

EXPERT AFFIDAVITS IN ATTORNEY-CLIENT DISPUTES – ARE THEY REQUIRED?



By Ryan Downes

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In Minnesota, if you want to pursue an action against a licensed attorney based on “negligence or malpractice,” and you will need to rely on expert testimony to establish a *prima facie* case, you are required to submit an affidavit from an expert stating an opinion that the target of your lawsuit deviated from the appropriate standard of care. Minn. Stat. § 544.42, subd. 2. But does this apply to claims for breach of fiduciary duty brought against an attorney?

That answer, as it so often is in the legal profession, is, “It depends.” A recent decision handed down by the Minnesota Supreme Court, *Mittelstaedt v. Henney*, 969 N.W.2d 634 (Minn. 2022), has made it clear that, depending on the case, even breach of fiduciary duty claims against attorneys may require an expert affidavit under Minn. Stat. § 544.22.

The facts in *Mittelstaedt* were as follows: an attorney (Henney) represented a client (Mittelstaedt) in a business transaction, but the attorney allegedly failed to disclose to his client that he had an ownership interest in the other party to the transaction. 969 N.W.2d at 637. A dispute arose between the parties involving the attorney’s representation, and the client brought, among others, a claim for breach of fiduciary duty against the attorney. *Id.* The district court granted summary judgment on the plaintiff’s claim of breach of fiduciary duty, but did not address the “expert-affidavit issue.” *Id.* at 638.

On appeal, the Court of Appeals affirmed the decision, but on different grounds. *Id.* at 638. Despite no party arguing that the provisions of Minn. Stat. § 544.42 was “important” on appeal, the Court of Appeals held that because breach-of-fiduciary duty claims against attorneys have the same elements as legal malpractice claims, the statute’s affidavit requirements should apply, and the plaintiff had not submitted expert affidavits. *Id.* The Court of Appeals explained that if the statute did not apply, plaintiffs would have a “back door” to trial on claims against professionals without ever filing an expert affidavit. *Id.*

The Minnesota Supreme Court took up review of the expert-affidavit issue, and reversed and remanded to the Court of Appeals. *Id.* at 641. The Court first noted that it had “long held” that professional negligence and breach of fiduciary duty were “distinct claims” because “[p]rofessional negligence claims allege an attorney breached their standard of *care*, whereas breach-of-fiduciary-duty claims concern a standard of *conduct*.” *Id.* at 639. To that end, the Court of Appeals had erred by holding that the two causes of action shared identical elements. *Id.*

Nevertheless, the Court noted, Minn. Stat. § 544.42’s language—which covers “negligence or malpractice” actions—encompasses a breach of fiduciary duty claim because “malpractice” is a category that includes multiple legal theories for recovery against professionals, including breach of

fiduciary duty. *Id.* As a result, the Court concluded that the statute’s expert-affidavit requirement for negligence or malpractice cases unambiguously applies to breach-of-fiduciary-duty claims when the other requirements of the statute are met. *Id.*

What are those other requirements? Well, the Court noted that the expert-affidavit requirement applies only where expert testimony “is to be used” by a party to establish a *prima facie* case. *Id.* at 640 (quoting Minn. Stat. § 544.42, subd. 2). Whether expert testimony will be necessary is dependent on the facts of each individual case. *Id.* The Court noted that while the “duty” and “breach” elements of a legal malpractice claim must generally be established by expert testimony, an exception exists for cases where an attorney’s conduct can be “evaluated adequately by a jury in the absence of expert testimony.” *Id.* As a result, whether expert testimony would be required for a breach-of-fiduciary-duty legal malpractice claim against an attorney would have to be decided on a case-by-case basis. *Id.* The answer, at the end of it all, was “It depends.”

In light of the *Mittelstaedt* decision, attorneys should be proactive about evaluating whether a legal malpractice claim couched as a breach of fiduciary duty requires an expert affidavit. Submitting an expert affidavit even where you think a jury could evaluate the conduct at issue on its own may be the safe course to follow. Deciding to roll the dice and attempt to fit a claim into the exception to the rule may be risky. This is especially true because failure to adhere to the expert affidavit requirement can be a fatal mistake resulting in dismissal with prejudice and may, ironically, expose the attorney who brought the claim in the first place to a legal malpractice suit.

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