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N.J. SUPREME COURT YEAR IN REVIEW LEGAL ETHICS & MALPRACTICE

'Suit Within a Suit' Is Not Required

Legal malpractice plaintiffs may use expert testimony to prove proximate cause

By Bennett J. Wasserman

During the past term, the Supreme Court restored the life and luster to *Lieberman v. Employer's Ins. of Wausau*, 84 N.J. 325 (1980), one of the landmark decisions in the jurisprudence of lawyer malpractice. In the nearly quarter of a century since *Lieberman* was decided, it had become one of the most respected and widely cited cases on how to prove the proximate cause element of a legal malpractice action stemming from litigation malpractice. Its brilliance, however, had been tarnished by some recent appellate decisions. Thanks to *Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C.*, 179 N.J. 343 (2004), decided in the closing months of the past term of the Court, *Lieberman* has been restored to its coveted position.

Traditionally, malpractice plaintiffs were limited to the "suit within a suit" format to prove that the negligence of the defendant attorney was the proximate cause of their loss or otherwise disappointing result of their underlying case. That meant the former client needed to prove that there would have been a better outcome in their underlying case, had their prior attorney not been negligent. The plaintiff was required to try the underlying case to the jury sitting in the malpractice case the way it should have been tried the first time. But that approach was frequently inappropriate and, as several observers noted, just plain unfair. As a result, the "suit within a suit" had earned some well-deserved criticism from courts and commentators. In reversing the Appellate Division's dismissal of the plaintiff's case, the Court, in *Garcia*, reiterated each of those shortcomings, as if to admonish trial and appellate courts "advocating strict

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adherence to the 'suit within a suit' format that such an approach 'misreads' the *Lieberman* case." Id.

Garcia was a legal malpractice case that resulted when the plaintiff's attorney failed to name an indispensable party defendant in a chain-collision motor vehicle case before the statute of limitations had expired. When that error was discovered, substitute counsel took over, moved to amend the complaint to add that defendant, who was then granted summary judgment on the grounds that the statute of limitations had expired. As a result, the plaintiff had to settle her personal injury case with other less culpable defendants for a lot less than she claimed her case was worth. After settling the underlying case, she sued her first attorney for the difference between what she got from the other defendants ($87,000.) and what she claimed was the full value of her case ($225,000). The jury in the malpractice trial awarded her the $225,000, representing the fair settlement value of the underlying case.

The defendant lawyer appealed, claiming plaintiff should not have been permitted to offer expert testimony regarding the inadequacy of the settlement and the case instead should have been tried by adhering strictly to the "suit within a suit" formula. In any event, the defendant lawyer also argued that the settlement in the underlying case should operate to bar the legal malpractice action. The Appellate Division agreed in part and reversed the

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verdict, addressing only the "suit within a suit" issue. The Appellate Division was "satisfied that … there was no sound basis to depart from the 'suit within a suit' format, which it apparently viewed as presumptive. Accordingly, it held that the trial court erroneously exercised its discretion" when it allowed plaintiff to try its case with direct evidence from the underlying case plus the use of an expert to explain why the settlement was inadequate. It then blamed the malpractice plaintiff for choosing the wrong trial strategy and invoked the doctrine of "invited error" to reverse without a remand. The Supreme Court granted the plaintiff's petition for certitorari, reversed the Appellate Division and remanded the plaintiff's case back for further proceedings.

Garcia is the Court's gift to students of malpractice law because it catalogues in one place the frustrations that malpractice victims have encountered with the rigid "suit within a suit" proof paradigm.

"First," said the Court, "the rule wholly ignores the possibility of settlement. The simple fact is that many, if not most, legal claims are not tried to conclusion, but are amicably adjusted." Id. It makes good sense, then, not to require the malpractice plaintiff to prove what a jury would have done at the first trial, but, more precisely, what the outcome of the case would have been. If the probable outcome would have been a settlement, then proving what the likely settlement would have been gives a far more accurate indication of what the likely outcome would have been.

"Second," the Court continued, "it is often difficult for the parties to present an accurate evidential reflection or semblance of the original action. [Third], the passage of time itself can be a significant factor militating against the 'suit within a suit' approach." Id.

"[Fourth], … , a 'suit within a suit' cannot accurately reconstruct the underlying action…Often, parties must cope with the disadvantage of not having the same access to evidence or of having evidence grow stale with the passage of time … Evidentiary concerns loom large for underlying suits that never reach trial." Id. So, why should evidentiary hurdles that are never reached in the underlying case come back to haunt the plaintiff in the malpractice case?

Finally, "the 'suit within a suit' format has also drawn fire for being unfair to plaintiffs who must litigate the underlying claim against the lawyer who originally prepared it … Courts and commentators alike acknowledge the various ways in which the "suit within a suit" method can distort the underlying action … Such shortcomings have [therefore] created the need for alternative approaches and a measure of willingness to accept such alternatives when the situation demands." Id at 359.

Then, after furnishing that list of criticisms of the "suit within a suit" method, the Court seems to turn to address the rest of its decision to the trial courts. While under *Lieberman*, it was understood that the trial court would in the first instance normally exercise its discretion as to how to modify the "suit within a suit" approach when appropriate, that seems to no longer be the case. Now, the Court has expressed the preference, as observed by Justice Alan B. Handler in *Lieberman*, that "the [trial] court need not even become involved unless the parties have a disagreement over the course that the trial will take. In the absence of a disagreement requiring court intervention, a plaintiff is free, as in any case, to approach the trial as he or she sees fit, so long as the Rules of Court and Rules of Evidence are satisfied." Id. at 361. Unless victims of lawyer malpractice are given that degree of freedom to prove the underlying case through the use of expert testimony, then, as stated by the Court, we will err, "in too narrowly interpreting *Lieberman*." Id. at 363.

Thus with *Garcia*, we may well begin to see an easing of the rigidity with which some trial and appellate courts have recently applied the "suit within a suit" method of proof. But only time will tell whether and to what extent malpractice plaintiffs will be permitted to prove proximate cause (i.e., the probable outcome of the underlying case absent the negligence of the defendant lawyer) through the testimony of competent expert testimony.

Statute of Limitations

Vastano v. Algeier, 178 N.J. 230 (2003), reaffirmed the Court's prior decisions such as *McGrogan v. Till*, 167 N.J. 414 (2001), and *Grunwald v. Bronkesh*, 131 N.J. 483 (1993), requiring legal malpractice actions to be commenced within six years from when the attorney's breach of professional duty proximately caused the plaintiff's damages. In *Vastano*, the Court considered the "discovery rule," which extends the statute of limitations when the attorney malpractice is not readily ascertainable through means of reasonable diligence. The context of the holding is litigation malpractice and what constitutes "discovery" by the malpractice plaintiffs.

Plaintiffs had two main complaints against their counsel for his conduct at a trial of their negligence action arising from a car accident. First, they complained that their attorney had failed to produce expert reports, which resulted in the exclusion of their damage experts' testimony. Plaintiffs said they were awarded a "paltry damages verdict."

Secondly, plaintiffs complained that their counsel had failed to convey a settlement offer during jury deliberations that they would have accepted. They claim to have learned about the settlement offer in an appellate brief filed by opposing counsel that referred to the offer.

Relying primarily on *Grunwald*, the Court determined that the first basis for a cause of action accrued as soon as the unsatisfactory verdict was returned. The Court rejected plaintiffs' contention that their damages were merely speculative until after the Appellate Division upheld the jury award because the plaintiffs knew that their counsel had acted negligently at that time. Even if their damages could have been mini-

mized after a new trial, the cost of re-prosecuting their case was, in and of itself, sufficient to trigger the statute of limitations.

Moreover, plaintiffs admitted that they believed their counsel had acted improperly during the course of the trial, specifically when their experts' testimony was precluded. When the adverse verdict was handed down, plaintiffs knew, or reasonably should have known, that they had a cause of action based on counsel's actions during the trial.

The second basis for the cause of action arose as soon as plaintiffs received their file from the negligent attorney. The file contained the appellate brief referring to the settlement offer. Had they reviewed the file (even only the major pleadings within the file), they would have seen the settlement offer that had not been conveyed and they would have known that they had a cause of action.

In sum, the *Vastano* Court unanimously held that the accrual date of a cause of action for legal malpractice is "set in motion when the essential facts of the malpractice claim are reasonably discoverable." (citing *Grunwald*, 131 N.J. at 494.) The liberal six-year statute of limitations will not be extended beyond the discovery rule when plaintiffs had a reasonable chance to learn of their counsel's negligence. The Court added, however, that in some cases, the liberality of the discovery rule may well extend the six-year statute of limitations in legal malpractice cases. "There may be cases," concluded the Court, "in which it would be unfair to conclude that the contents of an extraordinarily large file were reasonably discoverable on the day the client took possession of the file." Vastano, however, did not present such a case. Id. 178 N.J. at 242.

Legal Ethics

RPC 3.3-Candor Toward the Tribunal vs. Effective Assistance of Counsel

In *In re Seelig*, 180 N.J. 234 (2004), the Court examined the interplay between an attorney's obligation to be an effective and zealous advocate for the rights and interests of his client on the one hand with that attorney's ethical responsibilities to disclose material facts to a court on the other which may not promote the interests of the client.

Jack Seelig represented Jeffrey Poje in defense of motor vehicle offenses and separate indictable charges arising from a motor vehicle collision in which two people had died. Seelig appeared with his client in municipal court and told the prosecutor there that he was going to enter guilty pleas on the motor vehicle charges. The municipal prosecutor was not aware that Poje had been arrested and charged by the County Prosecutor with aggravated manslaughter and death by auto, two indictable offenses, nor did Seelig volunteer that information. Nor did Seelig disclose this to the municipal court judge who accepted the guilty pleas to the motor vehicle charges. Seelig was aware that if the municipal court accepted his client's guilty plea to the motor vehicle offenses, the principles of double jeopardy could well bar the county prosecutor from prosecuting his client for the more serious indictable homicide offenses. Clearly, it would seem that in so doing, Seelig actually gave his client effective and zealous representation, thereby protecting his interests.

After he accepted the defendant's guilty plea, the municipal court judge notified the County Prosecutor that he had erroneously accepted the defendant's plea on the motor vehicle offenses because at the time, he did not recognize Poje even though he had previously arraigned him on the indictable charges. Neither the municipal court judge nor the court clerk notified the county prosecutor of the motor vehicle offenses, as required by a longstanding directive from the Administrative Director of the Courts, thereby depriving the county prosecutor of the opportunity to consider whether indictable offenses were involved. Here, there clearly were. When the county prosecutor found out about what happened in the municipal court, he successfully moved to vacate the defendant's pleas based on manifest injustice.

Because Seelig had failed to disclose the indictable offenses to the municipal court judge, the District Ethics Committee filed a complaint against him alleging violation of RPC 3.3 (a)(5), which provides: "A lawyer shall not knowingly fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure." In his defense, Seelig argued:

> I don't believe that a defense attorney has an obligaton to perform the function of the [S]tate, whether it be the judge, prosecutor, the police, whatever. … If we get to the point where the defense attorney has to stand up and stop a proceeding because the court, the prosecutor … [are] not doing their function, then we don't have a Fifth Amendment right or Sixth Amendment right to a lawyer. … You have one side proceeding against the defendant without representation … I knew what was going on, but it's not my obligation to protect the [State].

A majority of the District Ethics Committee dismissed the complaint against Seelig, finding that he had provided "effective assistance to his client in defending against the State's charges." A dissenting member felt that Seelig "also owes a duty of good faith and honorable dealing to the judicial tribunals before whom he practices … "

The Disciplinary Review Board reviewed the matter de novo. Four out of seven members found that Seelig had misled the court by failing to disclose the two deaths, thus jeopardizing the prosecution's case against his client. That failure to disclose, the majority found, was a violation of RPC 3.3 (a)(5) and 8.4 (d) and they concluded that Seelig should be reprimanded. Three members dissented and found that he was not required to disclose

information that was not requested of him. The dissent believed that it would be unfair to impose discipline in view of "the absence of prior notice that respondent's action constituted wrongdoing." Since imposition of discipline requires the concurrence of five members, the Supreme Court had to rule whether and what discipline would be appropriate.

In an interesting historical analysis of a defendant's right to effective assistance of counsel and its interplay with an attorney's ethical responsibilities, the Court concluded that under New Jersey's RPC 3.3 (a)(5), a lawyer's duty to protect the interests of his client may well be secondary to his duties to the legal system and the public interest. "Thus … RPC 3.3(a)(5) [shifts] the balance in respect to lawyer's responsibilities." The focus in effective assistance of counsel cases is to assure that the defendant gets a fair trial. Here, however, that was not at issue and so "the Sixth Amendment right to effective assistance of counsel should not be invoked to thwart the administration of justice." That would have occurred if the municipal court guilty pleas had not been vacated since there was never an issue of whether the defendant would get a fair trial due to ineffective counsel.

Clearly, the Supreme Court appreciated Seelig's dilemma. Although it affirmed the Disciplinary Review Board and upheld the ethical duties contained in RPC 3.3 (a) (5), the Court determined that because at the end of it all Seelig was looking out for the best interests of his client and not deliberately attempting to mislead the court, imposing discipline was not warranted. Notwithstanding the Court's decision, still open is the question of which public interest takes precedence, that of candor toward the tribunal, or those of double jeopardy and effective assistance of counsel.

RPC 5.6-Restrictions on Right to Practice Law

Borteck v. Riker, Danzig, 179 N.J. 246 (2004), gives us the benefit of another scholarly and in depth analysis of one of the RPCs. At issue was whether RPC 5.6 required invalidation of certain retirement provisions of a law firm's partnership agreement because they had "anti-competitive effects prohibited by RPC 5.6," according to the Appellate Division. The Court, however, disagreed and directed its Professional Responsibility Rules Committee to go back to the proverbial drafting board to clarify the definition of "retirement."

Robert Borteck, a well respected trusts and estates lawyer was a capital partner at Riker Danzig. At age 53, he withdrew from Riker to join another firm where he continued to practice law. His partnership agreement with Riker entitled a withdrawing or retiring partner to certain retirement benefits and set forth a notice provision governing the departure from the firm. Borteck withdrew without apparently complying with the notice provision and, according to the Appellate Division, "began soliciting many of his former clients." Id. at 250. Riker refused to pay the retirement benefits he requested, asserting he had not "retired" as that term was defined in the partnership agreement. Borteck sued and the firm counterclaimed. The trial court granted summary judgment on Borteck's claim for the retirement benefits. The Appellate Division affirmed. The Supreme Court granted Riker's petition for certification.

The Court needed to construe the language of RPC 5.6, which states that a "lawyer shall not participate in offering or making…a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement." The lynchpin issue here was how to define "retirement" because that exception to the rule acts as a "safe harbor, permitting restrictions on the practice of law not otherwise tolerated under the rule." Id. at 252. Then, it needed to determine whether Riker's requirements "fall sensibly within that safe harbor or whether they are so unreasonable that they must be deemed void as against public policy." Id.

The Court decided that the Riker provision did not violate the safe harbor provision of RPC 5.6, but acknowledged that other New Jersey cases, where various practice agreements were invalidated, were distinguishable from this case. The Court found the Riker provisions were not arbitrary or punitive as in other cases. It also found that Riker's retirement plan contained at least three important criteria that are useful in defining such a plan. Those criteria relate to minimum age, length of service and payment of benefits over a period of time. Riker's plan had each of those. Therefore, it was not punitive or arbitrary to the withdrawing partner who sought to continue work at a competitive entity. The Court's Professional Rules Committee, however, was directed to come up with a proposal for a clearer definition of "retirement," the safe harbor exception of RPC 5.6. It would seem, however, that the Court's research and erudition goes a long way to helping the practicing bar understand the elements of that definition until the Committee proposes definitive criteria.

RPC 1.12-FormerLaw Clerks

In *Comparato v. Schait*, 180 N.J. 90 (2004), the Court provided some reassurance to judicial law clerks who accept employment with a law firm after their clerkship, as well as to the firms employing them. *Comparato* involved a matrimonial matter pending before Judge James Convery. In Dec. 1998, after a several month trial, Judge Convery issued a written opinion granting the parties a divorce and providing for alimony and equitable distribution of marital assets. Several post-judgment motions ensued, including a motion to enforce litigant's rights, filed in Aug. 1999.

Judge Convery's law clerk, Priscilla Miller, began her clerkship in Sept. 1999. On Sept. 24, 1999, Judge Convery granted defendant's motion to enforce litigant's rights, and in Feb. 2000, the court granted a second motion. In April 2000, Judge Convery issued a bench warrant for plaintiff's failure to abide the by the divorce

decree and the motions to enforce litigant's rights. In Sept. 2000, Judge Convery denied plaintiff's motion to vacate or stay the prior enforcement orders and the bench warrant.

During the trial and ensuing motion practice, defendant was represented by Neil Braun of Braun, Donahue, Hagen, Klein & Newsome. At the end of her clerkship, Miller accepted a position with the Braun, Donahue firm. Judge Convery was made aware of his law clerk's position.

In Jan. 2002, Neil Braun left the Braun, Donahue firm and formed Gomperts & Braun. Miller began working at the Gomperts firm in April 2002. At that time, she reviewed plaintiff's appeal of Judge Convery's alimony award, and drafted an appellate brief in response to plaintiff's motion for leave to appeal. She also appeared at the plaintiff's deposition and mentioned to plaintiff's counsel at that time that she had clerked for Judge Convery. Judge Convery denied plaintiff's subsequent motion for recusal and to disqualify the Donahue and Gomperts firms, finding that, as his clerk: (1) Miller had no intimate or special knowledge about the matter; and (2) the work performed during her clerkship was largely ministerial — consisting of keeping track of motions, and managing the court's calendar. The Appellate Division affirmed.

Relying on the then-language of R.P.C. 1.12(a) and *Marxe v. Marxe*, 238 N.J. Super. 490 (Ch. Div. 1989), the only reported decision on the matter, the Court held that Miller's involvement with the matrimonial matter as a law clerk did not rise to the level of "personal and substantial" participation which ought to disqualify her. Then-Rule 1.12(a) prohibited an attorney from representing someone in connection with a matter in which the lawyer participated "personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person unless all parties to the proceeding consent after disclosure." Because the litigation was in an enforcement, rather than substantive, mode, the Court determined that Miller's tasks as a clerk were largely ministerial, and thus did not rise to the level of personal and substantial involvement. Likewise, Miller's duties included summarizing briefs filed with the court and generally available to the public. Thus, she was not privy to any confidential information warranting disqualification of the Donahue or Gomperts firms.

The Court did determine, however, that disqualification would be warranted in the event the law clerk's participation in pending matters rose to a substantive level and became "personal and substantial." Although no violation of R.P.C. 1.12(a) occurred, the Court recommended that Miller be screened against any further involvement in the matrimonial litigation, so as to avoid the appearance of impropriety.

Effective Jan. 1, 2004, R.P.C. 1.12(b) allows a law firm to represent a party, "despite its association with a lawyer disqualified by paragraph (a), if: (1) the disqualified lawyer is timely screened from any participation in the matter … and (2) written notice is promptly given to the parties … to enable them to ascertain compliance with the provisions of this Rule." The Court ended its opinion by directing the Professional Responsibility Rules Committee to review R.P.C. 1.12 to determine whether it currently contains an appropriate standard for disqualification.

In making its decision, the Court relied in part on the language of *Marxe* that observed, "at no time does anyone other than the judge ever decide any issue." 238 N.J. Super. at 493-94. Although this cannot be denied, Justice Barry Albin's dissent raises the practical challenge of the role of judicial clerks in assisting judges. The dissent noted that even the process of digesting cases "may involve subjective editorial judgments filtered through the particular value system of the clerk." Likewise, the level of involvement is measured not by the time spent on a matter, but by "the nature of the participation of the law clerk." Thus, to the dissent, any type of substantive work on a matter by a judicial law clerk should be a basis for disqualification.

Even more problematic to the dissent is the possibility that the majority's lack of a bright line rule will open the floodgates to further litigation to determine the extent of the law clerk's involvement. This could create a culture of deposing judges and their law clerks to determine the scope of their involvement in the case.

Although the dissent's concerns are well taken, even the dissent recognized that in all cases the ultimate decision-maker is the judge presiding over the matter. Law clerks — whose functions are primarily to assist the judge in managing his or her calendar and digesting motions, briefs, transcripts and other pleadings — cannot be confused with substantial involvement in the decision-making process. Moreover, because screening the law clerk away from the pending case will prevent any appearance of impropriety, a solution can be achieved without the drastic measure of disqualifying a party's chosen counsel while the litigation is ongoing.

RPC 8.4 (b)—Misconduct, Criminal Acts

In *In re Gallo*, 178 N.J. 115 (2003), the Court determined that in certain circumstances, the scant factual allocution provided during a guilty plea is insufficient to be the sole basis for the attorney's subsequent discipline pursuant to R.P.C. 8.4(b) for committing a criminal act that reflects adversely on the attorney's honesty, trustworthiness or fitness as a lawyer. Rather, the attorney subject to discipline, the grievants and the public, are "entitled to a disciplinary review process in which a full, undistorted picture is the basis for disciplinary sanctions."

Pursuant to a plea agreement, Stephen Gallo was convicted of four counts of fourth-degree criminal sexual contact. At his plea hearing, Gallo admitted only that he was guilty of non-consensual sexual contact. At his subsequent disciplinary hearing, Gallo took the position that only plea admissions could be the basis of discipline. The Office of Attorney Ethics did not

object.

The Court determined that because of the differing standards of proof in criminal cases and disciplinary hearings, even if Gallo had been acquitted after a criminal trial, the DRB would not have been bound by that decision and could have considered evidence adduced at trial. Often, the guilty plea will provide a sufficient factual basis for discipline. However, when a plea is simply a "bare bones" admission, it cannot form the sole basis for discipline, and the DRB should examine the underlying facts at a full hearing.

The Court concluded by noting that sexual misconduct against a client is always unacceptable. However, it is even more inappropriate when an attorney betrays a client's trust by taking not just money or goods, but "their dignity and psychological well-being." As a result, "attorneys who sexually molest their clients will be subject to severe disciplinary sanctions."

While hopefully the sexual misconduct aspects of the *Gallo* case will not directly impact any of our peers, the outcome is more far-reaching in the context of an attorney who has committed a crime. In view of the Court's unanimous decision, an attorney who has committed a crime may no longer be able to save his or her license by quickly pleading guilty, providing a blanket general admission, and serving his or her sentence. Rather, the DRB will consider the underlying facts of the crime and make its decision accordingly.

Conclusion

The Court's decisions of the 2003-2004 term have sought to clarify and reaffirm prior decisions such as *Lieberman* and *Grunwald*, as well as resolve any lingering ambiguity in the R.P.C.s which may leave attorneys or law firms in the crosshairs of legal and ethical quandaries. ■