Saffer Fee Shifting and Fee Disgorgement

Who is at Risk?

by Brian J. Molloy and Bonnie Birdsell

Twenty years ago, in *Saffer v. Willoughby*, the New Jersey Supreme Court embarked on a new path for New Jersey jurisprudence by allowing a successful plaintiff in a legal malpractice action to recover as consequential damages the fees and costs for prosecuting the malpractice action.[1] The *Saffer* Court also held that a negligent attorney is generally not entitled to recover legal fees for representing the client in the underlying action.[2]

Much has been written about how the *Saffer* decision has resulted in disparate treatment of attorneys in professional malpractice cases.[3] Fee shifting only applies to attorneys, but only if they lose. If attorneys are successful in defeating the malpractice claim, the former client has no fee-shifting exposure. The *Saffer* fee shifting applies to the broad range of potential legal malpractice claims, including common negligence claims. Attorneys are the only group of defendants who are potentially liable for an adverse party's attorney's fees for simple negligence.

The *Saffer* decision has now morphed into a broader fee-shifting rule, allowing non-clients to recover counsel fees. On April 26, 2016, the New Jersey Supreme Court released its sharply divided 3–2 decision in *Innes v. Marzano Lesnevich*, where the Court held that attorneys can be liable for counsel fees if, acting as trustees or escrow agents, they intentionally breach a fiduciary obligation to a non-client.[4] The Court remanded the case to the trial court to determine whether the attorneys intentionally violated their fiduciary duty, since the jury only determined whether the attorney's conduct was negligent. The *Innes* decision expands the nature and type of case where attorneys are exposed to fee-shifting claims.

The fee disgorgement portion in *Saffer* has also created confusion among the practicing bar. Plaintiffs' legal malpractice attorneys frequently claim that any negligence by an attorney will trigger a disgorgement of all fees.

The *Saffer* Decision

The primary issue in *Saffer* was the appropriate procedure for the fee arbitration committee when a legal malpractice claim is discovered beyond the time authorized by Rule 1:20A-3(b)(1) to withdraw an arbitration request.[5] Saffer was retained to pursue claims against the client's former agent and business manager for diverting approximately $1 million into tax shelters, without the client's knowledge. All of the money was lost. Saffer asserted a claim only against the agent, not the business manager, apparently believing there was no evidence to support a claim that the business manager was involved in the diversion of funds. The agent swiftly filed for bankruptcy after a jury awarded substantial damages against him, leaving the client without any meaningful recovery.[6]

In a subsequent fee dispute between Saffer and the client, the client's new attorney discovered evidence in Saffer's file supporting a direct claim against the business agent. The client alleged Saffer ignored this evidence, and that if the business agent had been joined in the initial suit the client would have been able to collect the full amount of his damages.[7]

After deciding the fee arbitration issue, the Court, with limited analysis, addressed whether a negligent attorney can collect and/or retain his or her fees, and whether the legal fees incurred in pursuing a legal malpractice action are recoverable as consequential damages.[8]

The *Saffer* Court, relying primarily upon out-of-state cases, held that a negligent attorney in a malpractice case is responsible for the legal fees and costs in the malpractice action as consequential damages.[9] The authority cited by the Court, however, offers limited support for this conclusion. A strong argument can be advanced that the Court misapplied, and in the process expanded, the out-of-state cases. The Court seemingly conflated two related, but distinct, issues.

The first issue is whether the recovery in a legal malpractice

action should be offset by the legal fee the client would have incurred in the underlying action. The rationale in the cases cited by the Court refusing to deduct the legal fees incurred in the underlying case is important. Because "the additional legal fees that a client typically incurs in pursuing the malpractice action *cancel out* any fee that the plaintiff would have owed the negligent attorney…" in the underlying action, there should be no offset or deduction for legal fees incurred in the underlying action.[10] Stated differently, the client should only pay once for legal fees based on a legal malpractice claim. Refusing to deduct the legal fees in the underlying case will effectively compensate the client for the legal fees in prosecuting the malpractice case.

The second issue is whether the recovery in a legal malpractice action should be offset by the legal fee in the malpractice action itself. The *Saffer* Court, without explanation, went well beyond the relief granted by the out-of-state cases by holding that there should be no deduction for the legal fees the client would have paid in the underlying case. *Plus,* the plaintiff in the malpractice action can also recover fees and costs for prosecuting that action.[11] Thus, a successful malpractice plaintiff can recover *more than* the amount he or she could ever have recovered in the absence of malpractice, and would be in a much better position than had there been no malpractice in the underlying case. This windfall is unique to New Jersey law.[12]

Regarding the disgorgement of fees, the *Saffer* Court stated that "a negligent attorney in the appropriate case is not entitled to recover his [or her] legal fees."[13] Post-*Saffer* many practitioners have overlooked the qualifying phrase "in the appropriate case," and have tried to expand the scope of this portion of the *Saffer* decision by requiring the disgorgement of *all* fees, even where the alleged negligence was discreet and did not compromise other work performed for the client.

Fee Shifting

Despite the fact that New Jersey has a well-established public policy against shifting costs,[14] the *Saffer* Court effectively carved out an exception to the American rule. The American rule, unlike the English rule, requires each party in a litigation to bear his or her own costs and fees.[15] The American rule "emphasizes equal access to justice" by requiring each party to pay its own way.[16]

The purported rationale of the *Saffer* Court was to put victims of professional malpractice in the same position they would have been in, but for the malpractice. Without distinguishing between negligence-based and intentional-based professional malpractice claims, the *Saffer* Court concluded that fees and costs in prosecuting any legal malpractice action are consequential damages.

The *Saffer* Court repeatedly stated that it is the former client of the attorney who is entitled to this fee shifting. "*A client* may recover for losses…"; "a negligent attorney is responsible for the reasonable legal expenses and attorneys' fees incurred *by the former client*…"[17]

Subsequent courts have applied the *Saffer* fee-shifting rule beyond malpractice cases, to cases involving intentional attorney misconduct. In *Packard-Bamberger & Co., Inc. v. Collier*, the Court based its decision on the premise that an attorney who intentionally violates a duty of loyalty owed to a client commits a significantly more egregious offense than one who negligently breaches a duty of care.[18] The *Packard* Court, however, decided that this recovery was contingent upon the existence of an attorney/client relationship:

> We emphasize that a plaintiff must demonstrate the existence of an attorney/client relationship as a pre-requisite to discovery. Such a requirement is consistent with the goal in *Saffer* of holding attorneys responsible for professional conduct that causes injury to their clients.[19]

Saffer's Remedy—Is it Worse Than the Ailment?

The authors wonder: If the *Saffer* decision was intended to put the victim of professional malpractice back in the same position he or she would have been in but for the malpractice, then why are victims of attorney malpractice treated more favorably than any other victim of professional malpractice? Why are attorney defendants treated in this discriminatory manner when all other professional defendants are not exposed to the *Saffer* fee-shifting rule?

As stated earlier, *Saffer* grants a windfall recovery to plaintiffs in successful legal malpractice actions because there is no set-off for the fees the client would have incurred in the underlying case.[20] Acknowledging what the Appellate Division would later deem the "seeming conundrum of duplicate recovery," the *Saffer* Court found that such a windfall is a byproduct of the fact that "courts may feel [the windfall] is deserved by the client having to endure two lawsuits."[21] But any plaintiff in a professional malpractice case has to endure two proceedings, the initial relationship with the professional and then a lawsuit for damages. The Appellate Division subsequently explained this windfall benefit as "the lesser evil to crediting the attorney with an undeserved fee where he has botched the job."[22]

A cogent argument can be made that the *Saffer* Court overlooked the fact that the courts that allowed a recovery of the fees in prosecuting the malpractice action did so because those fees would cancel out any fee the plaintiff would have incurred in the underlying action. New Jersey is the only jurisdiction with this self-inflicted conundrum. Thus it should come as no surprise that the *Saffer* rule is unique to New Jersey, and no

other state has followed its lead.[23]

To the extent the Court felt that an injury needed to be addressed, the authors believe, the *Saffer* remedy is far worse than the ailment. At a minimum, as a result of the potential windfall recovery a legal malpractice plaintiff may recover, plaintiffs are disinclined to settle because of the anticipated windfall. It is also not unusual for the fee claims in these cases to greatly exceed the damage claims, thereby further complicating settlement opportunity. The practical effect of *Saffer*, the authors believe, is to make settlement more difficult.

The *Innes* Decision

The *Innes* case presented the Court with an opportunity to re-examine the policy-based arguments supporting the *Saffer* decision. The Court granted certification to review whether the attorney-defendants can be liable for attorney's fees as consequential damages to a non-client for an alleged breach of a trustee or escrow agent duty.

Justice Lee Solomon, writing for the majority, stated that exposing attorneys to a fee-shifting award in favor of a non-client based on an intentional violation of a fiduciary duty is not an extension of the *Saffer* rule, but rather an extension of another line of cases involving fiduciaries who, by their intentional misconduct, inflicted damage upon the beneficiaries and were exposed to fee shifting.[24] The majority focused on the status of the defendants as fiduciaries, not as attorneys. While acknowledging the decision expands prior case law, they emphasized that "[w]e have never held that a non-client is entitled to a fee-shifting award for an attorney's negligence."[25]

Justice Jaynee LaVecchia dissented, joined by Judge Mary Catherine Cuff. Their dissent states that the majority decision is not supported by existing case law, statutory law or court rule, and they cogently chronicle the shift away from the American rule in cases where attorneys are the defendants. As noted in the dissent, in all prior cases where the Court allowed fee shifting against attorneys in intentional misconduct cases not involving legal malpractice, the Court emphasized that the existence of the attorney-client relationship was a prerequisite to a fee-shifting recovery.[26] The dissent further noted that the majority opinion either expands the *Saffer* and *Packard-Bamberger* precedent by allowing fee shifting against attorney-defendants to extend to non-client relationships, or it is no longer limiting fiduciary fee shifting to the singular context of undue influence claims.[27] According to the dissent, in either event the majority opinion does not fully acknowledge the impact of its decision.

The dissent further noted that without an award of attorney's fees, the prevailing party in a breach of a fiduciary relationship would not be fully compensated for the loss suffered, but the same is true in every case in which damages must be recovered through legal action.[28]

The *Innes* case presented the Court with an opportunity to re-examine the policy underlying *Saffer*, and perhaps to recalibrate the remedy in attorney malpractice cases. Instead of a re-examination of *Saffer*, the Court, by a one-vote difference, has effectively expanded the *Saffer* fee-shifting rule.

Disgorgement of Fees

The general impression is that, if an attorney is negligent in representing a client, he or she is not entitled to *any* fees for the entirety of the work for that client. The authors believe this is simply incorrect. In fact, the disgorgement ruling in *Saffer* is far more nuanced. The mere fact that an attorney is negligent does not mean the client is entitled to recovery of the entire fee. A limited negligent act does not taint the entire body of legal work for the client. Rather, the client is entitled to a disgorgement of that discrete portion of the fee that is reasonably related to the negligent work.

Saffer offers important qualifying language in the disgorgement analysis. Initially, *Saffer* held that "in the appropriate case" a negligent attorney is not entitled to recover his or her fee, and that "ordinarily" an attorney may not collect fees for services negligently performed.[29] Thus, it is clear the mere allegation of negligence, or even a finding of negligence regarding a particular task or event, would not trigger a disgorgement of all of the fees paid to that attorney. The decision in *Packard* directly supports this conclusion when the Court stated that a client "is entitled to recover for losses that are proximately caused by an attorney's negligence."[30] Thus, *Packard* limits disgorgement of fees to those related to an attorney's negligence, and not fees related to other services performed by the attorney that were not negligence.

The Appellate Division further emphasized this limitation in *Grubbs v. Knoll*, by stating that in fixing an award of counsel fees, a trial judge must ensure the award does not cover effort expended on independent, competently pursued claims that happen to be joined with those claims for which the client is entitled to recovery of attorney fees.[31] In that case, the Court ultimately held the attorney responsible for 10 percent of the total fees and costs in the underlying action (representing the amount related to his negligence), in addition to total fees and costs in the malpractice action.[32]

Conclusion

Saffer and now *Innes* impose a heavy burden on New Jersey attorneys in claims by both clients and non-clients. It is a burden whose weight is unparalleled in the entirety of the United States.

While *Saffer*'s holding should be revisited, the authors believe it should not be revisited for the purpose of expansion. Rather, such a review should

be conducted to clarify and hopefully limit the disparate effect of *Saffer* and *Innes* on New Jersey attorneys. ⚖

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ENDNOTES

1. *Saffer v. Willoughby*, 143 N.J. 256, 272 (1996).
2. *Id.*
3. *See* Michael K. Furey and Sylvia-Rebecca Gutierrez, The '*Saffer*' Rule: Is It Time To Reconsider?, *NJ Law Journal*, Nov. 25, 2015, at 23.
4. *Innes v. Marzano-Lesnevich*, ___ N.J. ____ (April 26, 2016) (A-16-14).
5. *Saffer*, 143 N.J. 256, 260 (1996).
6. *Saffer*, 143 N.J. 256, 261-62 (1996).
7. *Saffer*, 143 N.J. 256, 262 (1996).
8. *Saffer*, 143 N.J. 256, 270-72 (1996).
9. *Id.*
10. *Saffer*, 143 N.J. 256, 270 (1996).
11. *Saffer*, 143 N.J. 256, 271-72 (1996).
12. *Distefano v. Greenstone*, 357 N.J. Super. 352, 359-60 (App. Div. 2003)(*quoting* Ronald E. Mallen and Jeffrey M. Smith, *3 Legal Malpractice* (West Group 2000 and Supp.) § 20.14 at 152; § 20.18 at 1616).
13. *Saffer*, 143 N.J. 256, 271 (1996).
14. *In re Niles*, 176 N.J. 282, 293-94 (2003); *see also N. Bergen Rex Transp., Inc. v. Trailer Leasing Co.*, 158 N.J. 561, 569 (1999).
15. *In re Estate of Lash*, 169 N.J. 20, 43 (2001) (*quoting Mihalik v. Pro Arts, Inc.*, 851 F.2d 790, 793 (6th Cir.1988)).
16. *Id.*
17. *Saffer*, 143 N.J. 256, 271-72 (1996) (emphasis added).
18. *Packard-Bamberger & Co., Inc. v. Collier*, 167 N.J. 427 (2001).
19. *Packard-Bamberger*, 167 N.J. 427, 443 (2001).
20. *Saffer*, 143 N.J. 256, 269 (1996).
21. *Distefano*, 357 N.J. Super. 352, 357-58 (App. Div. 2003)(*quoting Saffer v. Willoughby*, 143 N.J. 256, 269 (1996)).
22. *Distefano*, 357 N.J. Super. 352, 357 (App. Div. 2003).
23. *See Distefano*, 357 N.J. Super. 352, 359-60 (App. Div. 2003)(*quoting* Ronald E. Mallen and Jeffrey M. Smith, *3 Legal Malpractice* (West Group 2000 and Supp.) § 20.14 at 152; § 20.18 at 1616).
24. Slip Opinion pages 19-21, *citing Packard-Bamberger*, 167 N.J. 427 (2001), *In re Estate of Lash*, 169 N.J. 220 (2001), and *In re Niles Trust*, 176 N.J. 282 (2003).
25. Slip Opinion, page 19.
26. Dissenting Slip Opinion, page 6.
27. Dissenting Slip Opinion, page 15.
28. Dissenting Slip Opinion, page 19.
29. *Saffer*, 143 N.J. 256, 271-72 (1996).
30. *Packard-Bamberger*, 167 N.J. 427, 441 (2001).
31. *Grubbs v. Knoll,* 376 N.J. Super. 420, 431-32 (App. Div. 2005).
32. *Grubbs*, 376 N.J. Super. 420, 434 (App. Div. 2005).

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