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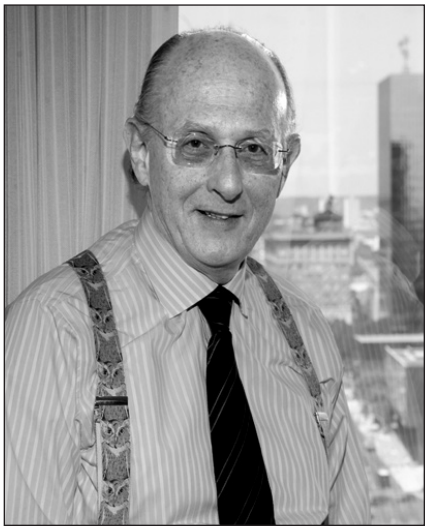
LEGAL ETHICS & MALPRACTICE

Settle and Sue Is Here to Stay

By Bennett J. Wasserman & Krishna J. Shah

Nearly 20 years ago, the New Jersey Supreme Court first decided whether and under what circumstances a client can settle a litigated matter and then sue her attorney for a purportedly inadequate settlement. After two seemingly contradictory opinions, *Ziegelheim* in 1992 and *Puder* in 2005, the Supreme Court clarified the issue further this year in *Guido v. Duane Morris, LLP*, 202 N.J. 79 (2010). Not only does the decision mark a return to the Court's original position on the topic — settlement of an underlying claim is not necessarily a bar to a subsequent malpractice suit — it also holds that plaintiffs need not move to vacate the purportedly defective settlement before proceeding with a malpractice action.

The Court first ruled on a plaintiff's ability to "settle and sue" in *Ziegelheim v. Apollo,* 128 N.J. 250 (1992). The decision appeared to protect clients even in instances where they made affirmative representations that they had entered into the underlying settlement knowingly and voluntarily. In *Ziegelheim,* the plaintiff settled her divorce action and then sued her former attorney for malpractice alleging that he failed to properly investigate her husband's assets and, therefore, negotiated a deficient settlement on her behalf. Notably, however, when testifying before the Court immediately after the settlement was read into the record in open court, plaintiff stated that she understood the settlement, that she thought it was fair, and that she was entering into it voluntarily. Despite these representations, the Court allowed plaintiff to move forward with her malpractice claim, in large part, based on her assertion that she only believed the settlement to be fair in light of her attorney's flawed representation that "wives could expect to receive no more than ten to twenty percent of the marital estate if they went to trial."



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In rendering its decision, the Court made note of the fact that plaintiff had sought to set aside the settlement she now complained of. While the motion to set aside the settlement was pending, the malpractice action was called to trial. Plaintiff voluntarily dismissed her first malpractice action against her former attorney, since it "was premature in the absence of a ruling on the motion to reopen the divorce decree." In light of the family court's ruling that plaintiff had entered into "settlement after extensive negotiations" and its refusal to set aside the underlying settlement, the Court found that plaintiff "was left only with her case against [her former counsel]" and allowed the malpractice action to proceed.

In a subsequent decision, *Puder v. Buechel*, 183 N.J. 428 (2005), the Court did an about face and interpreted the *Ziegelheim* Court's discussion of plaintiff's efforts to set aside the settlement

agreement at issue as a prerequisite in all instances where a plaintiff decides to "settle and sue." In *Puder,* plaintiff alleged that her former attorney "insufficiently and inadequately" negotiated a settlement of her claims "without adequate discovery and information concerning [her husband's] income and assets." Plaintiff successfully moved for a stay of the malpractice action until the resolution of a hearing in the matrimonial matter to determine whether the family court would enforce the settlement negotiated by plaintiff's former counsel.

In the meantime, however, plaintiff's new counsel negotiated a second settlement. Although plaintiff believed that the settlement could have been better had her former counsel properly handled the mater, she conditionally accepted the second settlement as "fair" in light of her "exposure if the judge finds the [former agreement] enforceable" — she would receive even less of the marital estate than her new attorney had negotiated on her behalf. Further, plaintiff testified that despite the new settlement, she was "still preserving any and all claims" she had against her former counsel. The defendant attorney, however, argued that plaintiff's voluntary acceptance of the second settlement absolved her of all malpractice liability because the "causal link" with regard to the alleged damages had been "irrevocably severed."

The Court, citing to the "well-settled legal principle that the law favors settlements," and that "a client should not be permitted to settle a case for less than it is worth…and then seek to recoup the difference in a malpractice action against the attorney," gave short shrift to plaintiff's argument that she should not be punished for mitigating her damages under the first settlement by entering into the second settlement. The Court held that plaintiff was "bound by her calculated decision to resolve the dissolution of her marriage by accepting [the second settlement offer] in open court."

The Court's most recent opinion in *Guido v. Duane Morris, LLP,* exhibits a return to the more client-friendly *Ziegelheim* era. In *Guido,* the plaintiffs who were shareholders, settled their action against the company and several of its officers and directors and then sued their former attorneys for allegedly failing to advise them of the impact the agreement would have on the value and marketability of their shares. At the time the settlement was placed on the record, plaintiffs testified that they understood the terms of the agreement, had no further questions, and agreed to be bound by the terms of the agreement.

The Court noted that certain long-terms implications would not "necessarily be obvious from the settlement terms themselves" and "the fact that a party received a settlement that was fair and equitable does not mean necessarily that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent."

In response to the attorneys' argument that plaintiffs' claim was premature in light of their failure to seek repudiation of the settlement in the underlying action, the Court found no basis in the record to believe that, after almost two years, the general equity court would set aside the settlement in the underlying matter. Indeed, the Court recognized that it may very well be an exercise in futility for plaintiffs to now seek repudiation.

Amicus, the Trial Attorneys of New Jersey, argued that plaintiffs' failure to seek repudiation for over two years should preclude the filing of a legal malpractice action based on an alleged misunderstanding of the settlement's terms. They argued that such a rule "would provide consistency and finality that both litigants and attorneys expect from a settlement agreed to and accepted on the record" in open court. Allowing the suit to proceed, they argued, would have a detrimental effect on the bar and court calendars, and would undermine the integrity of the judicial and mediation process.

The Court, however, returned to *Ziegelheim*'s "bedrock principle," viewing it as the rule, and *Puder* as an equitable exception that could bar some "settle and sue" suits. Placing great emphasis on the fact that plaintiffs in *Guido* never made any representation that the settlement was "fair" or "adequate," the Court held that a client need not first seek to vacate a settlement based on purportedly negligent advice. Rather, he may proceed directly to settle and then sue his former attorney.

Paragon Contractors Inc. v. Peachtree Condominium Association

We take the liberty of a brief peek at one decision that did not arise in a legal malpractice setting, but has important ramifications to attorney liability litigation. The Supreme Court forewarned attorneys in *Paragon Contractors Inc. v. Peachtree Condominium Association,* 2010 WL 2553869 (2010), that the absence of the affidavit of merit conference mandated by *Ferreira* v. *Rancocas Orth. Assoc*., 178 NJ 144 (2003), will not serve to toll the statutory time frames in the Affidavit of Merit statute — which is at the heart of legal malpractice actions. (See Ronald Grayzel, Tort Law, 201 N.J.L.J. 767).

The Affidavit of Merit statute provides that in an action for damages from an alleged act of malpractice or negligence by a licensed person, the plaintiff must provide each defendant with an affidavit of an appropriate licensed person within 60 days following the filing date of the answer to the complaint that "there exists a reasonable probability that the care, skill or knowledge exercised that is the subject of the complaint fell outside acceptable professional or occupational standards or practices." The Court may grant no more than one additional period not to exceed 60 days upon a finding of good cause.

If an attorney fails to provide an Affidavit of Merit after the expiration of 120 days, generally dismissal with prejudice is required. However, where extraordinary circumstances are present, a late affidavit will be permitted. The courts have yet to define the full scope of extraordinary circumstances as an equitable remedy; however, attorney inadvertence in complying with the Affidavit of Merit statutory time limits is usually not such an extraordinary circumstance that would save the action.

The *Ferreira* decision provided a way to assure the timely filing of Affidavits of Merit by requiring the trial court to hold an accelerated case management conference within 90 days of the service of an answer in a malpractice action. It was

thought that the conference would assist parties and the court in identifying any failure to comply with the Affidavit of Merit statute in time to correct it within the statutory time limit. But the *Paragon* case highlights how an administrative snafu might undermine the safety net that *Ferreira* was intended to provide.

In *Paragon*, the Supreme Court held that failure to hold a *Ferreira* conference will not be a valid excuse that will toll the statutorily prescribed time frames. The Court noted that there was a lack of unanimity in the courts over that conclusion, and the Appellate Division was divided over whether the failure to hold a *Ferreira* conference prevented dismissal with prejudice under the statute. The Supreme Court noted this lack of clarity may have confused lawyers as to the significance of the failure to hold a conference, who may have incorrectly assumed that the absence of the conference provided a safe harbor from the Affidavit of Merit's statute's time requirements. That's an out from timely filing of Affidavit of Merits that is no longer available.

It was this initial confusion and divergence in opinion that the Supreme Court found required lenience. In the context of this case, the confusion recognized by the Supreme Court constituted an extraordinary circumstance that may have caused counsel to rest when he/she should have acted. The Supreme Court stressed that it is only the confusion over the role of the *Ferreira* conference that warranted relief in this case. And now that the cloud of confusion has been lifted, attorneys are warned that failure to have a *Ferreira* conference will not toll the statute's time frames. The ramifications should be abundantly clear: If an attorney blows the time limits in any professional malpractice case governed by the Affidavit of Merit Statute, the next case may be a legal practice action against him.

Legal Ethics

In *City of Atlantic City v. Trupos*, 201 N.J. 447 (2010), the Court addressed the question of whether a law firm's representation of individual taxpayers in real estate tax appeals presented a conflict of interest with regard to its representation of a municipality on potentially related matters. Daniel Gallagher, Esq., of Miller, Gallagher & Grimely, served as legislative counsel for Atlantic City for two years. He was then retained to represent and advise plaintiff in all matters assigned by the city solicitor, including tax appeal matters. In connection with a litigation involving the city, represented by the Gallagher law firm, the Court ordered the city to solicit bids for the implementation of a revaluation of property tax assessments. The law firm also served as one of the nonvoting consultants to a committee charged with implementing the revaluation of real estate tax assessments. Meeting minutes reflected that Gallagher attended but did not participate in meetings of the committee. Furthermore, Gallagher and the law firm's representation of plaintiff during the relevant time was limited to casino and large commercial property tax appeals. The law firm ceased the bulk of its representation of plaintiff as of March 1, 2008. (See Robert Alter, Tax Law, 201 N.J.L.J. 775.)

Afterwards, the law firm was retained to represent individual taxpayers challenging their 2009 assessments. Since the Atlantic County Board of Taxation lacked jurisdiction to hear plaintiff's claim for disqualification of the law firm, plaintiff brought the claim before the Tax Court, which decided that the law firm was precluded from representing tax payers in tax appeals adverse to plaintiff. Upon an appeal filed by the law firm, the Appellate Division affirmed the Tax Court's decision. The law firm brought this appeal to the Supreme Court.

The Supreme Court ultimately vacated the order of the Tax Court disqualifying the law firm from representing the Atlantic City taxpayers in connection with their 2009 tax appeals. The Court felt the cornerstone issue in this appeal was narrow: Whether the law firm's representation of the city in defense of tax appeals during 2006-2007 was "substantially related" to the law firm's prosecution of individual taxpayers' 2009 tax appeals against the city. The Supreme Court found that R.P.C. 1.9 (Duties to Former Clients) provided the standard for decision in this appeal. The rule provides that "a lawyer who has represented a client in a matter shall not thereafter represent another client in the same or substantially related matter in which that client's interests are materially adverse to the interest of the former client." The weighing of interests exercise involves a balance of competing interests by weighing the need to maintain the highest standards of the profession against a client's right to freely choose his counsel. The burden of persuasion on all elements under R.P.C. 1.9(a) remains with the moving party, as it bears the burden of proving that disqualification is justified.

In this case, two of the three necessary predicates to the application of the R.P.C. 1.9(a) disqualification bar were not in dispute: (1) the law firm formerly represented plaintiff, and (2) the interests of the law firm's clients in the 2009 tax appeals were materially adverse to plaintiff's interests in those tax appeals. Therefore, the only outstanding question was whether plaintiff's cases, handled by the law firm in 2006- 2007, and the individual taxpayer appeals, handled by the law firm in 2009, were considered the same or substantially related matters.

The Supreme Court noted that there was no reported case in New Jersey that spoke directly on what may constitute "substantially related matters" as set forth in R.P.C. 1.9(a), and therefore, was guided by other jurisdictions and their definitions of "substantially related" matters in the attorney disqualification context. Pennsylvania courts, for example, found matters to be "substantially related" if they involved the same transaction or legal dispute, or if there was otherwise a substantial risk that confidential factual information would materially advance the client's position in the subsequent matter. New Jersey federal courts also weighed in on this point by eliminating the "appearance of impropriety" language from the rules of professional conduct in 2004.

A distillation of these varied guidelines from other jurisdictions provided the Court with a workable standard. A matter is considered to be "substantially related" if (1) the lawyer whose disqualification is sought received confidential information from the former client that can be used against the client in the subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior

representation are both relevant and material to the subsequent representation.

In this case, while the law firm's involvement of the prior and current representation touched the same subject matter — the propriety of municipal real estate tax assessments — the city's sole complaint, and the basis on which it sought the law firm's disqualification, arose from its concern that the law firm may have acquired otherwise privileged information when it participated, on a nonvoting basis, in the selection of the revaluation company that produced the assessments subject to the 2009 appeals. The facts showed that the law firm attended two meetings during which the selection of the appraisal company was discussed. There was no discussion of valuation methodology or other substantive matters. Even if the methodology were discussed, the contents of the discussion were not confidential since plaintiff would have been required to disclose how it reached the value assigned to the property that was subject to the appeal.

The city failed to point to confidential communications it shared with the law firm that could have been used against it in the 2009 tax appeal. There was no proof of any settlement strategy being shared with the law firm. Also, there was no proof that the facts of the prior representation were relevant or material to the objected to representation.

The Supreme Court concluded that the law firm did not receive confidential information during its prior representation that could be used against plaintiff in the prosecution of the current representation. The facts relevant to the prior representation of plaintiff were not relevant or material to the current representation. The order of disqualification entered against the law firm was vacated. The decision is an important one, especially in an era of increasingly complex litigations where motions to disqualify are motivated in large part by strategic rather than ethical reasons. Counsel now, at the least, have a better understanding of the meaning of the "substantially related" standard.

In the Matter of David J. Witherspoon

What is the appropriate level of discipline to be imposed on a lawyer who uses the power of his license to practice law to secure sexual favors from his clients? The Supreme Court visited this question in *I.M.O. David J. Witherspoon*, 2010 WL 2950174 (2010). This disciplinary matter arose in the context of a three-count attorney ethics complaint, concerning allegations of sexual harassment, sexual discrimination, failure to pay the required annual assessment to the lawyer's fund for client protection and failing to maintain proper financial bookkeeping. However, the proceedings before the Supreme Court focused on one count only involving sexual improprieties, which was also the only count Witherspoon contested before the District VI Ethics Committee (DEC).

It was alleged that Witherspoon made comments offering discounted legal fees to one client in 2001 and on several occasions in late 2005 and early 2006 to two clients and a family member of another client in exchange for sexual favors. Witherspoon contested the allegations, stating that his comments were made in jest and not meant to insult or demean anyone. The DEC found that Witherspoon's arguments were entirely unpersuasive and violative of accepted professional norms, and that his comments had no other purpose than to embarrass his clients. The DEC found that Witherspoon violated R.P.C. 1.7(a)(2) (conflict of interest), R.P.C. 4.4 (purpose to embarrass, burden or delay), R.P.C. 8.4(d) (conduct prejudicial to administration of justice) and R.P.C. 8.4(g) (sexual harassment or discrimination). The DEC recommended that he be censured for these violations along with mandatory sensitivity training and other supervisory measures.

The matter went before the Disciplinary Review Board (DRB) for a de novo review. After its consideration of the record, the DRB found that the evidence of the allegations against Witherspoon was clear and convincing and agreed with the DEC that Witherspoon's conduct was unethical. However, the DRB disagreed with the DEC disciplinary recommendation. The majority of the DRB determined that an imposition of a 3-month suspension from the practice of law would be appropriate. The dissenting opinion of the DRB was for the imposition of a 6-month suspension based not only on the current allegations, but also his prior blemished disciplinary history.

The only issue before the Court was the appropriate amount of discipline to be imposed on Witherspoon for his ethical violations. In an effort to evaluate the conduct and respond with the appropriate discipline, the Court reviewed its previous opinions, noting the paucity of bright-line rules for such cases. Obviously, the evaluation of the appropriate discipline is a fact-sensitive venture.

The Court indicated that it did not agree with any of the recommendations made by the DEC and DRB, but concluded that a one-year period of suspension is the appropriate discipline in this matter. The Court noted that "none of the grievants in this case accused the attorney of forcing them to endure any unwanted physical contact or even attempting to do so, none of them felt sufficiently pressured that she considered giving into his advances, none sought therapy or treatment to overcome the experience, none suggested the incidents were traumatic, none pursued criminal charges."

The Court noted that the record lacked the severity of behavior that in prior cases had led to disbarment, as there was no evidence that Witherspoon was threatening or dangerous. Furthermore, while preying on clients goes to the heart of the attorney-client relationship, the majority of the Court could not go along with creating a bright-line rule mandating disbarment for such misconduct. Therefore, the Court felt it was appropriate in this case to impose the suspension of practice of law for a period of one year, as well as require Witherspoon to undergo sensitivity training and institute accounting controls in his office before he could return to practice. Some might breathe a sigh of relief with a one-year suspension; others might call for a more drastic remedy. The Court, though, in its wisdom, stuck to the facts.

In the Matter of the State Grand Jury

When is it acceptable for a lawyer to receive payment for representation of a client from a third party? The Supreme Court addressed this issue in *I.M.O. of the State Grand Jury*, 200 N.J.

481 (2009). The state filed a motion to disqualify attorneys selected and paid for by the employer to represent employees, both involved and not involved, in grand jury proceedings conducted in connection with an investigation of the employer for alleged fraud.

The employer arranged for counsel for its employees after the state commenced a grand jury investigation into whether a corporate contractor had submitted fraudulent invoices for services purportedly rendered to a county government. The company entered into four separate retainer agreements with four separate lawyers to represent both the involved and noninvolved employees. The retainer agreements provided that the company would be responsible for all reasonable and necessary legal fees incurred. The sole obligation of the law firm was to the employee and the law firm was not required to disclose any legal strategy, theory or plan of action to the company. The company informed the employees that it retained these lawyers for them under no obligation to do so, and it may stop paying legal fees and costs at any time.

R.P.C. 1.8(f) governs the circumstances for when it is appropriate for an attorney to be compensated for his services by someone other than his client. The rule forbids a lawyer from accepting compensation for representing a client from one other than the client, unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment and the lawyer-client relationship; and (3) information relating to representation of a client is protected as provided for by the rule.

The trial court denied the state's disqualification application and issued an order limiting the amount of information to be transmitted by the lawyer to the employer. Further, it imposed restrictions on the ability of the employer to discontinue payment of the legal fees, as well as the lawyers' ability to discontinue representing the employees.

The Appellate Division rejected the state's motion for leave to appeal. The state then successfully sought review by the Supreme Court.

While the lawyers whose disqualifications were sought stated that the R.P.C. 1.8(f) clearly contemplates this type of arrangement, the state argued it would nevertheless split the attorney's loyalty and discourage the lawyer from counseling the client to cooperate with the state, even when cooperation might be in the client's best interest. The state was concerned the company's payment of legal fees might taint the grand jury proceedings. The state also claimed that such a conflict cannot be waived, and even if it could be waived, the waiver could only be demonstrated through live testimony, not via certifications as was done in this case.

The Court noted that to warrant such disqualification, the asserted conflict must have some reasonable basis. It had long been understood that it may well be improper to accept an employer's promise to pay the employee's legal fees because of an inherent risk of dividing the attorney's loyalty between the client and the employer. Such a conflict of interest probably cannot be waived when the public interest in the disclosure of criminal activities may be hindered.

R.P.C. 1.8(f), however, permits a lawyer to accept compensation from a third party. The Court also noted that two other R.P.C.'s directly touch on the question presented. R.P.C. 1.7(a) forbids a lawyer from representing a client if the representation involves a concurrent conflict of interest recognized as a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to a third person or a personal interest of the lawyer. R.P.C. 5.4(c) provides that a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another, to direct or regulate the lawyer's professional judgment in rendering such legal services.

Harmonizing these rules, the Court offers the following guidance: A lawyer may accept payment, directly or indirectly, from a third party only when each of the following six conditions are satisfied: (1) the informed consent of the client is secured; (2) the third-party payer is prohibited in any way from directing, regulating or interfering with the lawyer's professional judgment in representing the client; (3) there cannot be any current attorney-client relationship between the lawyer and the third-party payer; (4) the lawyer is prohibited from communicating with the third-party payer concerning the substance of the representation of his client; (5) the third-party payer shall process and pay all such invoices within the regular course of its business, consistent with the manner, speed and frequency it pays its own counsel; and (6) once a third-party payer commits to pay for the representation of another, the third- party payer shall not be relieved of its continuing obligations to pay without leave of court obtained with prior written notice to the lawyer and the client.

Applying these principles to this case, the Supreme Court found that the trial court had properly denied the state's motion to disqualify counsel because each of these six safeguards were present: informed consent was given, there was no interference with the lawyers' professional judgment, none of the lawyers selected to represent the individual employees had any current relationship with the company, the retention agreements made clear that the lawyer was not required to disclose any substance of the representation of the client and all billings would be redacted of such information, and payment was prompt.

State v. McCabe

The Supreme Court tackled the issue of recusal of a municipal court judge in *State v. McCabe*, 201 N.J. 34 (2010). McCabe was a defendant in a DWI case before a municipal court judge who happened to have an unrelated pending case with defense counsel. Uneasy with such a relationship, the defendant filed a motion to recuse the municipal court judge. The Supreme Court was asked to decide whether a municipal court judge must recuse himself when the judge and the defense attorney are adversaries in an unrelated pending probate case that had been dormant for two years.

McCabe filed the recusal motion, arguing that recusal was necessary to avoid an actual or potential conflict of interest and an appearance of impropri-

ety. The defendant's counsel argued that although the probate matter had been inactive for two years, it was still a pending case.

The municipal court judge, however, did not find any prejudice to McCabe that warranted recusal. The Superior Court denied McCabe's motion for leave to appeal the municipal court's ruling.

Subsequently, the unrelated pending probate case that was at the heart of the recusal motion was dismissed for lack of prosecution. McCabe was also denied leave to file an interlocutory appeal with the Appellate Division. The Supreme Court, however, accepted McCabe's appeal and granted a stay of the municipal court DWI matter. McCabe argued before the Supreme Court that the Superior Court applied the wrong standard on appeal by failing to conduct a de novo review. McCabe also argued that the Superior Court applied the wrong legal standard and it misconstrued the facts by characterizing the probate case in the past tense even though it was still open and pending at the time the DWI case was to be heard. The state countered by stating that the probate case was moot, the Superior Court properly reviewed the matter for abuse of discretion and recusal was not warranted under R. 1:12-1 or controlling case law because there was no evidence of animosity between the parties arising from their roles in the probate case and nothing to suggest that the municipal court judge would not be fair and impartial to McCabe in his DWI case.

The Supreme Court revisited *DeNike v. Cupo,* 196 N.J. 502 (2008), and noted that judges are required to refrain from sitting in any cases where their objectivity and impartiality may fairly be brought into question. Judges must avoid acting in a biased way or in a manner that may be perceived as partial. These principles guided the *DeNike* Court to the standard used to evaluate requests for recusal, "Would a reasonable, fully informed person have doubts about the judge's impartiality?" This same test is to be applied to municipal court judges.

Applying this standard to the facts of *McCabe*, the Court found that part-time municipal court judges must recuse themselves whenever the judge and a lawyer for a party are adversaries in some other open, unresolved matter. The state's contention that the dismissal of the probate case eliminated any conflict, thereby rendering the appeal moot, was wrong. The after-the fact dismissal cannot cure an appearance of impropriety that might have existed at the time the recusal motion was heard.

Under the circumstances presented in *McCabe*, allowing a judge to oversee a case in which the defendant's attorney is also the judge's adversary in another pending matter is to invite reasonable doubts about the judge's partiality, which in turn raises questions of overall integrity of the process and fairness in the proceedings. While the Court noted that motions for recusal ordinarily require a case-by-case analysis of the particular facts presented, it did create a bright-line rule in this area. The rule is created to offer guidance to municipal judges and litigants alike and provides that part-time municipal court judges must recuse themselves whenever the judge and a lawyer for a party are adversaries in some other open, unresolved matter. Cases are considered open through the 45-day period in which an appeal may be filed and while an appeal is pending. If the matter is reopened afterward for good cause, a motion for recusal may be entertained at that time.

The Court belatedly noted that in deciding whether recusal is appropriate because a lawyer and the municipal court judge were former adversaries in a closed case, judges should evaluate the factors in R 1:12-1, any history of animosity between counsel and judge, how recently the judge and opposing counsel were adversaries, and the timing of a motion for recusal. Clearly, the *McCabe* case is a further step by the Supreme Court to protect the integrity of the entire judiciary and to dispel even the hint or the possibility of a hint of any unfairness in the judicial process.

In the Matter of Philip Boggia

Are political contributions acceptable from a firm's joint business account where one partner is a part-time municipal court judge? In *I.M.O. Philip Boggia*, WL 2900994 (2010), a complaint was brought against Philip N. Boggia, a part-time municipal judge, whose law partner had made political contributions from the firm's joint business account. The complaint alleged violations of the Code of Judicial Conduct Canon 7A(4) as well as New Jersey Court Rules 2:15-8(a)(5) and (6).

Boggia testified at a formal hearing before the Advisory Committee on Judicial Conduct (ACJC) on March 26, 2009, that he was unaware of the contribution checks signed by his law partner until the complaint was filed. Boggia testified that while he and his law firm made contributions in the past, he was aware that such actions were no longer allowed now that he was a judge. Under such awareness, once he became a part-time municipal judge, he verbally advised his law partner and office staff to stop making political donations from the law firm's business account. Boggia's law partner submitted a certification stating that the contributions were made inadvertently and in error. Boggia was unaware of whether the political contributions were attributable to his partner's draw or treated as an expense of the law firm.

The ACJC issued a presentment and found by clear and convincing evidence that the respondent violated the Code of Judicial Conduct as well as the New Jersey Court Rules. The ACJC held that even if Boggia did not possess actual knowledge of the donations, the appearance was created that he, with his law partner, was responsible for the political contributions.

An Order to Show Cause was issued on June 1, 2009. The ACJC argued that part-time municipal court judges are absolutely barred from political involvement, either in appearance or reality, and that the firm's contributions raised questions about Boggia's susceptibility to political influence. While Boggia conceded that he was barred from such activity, he contended that the prohibition requires some purposeful, knowing or reckless conduct on his part. He argued that he was being held vicariously liable for his partner's actions and that a strict liability standard would effectively ban part-time municipal judges from employment at firms that

make political contributions.

The Conference of Presiding Municipal Judges and the New Jersey State Bar Association participated as amicus curiae. The Conference maintained that Boggia's conduct did not violate the Code of Judicial Conduct, since his actions were not marked by moral turpitude. The NJSBA argued in favor of a strict, bright-line rule barring actual and apparent political participation by judges.

The Court has consistently upheld the notion of a complete separation of politics from the judiciary to ensure that the judicial branch operates independently of political influence and to maintain public confidence in the integrity and impartiality of the system. Canon 7A(4) provides that a judge shall not solicit funds for, or pay an assessment, or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions. The rules also require that judges must avoid all impropriety and appearance of impropriety. Under R. 2:15-8(a) the ACJC is directed to review any grievance alleging that a municipal court judge is guilty of engaging in partisan politics or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The Supreme Court applied these principles to the facts of this case. Several facts presented a close call as to whether Boggia violated Canon 7A(4), including multiple political contributions drawn from the law firm's business account and the law firm's and Boggia's name appearing on the checks.

The Court noted that judges need to take adequate steps, to the best of their ability, to avoid an appearance of impropriety. In this case, Boggia was fully aware of the firm's prior practice in making political contributions; he was one of only two partners in the firm and had full access to all of the firm's financial records. Furthermore, only four people, including Boggia, had authority to write out checks on the business account.

The Court recognized that Boggia took some steps, albeit ineffective, to try and avoid what happened. In addition, his law partner acknowledged that he was responsible for all of the political contributions made. The Supreme Court could not find that the standard of clear and convincing evidence needed to sustain a charge against a judge was met. Also, to the extent that there was any lack of clarity in the law, the court declined to find a violation of the Canon 7A(4) in this matter.

The Court noted, however, that whether a lawyer's name appears on the masthead, or if he or she is a partner, shareholder, director, of counsel, or associate, the appearance of impropriety standard calls for vigilance. For that reason, the ban on making political contributions from a law firm's business account must apply not only to part-time municipal judges themselves, but also to the lawyers with whom they are affiliated in any capacity.

The Supreme Court referred this matter to the Professional Responsibility Rules Committee and the Advisory Committee on Extrajudicial Activity to develop appropriate rules to implement this decision which would ensure compliance not only by part-time judges, but also the lawyers in their respective firms.

In sum, this term the Court gave us a full menu in the areas of legal malpractice and legal and judicial ethics. New Jersey law has now been made clear on the parameters of "settle and sue" malpractice litigation; we have been warned about the malpractice trap for not adhering to the statutory time limits for furnishing affidavits of merit; and we have some solid guidance in these areas: on how to analyze conflicts of interest between current and past clients; on professionalism and the risks of personal indiscretions with clients; on the standards of judicial recusal; and on balancing judicial service with otherwise protected political activities of a municipal judge's law firm. In all, it's been a pretty productive term for the Court in the area of legal malpractice and ethics and, one that is chock full of important decisions that reflect the outstanding quality of its Justices who, with clarity of thought and writing, have again helped to enhance and protect the qual-