented Maria as her real estate lawyer and real estate development lawyer related to separate property that she owns; and 2) Maria still owes Adams a considerable fee for work he performed for her land development company.

Ruben brings a legal malpractice suit against Adams, alleging breach of fiduciary duty.

INSTRUCTIONS

The instructions set forth below represent one way in which the instructions in a legal malpractice case for breach of fiduciary duty could be structured. There are other equally acceptable ways to arrange these instructions, provided the general design of the 302 series of instructions (UJI 13-302A through 13-302F) is followed. The goal is to provide the jury with a clear set of instructions. Logic should be the guide in sequencing instructions. For purposes of this example, preliminary jury instructions (e.g., those found in Chapter 1), general instructions (e.g., those found in Chapter 2 and Chapter 20), and verdict forms have not been included. (Examples of verdict forms can be found in Chapter 22.) For purposes of trial, such instructions should be used as appropriate given the facts and circumstances of the case. These instructions have been modified from the Uniform Jury Instructions where appropriate to reflect the issues in dispute in the fact pattern.

UJI 13-302A

In this civil case, Ruben is seeking compensation from Adams for damages Ruben claims were caused by Adams' failure to disclose that Adams had a conflict of interest in representing Ruben because he had previously represented Maria in a substantially related matter, and is owed money by Maria.

UJI 13-302B

To establish his claim of legal malpractice, Ruben has the burden of proving that Adams put his own interests before those of Ruben, and that Adams did not disclose his representation of Maria and obtain a written waiver of conflict.

UJI 13-302C

Adams denies Ruben's contentions. Adams contends there was no conflict of interest

because the previous representation of Maria regarding her separate property was not substantially related to the divorce proceeding.

UJI 13-2401

For Ruben to recover from Adams on Ruben's claim of legal malpractice, you must find that the following have been proved by a preponderance of the evidence:

1. Adams owed a duty to Ruben;
2. Adams breach that duty; and
3. That breach was a cause of a loss to Ruben.

UJI 13-2404

A lawyer has a fiduciary duty to

1. Have undivided loyalty to the client.
2. Disclose conflicts of interest to the client and obtain informed consent in writing that the client has waived the conflict.

A lawyer who fails to do so breaches his fiduciary duties.

UJI 13-2406

A lawyer has a duty of loyalty to a client. A lawyer breaches the duty of loyalty by putting the lawyer's own interests, or the interests of another, before those of the client.

UJI 13-2411

The Rules of Professional Conduct provide guidance to lawyers. Evidence regarding the Rules of Professional Conduct may be considered in deciding whether Adams owed Ruben a duty, and whether Adams breached that duty. However, that evidence is not conclusive. You must consider all of the evidence that you have heard in deciding the questions of duty and breach.

Part B: Sample fact pattern and jury instructions for malpractice of attorney in handling personal injury case.

FACTS

Lawyer Ana Lee represented client Lawrence Marton in his medical malpractice case against General Hospital and Dr. Park after Mr. Marton was injured when his stroke was not timely diagnosed by Dr. Park. Before being credentialed by General Hospital, Dr. Park lost credentials at another hospital for failing to timely complete medical records. Ms. Lee decided not to hire an expert in support of Mr. Marton's negligent credentialing claim against General Hospital for credentialing a doctor who had been fired from another hospital in the past, reasoning that the negligence would be clearly understood by the jury. Mr. Marton then settled his claim against the doctor. Mr. Marton's only claim against the hospital was for negligent credentialing. The hospital filed a motion for summary judgment on the negligent credentialing claim because there was no expert testimony as to the standard of care. The motion was granted. After the conclusion of his medical malpractice case, Mr. Marton brought suit against Ms. Lee, claiming he would have prevailed on his negligent credentialing claim if Ms. Lee had retained an expert. As there was no issue of untimely completed medical records Mr. Marton's case, the

hospital disputed that any causal link between the malpractice and the negligent credentialing claim existed.

INSTRUCTIONS

The instructions set forth below represent one way in which the instructions in a legal malpractice case for negligence could be structured. This case provides an example for compiling instructions in a case where causation and damages in the underlying case are at issue. The New Mexico Supreme Court has not expressly adopted the “trial-within-a-trial” approach. George v. Caton, 1979-NMCA-028, ¶¶ 46-47, 93 N.M. 370, 600 P.2d. 822. In a legal malpractice case where the malpractice asserted is negligence in handling an underlying claim or case, the jury must determine whether the plaintiff would have achieved a more favorable outcome in the underlying case. To enable the jury to assess the underlying claim, it may be appropriate either to present expert testimony as to the likely result of the underlying case, or for the jury to decide the probable outcome of the underlying case as if the jury were the jury on that case (i.e., calling and examining those persons who would have been witnesses and presenting the demonstrative and documentary evidence that would have been presented but for the attorney’s negligence). See 5 R. Mallen & J. Smith, Legal Malpractice, § 33.8; see also Andrews v. Saylor, 2003-NMCA-132, ¶ 16, 134 N.M. 545, 80 P.3d 482. The method employed will depend on whether the trial court adopts the “trial-within-a-trial” approach, or an approach based on the use of expert testimony. If the trial court adopts the “trial-within-a-trial” approach, the jury should be provided with instructions for determining the probable outcome of the underlying case.

UJI 13-302A

In this civil case, Lawrence Marton is seeking compensation from Ana Lee for damages Mr. Marton claims were caused by Ms. Lee’s decision not to hire an expert in support of Mr. Marton’s negligent credentialing claim against General Hospital.

UJI 13-302B

To establish his claim of legal malpractice, Mr. Marton has the burden of proving that he would have prevailed on his negligent credentialing claim had Ms. Lee retained an expert.

UJI 13-302C

Ms. Lee denies that Mr. Marton would have had been awarded damages had his negligent credentialing claim gone to the jury. She also claims that her decision not to hire an expert was not negligent, but was a reasonable decision at the time based on the information she had.

UJI 13-2401

For Mr. Marton to recover from Ms. Lee on Mr. Marton's claim of legal malpractice, you must find that the following have been proved by a preponderance of the evidence:

1. Ms. Lee owed a duty to Lawrence;
2. Ms. Lee breached that duty; and

3. That breach was a cause of a loss to Mr. Marton.

UJI 13-2403

A lawyer has a duty to use the same degree of care, skill, and diligence ordinarily used by attorneys under similar circumstances. A lawyer who fails to do so is negligent.

UJI 13-2407

A lawyer has a duty to advise the client of negative consequences a reasonable lawyer would conclude may result from the course of action the lawyer recommends. This duty does not require a lawyer to discuss with his client every possibility, no matter how small or remote.

UJI 13-2412

A lawyer does not necessarily breach a duty to a client just because she makes a decision and it turns out that another decision would have been a better choice.

UJI 13-2414

The damages that may be recovered in a legal malpractice action are those which the plaintiff would have recovered in the absence of the lawyer's negligence. The damages that may be recovered also include expenses that the plaintiff incurred to avoid or reduce the loss caused by the lawyer's negligence. You will receive additional instructions regarding how you are to determine the damages the plaintiff would have recovered in the absence of the lawyer's negligence.

[Adopted by Supreme Court Order No. 17-8300-013, effective for all cases pending or filed on or after December 31, 2017.]