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## COMMENTARY

### What if Bernie Madoff Were A New Jersey Lawyer?

By Bennett J. Wasserman

A century ago, Gov. Woodrow Wilson prophetically warned our State Bar Association: “the public is losing respect for the law profession.” If we hope to reverse that trend, the Bar Association must withdraw its endorsement of the Professional Services Business Enhancement Act. If enacted, it would absolve dishonest and negligent lawyers of responsibility for the full measure of consequential damages to undo the harm they cause their clients. It would also slash the current six-year statute of limitations to two.

Sadly, today’s legal landscape is littered with metaphors like Madoff, Dreier and Enron — catastrophes inflicting damage on innocent clients that could have been avoided if the lawyers involved had taken their fiduciary duties seriously. The fiduciary duty is central to our creed: We must put the interests of those who rely on our professional advice and acts ahead of our own.

Our Supreme Court has crafted a unique system that upholds the vitality of the lawyer’s fiduciary duty and

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empathizes with victims of its breach. For example, with *In re Wilson*, 81 N.J. 451 (1979), a fiduciary breach as serious as knowing misappropriation of client funds brings disbarment. Coupled with *Packard Bamberger v. Collier*, 167 N.J. 427 (2001), the dishonest lawyer must pay consequential damages, including his victim’s added legal fees to right his wrong. In cases of negligent misappropriation, while lesser discipline may be available, *Saffer v. Willoughby*, 143 N.J. 256 (1996), requires negligent lawyers to pay consequential damages, including their victims’ attorneys’ fees, to correct the damage caused. Such a logical system, where attorney discipline and victim compensation go hand in hand, protects the vitality of the fiduciary duty and enhances the public’s confidence in a law profession that should live by universal rules of professional accountability.

With its campaign to overrule *Saffer* and its progeny, our State Bar Association would undermine our Supreme Court’s coherent system wherein attorney discipline and victim compensation are recognized as separate sides of the same coin. To absolve dishonest and negligent lawyers from having to fully compensate their victims for the consequential damage they cause requires that the victim bear the pain caused by the wrongdoer. Surely, that won’t do anything to improve the public’s image of lawyers.

Honest, diligent and competent lawyers throughout New Jersey should be

up in arms at our Bar Association’s plot to unravel the Supreme Court’s fiduciary duty enforcement apparatus, because when the public loses confidence in the legal profession, good lawyers are dumped into the same proverbial barrel as the bad apples. That hurts good lawyers.

The Bar Association whines that payment of consequential damages is “fee shifting” and no other profession is saddled with such a burden. The truth is that all other dishonest and negligent professionals must pay as consequential damages the professional fees and costs incurred by their victims to fix the damage they caused. And even if *Saffer* looks like fee shifting, it, more importantly, encourages compliance with and enforcement of the lawyer’s fiduciary duty — a public policy surely worth vindicating.

When Woodrow Wilson addressed us 100 years ago, another legal scholar, W.H. Hohfeld, demonstrated that for any duty to exist, there must be a “correlative right” to enforce it. The State Bar’s proposal would decimate the client’s right to enforce the lawyer’s fiduciary duty.

Without *Saffer* and its progeny to help clients enforce their lawyer’s fiduciary duty, that duty will surely wither away. So it comes as no surprise that an estate attorney in Pennsylvania — where there is no *Saffer* rule — will soon plead guilty to cheating his elderly clients out of \$35 million in a collapsed Madoff-style Ponzi scheme. How bizarre that our Bar Association rationalizes its assault on the fiduciary duty by claiming that New Jersey should become more like Pennsylvania and New York, the epicenters of these very scandals and which, understandably, have higher legal malpractice insurance rates than our own

state.

To many legislators, the voice of our State Bar Association is powerful and “pristine.” Therein the danger of its endorsement of this antifiduciary duty legislation. But opposition is mounting. Consumer and commercial groups, including AARP and HALT, oppose the proposed legislation. Legal academics have come out against it. And most impressive

is the recent opposition of the New Jersey Association for Justice, formerly ATLANJ, many of whose members also belong to the State Bar Association. Clearly, there is growing recognition among mainstream lawyers that our State Bar Association’s endorsement of this legislation should be reversed.

So as our State Bar Association convenes, it should ask: What if Bernie

Madoff were a New Jersey lawyer? Would any justice-loving Bar Association support legislation that would let him off the hook and let his victims bear the pain? We know Woodrow Wilson’s view of such folly. But will the next generation of lawyers want to be part of a Bar Association that would hasten the demise of the lawyer’s fiduciary duty by caring more for the Madoffs than for their victims? ■