

1 **13-2410. Legal malpractice; expert testimony.**

2 The only way in which you may decide whether _____ (*name of defendant*) breached
3 a duty is from evidence presented by lawyers testifying as expert witnesses. In deciding this
4 question, you must not use any personal knowledge of any of the jurors.

5 USE NOTES

6 This instruction shall be given when the alleged malpractice of a lawyer can be evaluated
7 only in light of the testimony of another lawyer testifying as an expert witness. The trial court must
8 make that determination.

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

11 **Committee commentary.** — Usually in a legal malpractice case expert testimony by a lawyer is
12 necessary to explain the applicable standard of care or standard of conduct and the defendant
13 attorney’s breach of the standard(s). The need for this testimony arises because legal malpractice
14 cases in which professional negligence or breach of fiduciary duty is alleged typically involve
15 “situations and requirements of legal practice unknown to most jurors and often not familiar in
16 detail to judges.” Restatement of the Law Governing Lawyers § 52 cmt. g, at 383 (1998). “Expert
17 testimony is used as the evidence to establish the standard of care or conduct by which the
18 defendant’s conduct is to be judged. Expert testimony [also] usually is necessary to show a breach
19 of the appropriate standard.” 4 R. Mallen, *Legal Malpractice* § 30:120, at 1781 (2017). *Accord*
20 [~~*First Nat’l Bank v. Diane, Inc.*~~] *First Nat’l Bank of Clovis v. Diane, Inc.*, 1985-NMCA-025, ¶ 24,
21 [~~102 N.M. 548~~] 102 N.M. 548, 698 P.2d 5 (“To establish malpractice, testimony of another
22 attorney as to the applicable standards of practicing attorneys is generally necessary.”); *Sanders v.*
23 *Smith*, 1972-NMCA-016, ¶ 14, [~~83 N.M. 706~~] 83 N.M. 706, 496 P.2d 1102 (“[D]eparture from or

1 neglect of legal standards lies within the field of knowledge in which only an attorney can give a
2 competent opinion.”).

3 Exceptions do exist in which expert testimony is not necessary in a legal malpractice case.
4 “[E]xpert testimony is unnecessary when it would be plain to a nonlawyer . . . that the lawyer’s
5 acts constitute negligence . . . or breach of fiduciary duty.” Restatement § 52 cmt. g, at 383; *see*
6 *also* 4 *Mallen*, § 37:127; *accord Walters v. Hastings*, 1972-NMSC-054, ¶ 40, 84 N.M. 101, 500
7 P.2d 186 (“[C]ases may arise in which the asserted shortcomings of the attorney are such that they
8 may be recognized or inferred from the common knowledge or experience of laymen.”).

9 Additionally, expert testimony is unnecessary “when it is established as a matter of law” that the
10 attorney’s conduct was negligent or a breach of fiduciary duty. Restatement § 52 cmt. g, at 383;
11 *see also* 4 *Mallen*, § 37:127; *accord* [~~*DeLisle v. Avallone*~~] *DeLisle v. Avallone*, 1994-NMCA-012,
12 ¶ 23, 117 N.M. 602, 874 P.2d 1266 (“Expert testimony is not necessary when the only question to
13 be answered by a jury is whether an attorney, who knew that [the] a filing time limit soon would
14 expire and [this] th[is] extinguish [his] [the] client’s rights did nothing to protect [his] [the] client’s
15 rights. In such a case, the question of breach of duty can be answered as a matter of law.”). *See*
16 *also* 4 *Mallen*, § 37:127 (identifying other potential exceptions); *Buke, LLC v. Cross Country Auto*
17 *Sales, LLC*, 2014-NMCA-078, ¶ 52, 331 P.3d 942 (providing other illustrative examples of when
18 expert testimony may not be necessary in a legal malpractice case).

19 [Adopted by Supreme Court Order No. 17-8300-013~~[- effective for all cases pending or filed on~~
20 ~~or after December 31, 2017]~~; as amended by Supreme Court Order No. S-1-RCR-2025-00126.]