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COMMENTARY

Way To Cut Quality of Lawyering: Cut Deadline for Malpractice Suits

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The irony — and reality — about legal malpractice lawsuits is that they make us all better lawyers. Therefore, the Legislature must reject the State Bar Association's Professional Services Business Enhancement Act.

The proposed statute seeks to cut from six to two years the statute of limitations for legal malpractice and reverse a line of Supreme Court decisions starting with *Saffer v. Willoughby*, 143 N.J. 256 (1996), that require a lawyer who commits malpractice to compensate his client for what it costs to correct it. This proposed statute would only diminish the quality of lawyers and damage their clients.

The six-year statute of limitations has been one of the most important tools in an ongoing effort to improve the quality of lawyering in New Jersey. Because of it, meritorious malpractice lawsuits have a fair chance of being brought. Cutting it to two years would drastically abbreviate the time frame within which meritorious cases could be filed. The current six-year limit does not hamper the dismissal of nonmeritorious cases.

The key to making us better lawyers is that the six-year time limit has permitted us to develop an invaluable database

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of claims experience from which we have learned how and why lawyers commit malpractice. We are now able to identify and address which acts or omissions constitute legal malpractice in most substantive and procedural settings. We have also been able to develop risk-prevention programs to help lawyers avoid malpractice. The practice of law gets more complex as time goes on. A cut in the statute of limitations from six to two years would eliminate two-thirds of the data we would otherwise have accumulated. Without that data, we would be unable to continue to improve the level of lawyering excellence we have thus far achieved.

With its call to reverse *Saffer*, the State Bar has spun the myth that to make malpracticing lawyers pay for their client's subsequent attorney's fees is a form of fee shifting, which singles out lawyers as the only professionals to pay the legal fees of the client victimized by malpractice. That is not true. When a plastic surgeon commits malpractice and the patient has to go to another surgeon to correct the resulting damage, the first surgeon has to pay for the subsequent surgeon's fees. The same is true with an accountant who errs in preparing a client's tax returns. The errant accountant is responsible for the subsequent accountant's fees to correct the malpractice.

The same principle should apply to lawyers as well. If we damage a client and the client has to hire another lawyer to correct that damage, we, like all other professionals, should be responsible for

the fees a client has to pay to fix our damage. Sometimes, the only way to fix that damage is with a legal malpractice suit. But that's not fee shifting. That's called consequential damages and that principle is applied logically and consistently for all professionals who commit malpractice. That makes good sense and good law. That's what *Saffer* stands for.

Above all, as lawyers our fiduciary duty requires us to put our client's interests ahead of our own. That distinguishes us from other licensed professionals. If we limit the client's right to sue us for malpractice — such as by cutting the statute of limitations — or if we insulate lawyers from paying the full measure of consequential damages that all others must pay — we have thus put our self-interest ahead of the client's. Sadly, the State Bar's proposal would legitimize that breach of our fiduciary duty. Our focus should instead be to continuously improve the quality of lawyering to prevent malpractice, not to diminish the rights and remedies of clients who are victims of poor lawyering.

Our state legislators should see the Professional Services Business Enhancement Act as the terribly misguided effort it is. It would diminish the quality of lawyering and cause more clients to be damaged by malpractice and stripped of their right to redress that wrong. If the State Bar has any real interest in preventing malpractice, it should support measures that uphold the improvement of lawyers and not measures that weaken the rights of those clients damaged by malpractice. This statute would hurt the Bar and all clients. The first thing we should do is kill the Professional Services Business Enhancement Act before it kills good lawyering and chases away good clients. ■