

## WHO IS AN EXPERT IN FIDUCIARY DUTY IN ATTORNEYS' AND MANAGERMENTS' PROFESSIONAL LIABILITY DISPUTES?

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**Unlike a criminal action, a civil action for professional malpractice or breach of fiduciary duty by management of a company is a type of tort action. The elements of a tort in every jurisdiction generally are:**

- (1) Does a *duty* exist of the defendant to the plaintiff? Generally, duties, *defined by the law of the jurisdiction applicable to the particular case*, are of two types:
  - Duty of care, including competence, diligence, and communications.
  - Duty of loyalty, including maintaining confidentiality of a client's confidential information and absence of conflict of interest and self-dealing.
- (2) If a duty exists of the defendant to the plaintiff, did the defendant *breach* that duty?
- (3) If so, was that breach the *proximate cause* of injury to the plaintiff or the plaintiff's property?
- (4) If so, what *damages* did the plaintiff suffer as the result of defendant's breach of that duty?

**Expert in fiduciary duty usually focuses on the first two elements of the tort, duty and breach of duty, not on the elements of cause or damages, but does NOT issue a legal opinion regarding what are the fiduciary duties of the defendant in the particular case.**

-Experienced and competent judges generally do not admit into evidence opinions by experts regarding law.

-Those judges rely on briefs and other submissions by counsel to the parties in the case to prove what the applicable law requires.

**Instead, expert in fiduciary duty:**

**- assumes the accuracy and completeness of definitions of the applicable fiduciary duty or duties (a) under the law of the jurisdiction applicable to the particular case and (b) provided by the attorney that retained that expert as an expert for that case, and**

**-assists the trier of fact, whether the judge or a jury, by demonstrating the application of the facts of the particular case to that definition of applicable fiduciary duty.**

***i.e.*, opining on facts, not law.**

For example, for my most recent expert opinion regarding an attorney's standard of care in a legal malpractice case involving an attorney licensed to practice law in New York, I relied on my attorney client's statement that, "under New York law, a claim for legal malpractice requires a plaintiff to demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages. If at that time laws and rules are clearly defined, an attorney's disregard of them is seldom

excusable. Conduct constituting violations of disciplinary rules may constitute evidence of malpractice.”

**Expert opinion on fiduciary duty that a court may admit in evidence under Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993) satisfies the “methodology” requirement of Daubert by relying on authorities for what constitutes a breach of fiduciary duty under those definitions that are NOT “LAW,” that is, NOT PRIMARILY provisions of Constitutions, statutes, regulations, ordinances, or executive governmental actions, but possibly relying on court opinions explaining non-legal authorities.**

For example, in a legal malpractice case based on the alleged breach of the *standard of care* applicable to the defendant attorney, the expert may rely on:

(1) the expert’s *personal experience practicing law for years in the same area of law practice and in the same geographical area as the defendant*: This circumstance rarely occurs because attorneys, for practical reasons, are reluctant to serve as experts against other attorneys in the same community, with whom they may have long-standing personal as well as professional relationships; or, alternatively

(2) the expert may rely on such generally accepted non-legal authorities about the standard of care applicable to the defendant attorney as the *Rules of Professional Conduct* adopted by the court regulating that attorney in the state in which that attorney’s law practice resulted in the dispute, and the *Restatement of the Law Third, The Law Governing Lawyers* published by the American Law Institute in 2000.

The **American Law Institute** (ALI) is a [research](#) and [advocacy group](#) of judges, lawyers, and legal scholars established in 1923 to promote the clarification and simplification of [United States common law](#) and its adaptation to changing social needs. Members of ALI include law professors, practicing attorneys, judges, and other professionals in the legal industry. ALI writes documents known as "[treatises](#)", which are summaries of state common law (legal principles that come out of state court decisions). Many courts and legislatures look to ALI's treatises as authoritative reference material concerning many legal issues. [**Demonstrating that nothing in the law is immutable or sacrosanct today**, H]owever, some legal experts and the late Supreme Court Justice [Antonin Scalia](#), along with some conservative commentators, have voiced concern about ALI rewriting the law *as they want it to be* instead of *as it is*.

The *Rules of Professional Conduct* adopted in each state of the United States, the *American Bar Association’s Model Rules of Professional Conduct* that are not themselves enforceable in any state but on which the Rules adopted in each state generally are based, and the *Restatement of the Law Third, The Law Governing Lawyer* satisfy Daubert’s admissibility test because they:

-are readily available to the public;-were, before publication, subjected to extensive peer review;

-include extensive explanatory commentary and examples of application of each principle stated in it;

-are accepted within the legal community as authoritative on the subject of fiduciary duty of attorneys; and

-existed *before* the current litigation and not created *solely* for litigation purposes.

**Examples of malpractice disputes in which I have opined as expert that the defendant did or did not satisfy the applicable standard of care include:**

1. Breach of duties of care and loyalty by a majority of the Board of Directors of a large not for profit in removing certain members of that Board;
2. Breaches of duty of care by attorneys in failing to read critical documents relevant to representation of the attorneys' clients;
3. Breach of duty of loyalty by an attorney that represented parties having opposing interests in the same commercial lending transaction; and
4. Breaches of duty of loyalty by attorneys that represented all owners of a business entity in connection with their attempted sale of that entity, or that represented multiple parties to litigation relating to the same transaction, each of which clients had different legal and economic interests in that transaction.