New Jersey Law Journal

VOL. CLXV – NO. 10 – INDEX 923 SEPTEMBER 3, 2001 ESTABLISHED 1878

Making Things Clear

Court stresses that every lawyer must treat matters of professional responsibility as a personal obligation

By Bennett J. Wasserman and Raphael M. Rosenblatt

At a time when the pace and complexity of modern-day law practice tend to blur what used to be unambiguous, many of us yearn for simplicity and clarity. We leave this past term of the New Jersey Supreme Court with the distinct feeling that at least in the areas of legal ethics and malpractice, the Court agrees.

In the area of legal ethics, the Court made it very clear that every lawyer must treat matters of professional responsibility as a personal obligation. That is especially true in an era in which the multistate practice of law is becoming the norm.

In *In the Matter of the Application of Steven B. Jackman*, 165 N.J. 580 (2000), a unanimous Court found that an associate with Sills Cummis Radin Tischman Epstein & Gross in Newark had engaged in the unauthorized practice of law for almost seven years — notwithstanding his purported reliance on a managing partner's alleged advice that he need not sit for the bar exam.

Steven Jackman was admitted to the Massachusetts bar in 1985 after he graduated from Harvard Law School. He started out as an associate with the Boston law firm of Goodwin, Procter & Hoar. In 1991, he moved to the corporate law department at Sills Cummis and planned to sit for the New Jersey bar exam in 1992.

As the date for the exam approached, he claims he was "politely requested" not to take it because his time was needed on a large transaction that the firm was handling. As a dutiful new associate with partnership aspirations, Jackman complied.

He claimed that the managing partner later advised him that "There was no particular necessity that [he] take the Bar exam in New Jersey in order to practice corporate law in New Jersey — but that sooner or later [he] ought to take it because it's kind of a good idea," according to the Court.

During his employment at Sills Cummis, before and after he postponed the New Jersey bar exam, Jackman worked as a full-fledged associate handling corporate mergers and acquisitions. He did not appear in court or sign pleadings in any litigated matter. However, he counseled clients, drafted and signed legal documents, negotiated with opposing counsel and billed his time as a senior associate.

In 1993, Jackman placed his Massachusetts law license on "inactive status" because he was employed full time in New Jersey. As time passed and as he became busier, Jackman continued to defer sitting for the New Jersey bar exam. In 1998, after he was passed over for partnership, he switched employment to a New York firm, which promptly advised him that he must sit for the New York bar exam. He did so in July 1999 and simultaneously sat for the New Jersey exam.

The Committee on Character became aware of this history and recommended against his admission to the New Jersey bar for having engaged in

Wasserman, who practices in Hackensack, is special professor of law at Hofstra University School of Law in Hempstead, N.Y., where he teaches a course in Lawyer Malpractice. Rosenblatt is associated with Hellring, Lindeman, Goldstein & Siegal in Newark.

the unauthorized practice of law while at Sills Cummis.

The Court was not impressed that Jackman was an office-based corporate lawyer as opposed to a litigator. Whether the attorney appears in court is not relevant to the lawyer's obligation under R. 1:21-1(a) to be duly admitted to the bar as a prerequisite to the practice of law. Nor did the Court give any credence to the ongoing national discussion on multistate transactional law practice.

Said the Court: "Nor is there an exception from our licensure requirement if one engages in transactional law only and does not enter appearances in court. The facts here compel one conclusion: Jackman practiced law in New Jersey for almost seven years handling legal matters implicating the rights and remedies of clients. That practice was unauthorized."

Nor was the Court impressed with Jackman's attempt to deflect some of the blame on the firm's managing partner when it was his personal obligation to make certain that he complied with the rules governing admission to the bar.

"The duty to be knowledgeable about and compliant with Bar admission and practice requirements is a personal one. An applicant for admission cannot have his past errors excused by simply pointing to another member of his firm, albeit a managing partner, upon whose words he relied," the Court wrote. "That reliance," said the Court, "was misplaced."

Jackman might find a sympathetic ear among some associates who feel the stress of their firm's culture to meet and exceed billable hour expectations if they hope to be considered for partnership. Those pressures, however, are no justification for a lawyer's failure to comply with what the Court had clearly stated to be a personal obligation—whether he is a new or a senior associate.

In a very subtle way, however, the Court sent a clear message to any law firm that puts profit ahead of professionalism.

First, the Court pointed out that unlike Sills Cummis, the New York law firm Jackman went to "promptly advised him that he must sit for the New York Bar exam."

Second, although it would not discuss the role of the "managing partner" to whom Jackman tried to shift the blame, it did see fit to quote that part of R. 1:21-1(a) that applies to supervisory attorneys: "No attorney authorized to practice in this State shall permit another person to practice in this State in the attorney's name or as the attorney's partner, employee or associate unless such other person satisfies the requirement of this Rule."

What the Court may have intended to convey by implication could be taken as a cautionary note to any firm that might be remiss in its duty to monitor its associates' compliance with fundamental rules of professional conduct.

Two other cases were decided by the Supreme Court in the legal ethics arena: *In the Matter of Wolf A. Samay*, 166 N.J. 25 (2001) and *In the Matter of Samuel V. Convery Jr.*, 166 N.J. 298 (2001).

The first dealt with improper conduct on the part of a municipal court judge and the other with a lawyer who unlawfully attempted to influence members of a town's board of adjustment. Both presented the Court with the question of how to discipline a member of the bar or bench who had abused his position for personal gain or for revenge.

Samay became a municipal court judge in Passaic in December 1993. In 1996, Samay signed an angry letter to his son's school, "Wolf Samay, Esq., J.M.C." Samay claims to have used the "J.M.C." only to show that he "had enough intelligence to make his own decisions and "take care of … problems." The Court summarily dismissed Samay's excuse as "totally lacking in credibility."

In another incident, Samay authorized arrest and search warrants for, and then presided over the arraignment of, his friend's wife whose arrest for harassment he had authorized.

In yet a third incident, Samay brought criminal charges against his son's gym teacher after a verbal altercation between the teacher and son, and then he presided over the gym teacher's arraignment.

The Court was persuaded that Samay had signed the criminal complaint in the third incident purely for revenge, knowing that "filing the incident report would set in motion a chain of events that would lead to the arrest of [the gym teacher] and [his] appearance in the Municipal Court in which respondent was the only judge." Samay should have recused himself sua sponte and not arraigned the gym teacher.

Samuel Convery was an attorney admitted to the New Jersey bar in 1969. A client retained him to assist with the purchase and development of real estate in Edison. He then attempted to improperly influence members of the Edison Board of Adjustment, a quasi-judicial body, to vote for his client's project. In April 1998, Convery pleaded guilty to one violation of 18 U.S.C. 600 (the Hatch Act), which essentially prohibits promising benefits in exchange for special consideration for political activity.

What both cases emphasize, in their own ways, is the importance of maintaining public confidence in the judiciary and the bar. Samay's signing a letter "J.M.C." for his personal gain, was, in the Court's words "a misuse that inevitably diminishes the public confidence in the judicial office."

Though that incident alone did not warrant discipline as severe as removal, Samay's repeat conduct led the Court to consider all of his actions together. Citing *In re Coruzzi*, 95 N.J. 557 (1984), and *In re Yaccarino*, 101 N.J. 342 (1985), the Court stressed that removal of an errant judge is designed to restore the public's confidence in the judiciary after it had been shaken by his commission of an offense that violated the public trust.

The Court pointed out that more cases are processed annually through municipal courts than any other branch of the judicial system and it is critical especially at that level where the public has most of its interface with the courts that there be a high level of public confidence.

In order to preserve the public's confidence in the judicial system, it is clear from the Court's opinion that nothing less than removal will suffice.

In the same vein, Convery's criminal conviction "reflected adversely on

his honesty, trustworthiness and fitness as a lawyer." An attorney's criminal conviction, no matter how minor, "tends to lessen public confidence in the legal profession as a whole," the Court said, citing *In re Hasbrouck*, 152 N.J. 366 (1998).

From both *Samay* and *Convery* what emerges is that the Court remains a vigilant guardian of the public's image of the profession. Any misconduct that diminishes the public's confidence in the legal or judicial system will be dealt with swiftly and sternly if for no other reason than to restore the public's trust. Nothing less will do. That much is clear.

Legal Malpractice

With *Packard-Bamberger & Co. Inc. v. Collier*, et al., 167 N.J. 427 (2001), the Supreme Court got the opportunity to address a tempest in the legal malpractice pot that had been ignited by its 1996 decision of *Saffer v. Willoughby*, 143 N.J. 256.

Saffer held that a plaintiff in a legal malpractice action may recover from his former attorney as consequential damages his attorneys' fees and reasonable expenses incurred in the malpractice suit. *Saffer* was a departure from the "American" rule that each party must bear its own counsel fees and costs of litigation unless provided by statute, contract or other case law. Thus, professional negligence became an exception, and *Packard-Bamberger* expands it even further.

The defendant attorney, Daniel Amster, was for many years Frank Packard's personal attorney. Packard was the owner of Packard-Bamberger & Co. Inc., which operated a supermarket and department store on a large tract of land in Hackensack. In addition to Packard and Amster, one of Packard's longtime employees, Andrew Collier, served on the board of directors of Packard-Bamberger and its subsidiary, ABP.

Packard and yet another friend, Emil Buehler, owned a third independent corporation, HVRC, which owned a parcel of land adjacent to the one on which the Packard-Bamberger and ABP department store was situated.

After Packard's death in 1981, a bitter struggle ensued for the assets of his two affiliated corporations, including the property on which the business was located. Packard's son John eventually seized control of Packard-Bamberger and ABP. He then discharged Amster and Collier.

After Buehler's death in 1984, John approached his executor indicating that Packard-Bamberger would be interested in buying the estate's interest in HVRC. The executor told John that the estate had no plans to sell. Unbeknown to John, Collier also had communicated with Buehler's estate about the sale of HVRC stock. Eventually Collier bought the HVRC stock for $220,000.

Amster had assisted Collier in that transaction, which resulted in his becoming the beneficial owner of half of Collier's HVRC stock.

During the protracted litigation, John secured and accepted a $4 million offer from a real estate developer to purchase the Hackensack property. During the time that offers were being considered, a different developer, Sherbrook, made an offer to Collier for $12 million.

Neither Amster nor Collier disclosed this to John. Amster's role in that transaction involving the purchase of HVRC stock became the basis for John's claim that Amster breached his fiduciary duty to Packard-Bamberger and usurped its corporate opportunity by acquiring HVRC stock for his own personal benefit.

John, who had gained control of Packard-Bamberger and its subsidiary, sued Amster and Collier alleging that both had breached their fiduciary duties by failing to disclose Sherbrook's offer of $12 million.

A second issue was whether Amster as Packard-Bamberger's attorney wrongfully usurped a corporate opportunity that belonged to Packard-Bamberger by purchasing the stock in HVRC. John alleged that HVRC's parcel of real estate would have enhanced the value of the main Hackensack property.

The trial court ruled that Amster had an obligation to Packard-Bamberger because of his role as its legal counsel and that he had violated the Rules of Professional Conduct for failing to disclose to his corporate client an opportunity that rightfully belonged to it. Instead, he took advantage of that opportunity for his own personal gain by acquiring an ownership interest in HVRC.

Interestingly, the trial court rejected the corporation's claim of legal malpractice against Amster because it could not establish a causal connection between his misconduct and the loss of the $12 million offer from Sherbrook.

Indeed, the court found that there were too many contingencies attached to that offer that would have made it unlikely that it would ever have been consummated. Thus, the court found no proximate cause between the breach of Amster's duty and any alleged damages.

However, there still remained Amster's breach of fiduciary duty in intentionally concealing from his corporate client an opportunity that might have enhanced the value of its property and taking advantage of that opportunity for his own personal gain.

This scenario, involving intentional wrongdoing of a lawyer, as opposed to negligent misconduct, gave the Supreme Court the opportunity to revisit the *Saffer* principle and in doing so the Court conveys a clear and succinct message.

It reaffirmed that although New Jersey generally disfavors the shifting of attorneys' fees, a prevailing party can recover those fees because "a negligent attorney is responsible for the reasonable legal expenses and attorney's fees incurred … in prosecuting [a] legal malpractice action"

However, the Court emphasized that "an attorney who *intentionally* violates the duty of loyalty owed to a client commits a more egregious offense than one who negligently breaches the duty of care. A client's claim concerning the defendant attorney's breach of fiduciary duty may arise in the legal malpractice context.

"Nonetheless, if it does not and is instead prosecuted as an independent tort, a claimant is entitled to recover attorney's fees so long as the claimant proves that the attorney's breach arose from the attorney-client relationship," the Court said.

Accordingly, the Court held that "a

successful claimant in an attorney-misconduct case [whether negligent or intentional] may recover reasonable counsel fees incurred in prosecuting that action."

The Court explained that such a ruling "is consistent with the goal in *Saffer* of holding attorney's responsible for professional conduct that causes injury to their clients. It is likewise consistent with the policy, also suggested in *Saffer*, that a client should be able to recover for losses proximately caused by the attorney's improper performance of legal services. That policy is intended to ensure that the client be placed in as good a position as if the attorney had performed properly."

Amster's duties as a director and legal counsel to Packard-Bamberger overlapped. Amster owed fiduciary duties to Packard-Bamberger in both of his roles and his misconduct breached his duties as a director and as an attorney.

Because Amster violated the duty he owed to Packard-Bamberger as legal counsel, the trial court's award of attorneys' fees was proper. In contrast, if Amster had not been counsel to Packard-Bamberger, his fiduciary duty to Packard-Bamberger would have arisen solely from his status as a director.

In that singular role, he would not have rendered any legal services to the corporation and therefore, an award of attorneys' fees to Packard-Bamberger's attorneys in the litigation against Amster would not have been appropriate.

Pivnick v. Beck, 165 N.J. 670 (2000), is important for two reasons.

First, the Supreme Court adopted the well-reasoned opinion of the Appellate Division enhancing the plaintiff's burden of proof where the former client alleges that the lawyer was negligent in drafting a will that failed to carry out the true intent of the testator. Now, plaintiff beneficiaries under wills or trusts, who feel they were cheated out of the legacy they had hoped for but did not get, must prove by clear and convincing evidence — and no longer by a preponderance of the evidence — that the lawyer who drafted the testator's wills or trust was negligent.

But the Supreme Court did more than enhance the plaintiff's burden in those select wills or trusts malpractice cases. It strengthened the importance of the Appellate Division opinion by adding an additional source of "authoritative support." It cited the *Restatement of the Law (Third)* The Law Governing Lawyers, Section 51. That section had been a source of great controversy during its drafting phases.

The annals of the American Law Institute's proceedings are replete with references to that controversy as is the substantial body of literature that resulted from these debates. Section 51 covers the lawyers' "Duty of Care to Certain Non-Clients."

It expands the traditionally limited scope of a lawyer's duty to third parties and puts an end the centuries-old privity bar that had insulated lawyers from liability to nonclients.

That doctrine was laid to rest in New Jersey years ago. In balancing the expansion of lawyer's duties to nonclients with the lawyer's primary duty to his client, Section 51 (3)(a) would impose liability to a nonclient when "the lawyer knows that a client intends as one of the primary objectives of the representation, that the lawyer's services benefit the non-client."

The section applies where the beneficiary of a will or trust who claims that because of the lawyer's negligence in drafting the testamentary instrument, he failed to carry out the testator's true intent, which would have yielded the plaintiff beneficiary a larger share of the decedent's estate.

In that limited class of cases, the Court made it a tad more difficult for the plaintiff to prove malpractice. Instead, just as the beneficiary would have to prove the testator's true intent in the will contest by clear and convincing evidence, that same burden of proof would now apply in the legal malpractice action against the draftsman of the will.

The Court, thus, enhanced the level of proof the plaintiff in the malpractice action must bear in proving the case against the drafter of the will. Previously, in legal malpractice cases, although the negligence of the lawyer in drafting could have been established by a preponderance of the evidence, the *Pivnick* case signals a clear change in that rule.

Presumably, the application of the enhanced burden of proof requirement would apply to the proximate cause element of the legal malpractice cause of action.

Traditionally, in order to make out proximate cause, the malpractice plaintiff must prove the underlying case by a preponderance of the credible evidence. But now, in the case where the beneficiary attempts to prove that the lawyer was negligent in drafting the will, he must prove by clear and convincing evidence that the testator's intent was different from the way the will was drafted and that difference accounts for the smaller legacy.

This, however, said the Appellate Division, and the Supreme Court agreed, does not signal a "wholesale enhancement of the burden of proof in legal malpractice cases generally." It is, however, a narrow exception in those cases where the malpractice plaintiff seeks to contradict "solemnly drafted and executed testamentary documents," such as a will or trust agreement.

In its third decision in the legal malpractice arena, the Supreme Court quickly put to rest a controversy over whether the statute of limitations for legal malpractice cases alleging damages for personal injuries was two years or six years.

In *McGrogan v. Till*, 167 N.J. 414 (2001), the Supreme Court reversed an Appellate Division decision that had truncated the longstanding six-year statute of limitations in legal malpractice actions to two years on the basis that damages sought by plaintiff in the underlying case were akin to personal injuries, which are governed by a two-year statute of limitations, 327 N.J. Super 595 (App. Div. 2000).

That Appellate Division decision reasoned that the plaintiff in the underlying case claimed that he was a victim of ineffective assistance of counsel in defense of criminal charges, as a result of which he suffered a loss of liberty due to a less favorable plea arrangement.

That loss of liberty was viewed by the Appellate Division as a form of personal injury that was governed by a two-year statute of limitations.

In reversing the Appellate Division,

the Supreme Court prevented what would have been a flood of litigation in the area by making it very clear that "a single statute of limitations controls the timeliness of all legal malpractice actions, irrespective of the specific injuries that are asserted.

"We hold further that the six-year limitations period set forth in N.J.S.A. 2A:14-1, which has applied heretofore to claims of legal malpractice, continues to govern those actions."

Interestingly, the Court also gave some very clear guidance should there be any reason to revisit in future cases the question of whether the six-year statute of limitations should apply. Here the Court acknowledged that legal malpractice is a hybrid cause of action containing elements of both contract and tort.

The hybrid nature of the cause of action has produced an enormous body of decisional law and literature on whether the longer contract or shorter tort statute of limitations should apply.

The Court quickly resolved the dispute and stated clearly and strongly: "Different limitations periods should not be applied in different cases dependent on the specific injury pled. Thus, whether a plaintiff employs an underlying theory of contract or tort in a legal malpractice action is irrelevant to the statute of limitations inquiry; what matters is that the gravamen of legal malpractice actions is injury to the rights of another, not personal injury … ."

"An underlying purpose of statutes of limitations is to reduce uncertainty concerning the timeliness of a cause of action … Statutes of limitation cannot promote greater certainty when decisions [such as the Appellate Division's] inject ambiguity into their application."

Echoing the words of yet another state Supreme Court, the high court stated: "This court should avoid applications of the law which lead to different substantive results based upon distinctions having their source solely in the niceties of pleadings and not in the underlying realities." Clearly a resounding victory for substance over form!

So, on balance, the Supreme Court gave clarity in at least three controversial legal malpractice scenarios. *Saffer v. Willoughby*, through *Packard-Bamberger*, extends and reaffirms the policy it first enunciated that the plaintiff in a malpractice case can be made whole again only if the errant lawyer compensates that former client by paying his new lawyer's fees and costs in the legal malpractice action brought against him.

An economic consequence for a lawyer's misconduct is now a reality imposed on members of the New Jersey bar whether the errant lawyer's misconduct is negligent or intentional.

The sanctity of testamentary instruments prevails over disgruntled beneficiaries who claim the negligent draftsmanship of the testator's lawyer "cheated" them out of their full inheritance by requiring an enhanced burden of proof of clear and convincing evidence. And now, the statute of limitations in all legal malpractice cases is six years regardless of the theory of the underlying case and the nature of the injuries sustained.

Clearly, this term was a good one for making things clear. ■