8.10 ATTORNEY MALPRACTICE – NEGLIGENCE DEFINED

I will now define the negligence of an attorney for you. An attorney is negligent in the representation of a client if the attorney fails to use the skill, prudence, and diligence that other attorneys commonly possess and would exercise under similar circumstances.

# USE NOTE

This instruction should be used in an attorney malpractice action based on negligence. It should be preceded by Instruction 3.01, which sets out the elements of a negligence claim, and followed by Instruction 3.06, which defines legal cause.

**COMMENT**

Professional negligence of an attorney consists of four elements: (1) the duty of the professional to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional’s negligence. Doe v. Hughes, Thorsness, Gantz, Powell & Brundin, 838 P.2d 804, 806 (Alaska 1992) quoting Belland v. O.K. Lumber Co., 797 P.2d 638, 640 (Alaska 1990); Power Constructors, Inc. v. Taylor & Hintze, 960 P.2d 20, 30 (Alaska 1998); Cummings v. Sea Lion Corp., 924 P.2d 1011, 1020 n. 14 (Alaska 1996); Linck v. Barokas & Martin, 667 P.2d 171, 173 n. 4 (Alaska 1983). An attorney who undertakes to represent a client owes the client the duty to “have and use the knowledge, skill, and care ordinarily possessed and employed by members of the [legal] profession in good standing.” Doe v. Hughes, Thorsness, 838 P.2d at 806 quoting W. Page Keeton et. al., Prosser and Keeton on the Law of Torts, § 32, at 187 (5th ed. 1984) (brackets in original); Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin, 828 P.2d 745, 765 (Alaska 1992) (“An attorney is negligent in the representation of a client if he breaches the required standard of care by failing to use such skill, prudence, and diligence as other attorneys commonly possess and would exercise under similar circumstances”) (emphasis removed). An attorney is negligent in the representation of a client only for actions “within the scope of that attorney-client relationship.” Cummings v. Sea Lion Corp., 924 P.2d 1011, 1019 (Alaska 1996). In a case in which the scope of the representation is contested, the second sentence of this instruction should be modified to read:

An attorney is negligent in the representation of a client if, within the scope of that attorney-client relationship, the attorney fails to use the skill, prudence, and diligence that other attorneys commonly possess and would exercise under similar circumstances.

See id.

An attorney's duty to use the requisite "skill, prudence and diligence" includes “the duty to advise the client of action the client should take in a given set of circumstances.” Doe, 838 P.2d at 807 (attorneys breached their duty to client as a matter of law by failing to advise the client of a course of action that would protect the client from a clearly foreseeable risk; attorneys’ concern regarding the client’s willingness to pay the additional costs of the course of action did not justify the attorneys’ failure to advise client to take the additional steps). In an appropriate case, the instruction could be modified to include this concept.