

The Eighth Circuit Further Strengthens the Mandatory Expert Affidavit Requirements In Litigation Against Attorneys

By Janel Dressen

Minnesota law recognizes various legal theories of recovery related to attorney misconduct, including intentional fraud and misrepresentation, breach of contract, breach of fiduciary duty, and professional negligence, also known as “malpractice.” *Noske v. Friedberg*, 713 N.W.2d 866, 875 (Minn. App. 2006). Under Minn. Stat. § 544.42 (“Section 544.42”), if a party alleges claims that require expert testimony to make out a prima facie case against an attorney, that party must submit two affidavits in support of the claims to avoid mandatory dismissal.

The first affidavit must be served upon the defendant with the pleadings (unless waived or modified by the court), and must state that “the facts of the case have been reviewed by the party’s attorney with an expert whose qualifications provide a reasonable expectation that the expert’s opinions could be admissible at trial and that, in the opinion of this expert, the defendant deviated from the applicable standard of care and by that action caused injury to the plaintiff” Minn. Stat. § 544.42, subd. 2(1) and subd. 3.

The second affidavit must be served upon the opponent within 180 days of the commencement of discovery, be signed by the party’s attorney and state the identity of each person whom the attorney expects to call as an expert witness to testify

with respect to the issues of negligence, malpractice, or causation, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. *Id.* at subd. 2(2) and subd. 4(a).

Section 544.42 does not apply if “the conduct complained of can be evaluated adequately by a jury in the



absence of expert testimony.” *Fontaine v. Steen*, 759 N.W.2d 672, 677 (Minn. App. 2009) (quoting *Hill v. Okay Constr. Co.*, 312 Minn. 324, 252 N.W.2d 107, 116 (1977)). However, attorney misconduct cases in which a plaintiff may dispense with expert testimony are “rare and exceptional.” *Id.* (quoting *Sorenson v. Saint Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 191 (Minn. 1990)).

In a recent Eighth Circuit decision—*Sandhu v. Kanzler*, — F.3d —, No. 18-2957, 2019 WL 3540063 (8th Cir. Aug. 5, 2019) (“*Sandhu*”)—

on appeal after the District of Minnesota granted summary judgment in favor of defendants’ attorney and law firm, the court considered three important questions under Section 544.42. On all three issues, the court’s decision further strengthened the expert affidavit requirements in actions against attorneys.

First, the Eighth Circuit considered whether an expert affidavit is required for a breach of fiduciary duty claim. Plaintiffs alleged that their attorney and law firm breached their fiduciary duties to Plaintiffs (former clients) by concurrently representing adverse parties. *Id.* The Eighth Circuit held that a breach of a fiduciary duty claim that arises out of an attorney-client relationship is “essentially ... [a] malpractice claim in another form.” *Id.*, citing *Wells v. Mattox*, No. A15-1771, 2016 WL 3223227, at *5 (Minn. App. June 13, 2016) and *Antone v. Mirviss*, 720 N.W.2d 331, 333-34 (Minn. 2006). “Because claims dealing with breach of a standard of care or conduct generally require expert testimony, it follows that claims for breach of an attorney-client fiduciary duty require compliance with § 544.42 unless the attorney’s conduct can be adequately evaluated by the jury without an expert’s opinion.” *Id.*

Second, the Eighth Circuit considered whether Section 544.42 applies when a claim against an attorney is for an alleged statutory

violation. The court also answered that question in the affirmative. “[Plaintiff] provides no authority for this proposition and we therefore decline to find that § 544.42 categorically does not apply to claims based on statute.” *Id.* at *6.

Third, the Eighth Circuit analyzed what type of allegations can be evaluated adequately by a jury in the absence of expert testimony and thereby dispense with the expert affidavit requirement. The court held that since “the claims were premised on a factually-complex relationship and intertwined history and on allegations that the attorney failed to disclose information, failed to investigate, made false statements to the state court, and, primarily, engaged in dual representation, such claims ‘lie outside the jury’s common knowledge’ and the plaintiff was required to comply with Minn. Stat. § 544.42.” *Sandhu*, at *5. The court further held that since plaintiffs’ claims were not premised on straightforward acts or omissions such as “an obviously missed deadline or a clear case of stealing client funds,” the plaintiffs must show that the attorney had a duty to investigate and that he failed to perform that duty. *Id.* at *6. An expert was required to make this showing. *Id.* The court affirmed the dismissal of plaintiffs’ claims against defendants for failure to comply with Section 544.42. *Id.*